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[B-189029]

Pay — Retired — Computation — Alternate Method — Public Law 94-106 Effect

Military retired pay is adjusted to reflect changes in the Consumer Price Index rather than changes in active duty pay rates, and as a result a "retired pay inversion" problem arose: service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, U.S. Code, was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement.

Pay—Retired—Effective Date—Uniform Retirement Date—Act—Public Law 94-106 Effect

In computing retired pay under 10 U.S.C. 1401a(f), the date immediately preceding an active duty basic pay rate change should generally be used as the earlier date of voluntary retirement eligibility, since this will normally result in a computation most favorable to the service member concerned. Under the uniform Retirement Date Act, 5 U.S.C. 8301, the hypothetical earlier retirement would have become effective on the first day of the following month, but retired pay could be computed on the basis of retirement eligibility on the date immediately preceding the active duty pay rate change.

Pay—Retired—Computation—Uniform Retirement Date Act—Public Law 94-106 Effect—Navy, Marine and Public Health Service Officers

Since the Uniform Retirement Date Act, 5 U.S.C. 8301, generally provides for retirements to become effective on the first day of a month, language contained in certain provisions of law authorizing the voluntary retirement of Navy, Marine Corps, and Public Health Service officers also providing for retirement on the first day of a month may be regarded as a surplusage insofar as retired pay computations under 10 U.S.C. 1401a(f) are concerned. Hence, those officers may have their retired pay computed under 10 U.S.C. 1401a(f) in the same manner as other service members, i.e., on the basis of retirement eligibility on the date immediately preceding an active duty pay rate change.

Pay—Retired—Grade, Rank, etc. at Retirement—Three and Four Star General Officers—Time-in-Grade Restrictions—Public Law 94-106 Effect

Where an Army or Air Force officer is retired in the grade of lieutenant general or general under 10 U.S.C. 3962 or 8962, the time-in-grade restrictions in 10 U.S.C. 3963 or 8963 do not apply in selecting an earlier hypothetical retirement date for retired pay computation pursuant to 10 U.S.C. 1401a(f).

Matter of: Department of Defense Military Pay and Allowance Committee Action No. 544, September 2, 1980:

This action is in response to a request from the Assistant Secretary of Defense (Comptroller) for a decision concerning the computation of retired pay of members of the Armed Forces under subsection 1401a(f) of title 10, United States Code (1976), in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 544, enclosed with the submission. The discussion in the Committee Action indicates that certain questions have

arisen with respect to the date of retirement eligibility to be used as the basis for computing military retired pay under that provision of law as the result of the decision rendered by our Office in *Matter of Lieutenant General William B. Fulton, USA, Retired*, B–189029, November 2, 1977.

Background

Section 1401a of title 10, United States Code, in general directs that military retired pay be adjusted to reflect changes in the Consumer Price Index rather than changes in active duty basic pay rates. Subsection 1401a(f) was added as an amendment to 10 U.S.C. 1401a by section 806 of the Department of Defense Appropriation Authorization Act, 1976, Public Law 94–106, October 7, 1975, 89 Stat. 538–539, commonly referred to as the "Tower Amendment." That subsection reads as follows:

> (f) Notwithstanding any other provision of law, the monthly retired or retainer pay of a member or a former member of an armed force who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retired or retainer pay to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date, adjusted to reflect any applicable increases in such pay under this section. In computing the amount of retired or retainer pay to which such a member would have been entitled on that earlier date, the computation shall, subject to subsection (e) of this section, be based on his grade, length of service, and the rate of basic pay applicable to him at that time. This subsection does not authorize any increase in the monthly retired or retainer pay to which a member was entitled for any period prior to the effective date of this subsection.

Subsection 1401a(f) was adopted in order to alleviate the so-called "retired pay inversion" problem, which was created by the fact that for several years upward cost-of-living adjustments of retired and retainer pay under 10 U.S.C. 1401a had occurred in greater amounts and at greater frequency than increases in active duty military basic pay. The result of this was that many of those who remained on active duty after becoming eligible for retirement were losing considerable retirement pay. The amendment adding subsection 1401a(f) was intended to provide an alternate method of calculating retired pay or retainer pay. The computation of a member's retired pay under the alternate method provided by 10 U.S.C. 1401a(f) is necessarily somewhat complex; it essentially involves calculating the maximum amount of retired pay based not on the member's actual retirement but rather on his earlier eligibility for retirement. See 56 Comp. Gen. 740 (1977).

The decision mentioned in the Committee Action, *Matter of Lieutenant General William B. Fulton, USA, Retired*, B–189029, *supra*, concerned the computation of the retired pay of an Army officer who was retired upon his request on April 1, 1977, under 10 U.S.C. 3918

(1976) on the basis of his having completed more than 34 years of creditable service. He was retired in the grade of lieutenant general (O–9) under the authority of 10 U.S.C. 3962(a) (1976). That statutory provision authorizes certain general officers of the Army who have served in a position of importance and responsibility to be retired in the highest grade held "at any time" on the active list, in the discretion of the President and with the advice and consent of the Senate.

General Fulton's retired pay entitlement computed on the basis of his actual retirement as a lieutenant general (O–9) on April 1, 1977, was less than the monthly retired pay to which he would have been entitled if he had retired at an earlier date, due to the effects of the "retired pay inversion" problem previously described. He had been promoted from the grade of major general (O–8) to that of lieutenant general (O–9) on September 1, 1975, and his maximum retired pay under 10 U.S.C. 1401a(f) resulted from a computation based on his retirement eligibility as a lieutenant general (O–9) on or after September 1, 1975, but before October 1, 1975 (the date of the 1975 military active duty basic pay rate change). In the alternative, if that computation could not have been used, his maximum retired pay rate under 10 U.S.C. 1401a(f) would have to have been computed on the basis of his retirement as a major general (O–8) on September 1, 1974. We were asked to render a decision on the question of whether General Fulton could have been eligible to retire as a lieutenant general (O–9) on or after September 1, 1975, but before October 1, 1975, for purposes of computing his retired pay under 10 U.S.C. 1401a(f) at the higher of the two rates.

In our November 2, 1977 decision in the matter, we expressed the view that General Fulton could not have been retired as a lieutenant general (O–9) on September 1, 1975, the same day that he was promoted to that grade on the active list. However, we also expressed the view that he could have been eligible for retirement at some later time during the month of September 1975 in that grade. In that case, we said, the Uniform Retirement Date Act, 5 U.S.C. 8301 (1976), would be applicable. That act provides:

> (a) Except as otherwise specifically provided by this title or other statute, retirement authorized by statute is effective on the first day of the month following the month in which retirement would otherwise be effective.
> (b) Notwithstanding subsection (a) of this section, the rate of active or retired pay or allowance is computed as of the date retirement would have occurred but for subsection (a) of this section.

We said that if General Fulton had been retired during September 1975, under subsection (a) of the Uniform Retirement Date Act his effective retirement date would have been October 1, 1975. We concluded, however, that under subsection (b) of the act retired pay could be

computed on the basis of his eligibility for retirement sometime during the period September 2–September 30, 1975, if the resulting computation under 10 U.S.C. 1401a(f) would be most favorable to him.

As indicated, our decision in General Fulton's case has given rise to questions concerning the date of retirement eligibility to be used generally under 10 U.S.C. 1401a(f). In the Committee Action, three specific questions have been presented regarding the application of the decision:

I. *The Day Before the Date of an Active Duty Basic Pay Rate Change Should Generally be Used as the Earlier Day of Voluntary Retirement Eligibility in Computing Retired Pay Under 10 U.S.C. 1401a(f)*

Since October 1, 1972, military active duty basic pay rate increases have in each year occurred only on the first day of October. In the submission it is stated that because subsection (a) of the Uniform Retirement Date Act specifically provides for retirement on the first day of the month following the month in which retirement would be effective, except as provided by other statute, September 1 is generally now being used as the hypothetical earlier voluntary retirement date for members affected by 10 U.S.C. 1041a(f), since it is the latest effective retirement date a member may have prior to an active duty pay increase on October 1. Thus, currently retired pay computation under 10 U.S.C. 1401a(f) is usually based on the member's grade and length of service on the first day of September in any given year the member would have been eligible to retire prior to the year of his actual retirement.

In the submission it is further stated, however, that in light of the decision in *Fulton*, *supra*, it appears that September 30 should generally be used for the earlier time of voluntary retirement eligibility in computing retired pay under 10 U.S.C. 1401a(f). Use of September 30 would be based on subsection (b) of the Uniform Retirement Date Act, which specifies the rate allowed when qualification for retirement is met, rather than subsection (a) of that act, which sets the effective retirement date. It is observed that if determination of the time of the hypothetical earlier retirement under 10 U.S.C. 1401a(f) should be based on the date qualifications for retirement are met for retirement as provided by each retirement statute, then the earlier date for computation purposes should be at the end of September to cover any member who had a change of status during September of any year subsequent to 1971.

Based on the foregoing, the first question presented in the submission is:

1. Does Comptroller General Decision B–189029, dated 2 November 1977, apply to all military retirees affected by 10 USC 1401a(f) with regard to the computation of pay on an earlier retirement date? If so, what date should be used for computation purposes without regard to 5 USC 8301(a)?

The principles of the November 2, 1977 decision pertaining to retired pay computation based on earlier retirement eligibility under 10 U.S.C. 1401a(f) in the case of General Fulton should be for application to other service members effected by the "retired pay inversion" problem. That is, if a member's retired pay based on his actual retirement is less than his entitlements based on some hypothetical earlier voluntary retirement, determination of the time of the earlier retirement eligibility for pay computation purposes under 10 U.S.C. 1401a(f) may be based on the date qualifications for retirement were met for retirement as provided by each retirement statute, notwithstanding that the earliest effective date of such hypothetical retirement would have been the first day of the following month, if the resulting computation is most favorable to the member concerned.

It follows that September 30 (rather than September 1) should generally be used as the hypothetical earlier time of voluntary retirement in computing retired pay under 10 U.S.C. 1401a(f), for the reason stated in the submission, i.e., to cover retired personnel who, like General Fulton, may have had a change of status during September of any year subsequent to 1971. It appears that the retirees affected would be those who during the month of September in any year after 1971 received either (1) a promotion, (2) a pay increase based on longevity of service, or (3) a 2½ percent increase in their retired pay multiplied by completing more than 6 months of an additional year of creditable service.

The use of September 30 as the earlier voluntary retirement eligibility date for years prior to the time of actual retirement in computing retired pay under 10 U.S.C. 1401a(f) would not, of course, be most favorable in the case of every member affected by the "retired pay inversion" problem. For example, if a member was not promoted but instead reduced in grade during the month of September, it would appear that the use of a retirement eligibility date earlier than September 30 would be more favorable to the member in computing his retired pay under 10 U.S.C. 1401a(f). See 56 Comp. Gen. 740, 741–743, *supra.*

Moreover, it is to be noted that while there have been active duty military basic pay increases on October 1, 1972, and on the first day of October in every year since then, prior to October 1, 1972, active

duty basic pay increases had occurred on the first day of other months. Also, in the future, changes in active duty basic pay rates may not all necessarily fall on the first of October. Thus, while September 30 should ordinarily be used under 10 U.S.C. 1401a(f) as the hypothetical earlier time of voluntary retirement for years in which an active duty basic pay increase occurred on the first day of October, the more general rule for application is that the day before the date of an active duty basic pay rate change is ordinarily to be used as the earlier day of voluntary retirement eligibility in computing retired pay under 10 U.S.C. 1401a(f).

In conclusion the principles of our decision B–189029, November 2, 1977, are for general application to retired personnel affected by 10 U.S.C. 1401a(f). Hence, the day before the date of an active duty basic pay rate change should be used as the earlier day of voluntary retirement eligibility in computing retired pay under 10 U.S.C. 1401a(f), if the resulting computation is most favorable to the member concerned. The first question is answered accordingly.

II. *Army and Air Force Generals and Lieutenant Generals*

In the submission it is further noted that 10 U.S.C. 3961 (1976) and 10 U.S.C. 8961 (1976), governing the retired grade of Army and Air Force members, impose a general requirement that a regular member (unless retired for disability, or unless entitled to a higher grade under another provision of law) must retire in the regular grade that is held on the retirement date. The highest regular grade for Army and Air Force members is major general (O–8), as prescribed in 10 U.S.C. 3281 (1976) and 10 U.S.C. 8281 (1976). It is also noted that 10 U.S.C. 3963 (1976) and 10 U.S.C. 8963 (1976) stipulate that regular Army and Air Force commissioned officers may retire in the highest temporary grade in which they served on active duty satisfactorily provided it was held for a minimum of 6 months.

It is said that a question has arisen as to whether the 6-month time-in-grade requirement of 10 U.S.C. 3963 and 8963 is negated for all three- and four-star Army and Air Force general officers (i.e., lieutenant general (O–9) and general (O–10) by our earlier decision concerning General Fulton, or whether the situation of General Fulton was unique and not equally applicable to the retirement of all three- and four-star general officers of the Army and Air Force.

Based on the foregoing, the second question presented in the submission is:

2. Do the provisions of B–189029 apply to all three and four star General Officers without regard to the requirements in 10 USC 3961, 10 USC 8961, and 10 USC 3963, 10 USC 8963?

As previously indicated, General Fulton was retired in the three-star grade of lieutenant general (O–9) pursuant to 10 U.S.C. 3962, which authorizes certain general officers of the Army who have served in a position of importance and responsibility to be retired in the highest grade held "at any time" on the active list, in the discretion of the President and with the advice and consent of the Senate. Hence, we concluded that a hypothetical time of retirement eligibility in the grade of lieutenant general (O–9) could be established for him, for purposes of computing his retired pay under 10 U.S.C. 1401a(f), "at any time" after his September 1, 1975 promotion from major general to lieutenant general on the active list.

It is our view that in computing retired pay pursuant to 10 U.S.C. 1401a(f) for those officers retired in grades O–9 and O–10 upon recommendation by the President and with the advice and consent of the Senate, the time-in-grade requirements of 10 U.S.C. 3963 and 8963 do not apply. Therefore, as was held in the *Fulton* case, when a member is retired in the O–9 or O–10 grade, in selecting an earlier more advantageous date for computing his retired pay under section 1401a(f), the O–9 or O–10 grade may be used in the computation, provided of course, that the member was serving in that grade at the earlier date selected.

Question 2 is answered accordingly.

III. *The Date to be Used as the Earlier Time of Voluntary Retirement Eligibility in the Computation of Retired Pay Under 10 U.S.C. 1401a(f)*

Provisions of law authorizing the voluntary retirement of members of the uniformed services generally do not contain specific language providing that the effective date of retirement will occur on the first day of a month or at any other particular time. This includes the voluntary retirement of commissioned officers of the Army, Air Force, Coast Guard, and National Oceanic and Atmospheric Administration on the basis of their having completed 20 years of active service. See 10 U.S.C. 3911, 8911 (1976); 14 U.S.C. 291 (1976); and 33 U.S.C. 853–1 (1976). In our answer to the first question presented in the submission, we indicated that in computing retired pay under 10 U.S.C. 1401a(f) it is permissible to use the day before the time of an active duty basic pay increase, as the date of voluntary earlier retirement eligibility for such service members. As was mentioned, under subsection (a) of the Uniform Retirement Date Act, 5 U.S.C. 8301, the effective date of such hypothetical earlier retirement would be the first day of the following month, but under subsection (b) of that act the retired pay could be computed on the basis of retirement

eligibility on the date before the new active duty pay rates became effective, if the resulting computation would be most beneficial to the member concerned.

The third question presented in the submission is:

> 3. Would the same date apply for those members eligibile to retire only under a law which specifically provides for retirement on the first day of a month?

We understand that this question concerns a provision of law authorizing the voluntary retirement of Navy and Marine Corps officers who apply for retirement after completing more than 20 years active service, 10 U.S.C. 6323 (1976). Subsection 6323(a) provides as follows:

> (a) An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

This statutory language is derived from the act of February 21, 1946, Public Law 305 of the 79th Congress, 60 Stat. 26, which for the first time generally authorized all commissioned officers of the Navy, Marine Corps, and Coast Guard who applied for voluntary retirement after completing 20 years of active service to be "placed on the retired list on the first day of such month as the President may designate." This act superseded several earlier retirement laws, none of which contained specific language providing for retirements to become effective on the first day of a month. See Senate Report No. 701, November 8, 1945, and House Report No. 1441, December 14, 1945. We have found no explanation in the legislative history of the act of February 21, 1946, as to why language was included to specifically provide for retirement on the first day of a month. Moreover, as has been noted, that language has been deleted from 14 U.S.C. 291, the current codification of the law authorizing Coast Guard officers to be voluntarily retired after 20 years of active service.

By 10 U.S.C. 1404 (1976) the retired pay computation provisions of 10 U.S.C. 1401a(f) are made subject to the Uniform Retirement Date Act which, as has been mentioned, directs that retirements are to be effective on the first day of a month except as specifically provided by statute. Thus, in our view, that language of 10 U.S.C. 6323(a) which also provides for voluntary retirements on the first day of a month may be regarded as a surplusage insofar as retired pay computations under 10 U.S.C. 1401a(f) are concerned. Furthermore, it is our view that the beneficial and remedial purposes of 10 U.S.C. 1401a(f) would be best served if hypothetical earlier voluntary retirements under its provisions were to be set in a manner that is as uniform, equitable, and simple as possible. Hence, we conclude that Navy and Marine Corps members whose retired pay is computed under the pro-

visions of 10 U.S.C. 1401a(f) and whose hypothetical earlier voluntary retirement is governed by the provisions of 10 U.S.C. 6323, may also have the day before the date of an active duty basic pay rate change used as the time of their earlier retirement eligibility, if the resulting computation is most favorable to them.

We note that the provision of law authorizing the voluntary retirement of members of the Commissioned Corps of the Public Health Service, 42 U.S.C. 212 (1976), also contains language making retirements effective "on the first day of any month." In accordance with the provisions of 42 U.S.C. 213a (1976), Public Health Service officers may be eligible to have their retired pay computed under 10 U.S.C. 1401a(f). Our comments concerning the computation of the retired pay of Navy and Marine Corps officers under 10 U.S.C. 1401a(f) are equally for application to Public Health Service officers whose retired pay is so computed on the basis of a hypothetical earlier voluntary retirement under the provisions of 42 U.S.C. 212.

The third and last question presented in the submission is accordingly answered in the affirmative.

[B-198761]

Officers and Employees—Transfers—Government *v.* Employee Interest—Merit Promotion Transfers—Relocation Expense Reimbursement—Absence of Agency Regulations

Employee, who transferred from Department of the Interior, New Orleans, to Commission on Civil Rights, Washington, D.C., claims relocation expenses on basis that transfer was under merit promotion program. Agency denied claim because transfer was for convenience of employee and because of budget constraints. Employee may not be denied relocation expenses of transfer pursuant to selection under merit promotion plan on basis that the employee initiated the job request by replying to a vacancy announcement. Budget constraints do not justify denial of relocation expenses on transfer in interest of Government. *Fontanella*, B-184251, July 30, 1975, modified (amplified). This decision was later modified (extended) by B-201256, April 27, 1981.

Matter of: Eugene R. Platt—Relocation Expenses, September 2, 1980:

This decision is in response to a request for reconsideration of Settlement Certificate No. Z-2821423, March 26, 1980, by which our Claims Division disallowed Mr. Eugene R. Platt's claim for relocation expenses incurred incident to his transfer from New Orleans, Louisiana, to Washington, D.C.

In September 1979, the Commission on Civil Rights posted a vacancy announcement for a position of Writer-Editor under its Merit Promotion Program. It posted the announcement at its headquarters in Washington, D.C., and at all of its regional offices. Copies were also sent to several community groups and the Federal Research Service Inc. Applications were received from 104 individuals, including Mr.

Platt. Mr. Platt states that, while he was a technical publication editor, GS-9, for the Bureau of Land Management, Department of the Interior, New Orleans, he learned of the vacancy announcement for a writer-editor with the Commission on Civil Rights in Washington, D.C. to be filled under the merit promotion program. He applied for the position and had a telephone interview with his prospective supervisor, during which Mr. Platt alleges that he was told the "normal reimbursement" would be made if he were selected. Later, an official with the personnel office telephoned Mr. Platt with an offer of employment at GS-11. The official made it clear to Mr. Platt that the Commission would not pay relocation expenses. The Civil Rights Commission reports that this policy was initiated in response to an Office of Management and Budget (OMB) bulletin ordering all agencies to reduce travel costs.

On December 5, 1979, the Commission sent Mr. Platt a written offer confirming the telephonic one, stating that the expenses of transportation and movement of household goods would not be paid and requiring a written response to the offer within a 5 day period.[1] On December 10, 1979, Mr. Platt indicated in writing his acceptance, with no qualifications or conditions. On December 20, 1979, Mr. Platt reported for duty in Washington, D.C., having traveled from New Orleans at his own expense. No travel orders were ever issued by the Commission and no travel advance was made.

Mr. Platt maintains that, even though the Commission made clear before he accepted the job offer that it had no intention of paying his relocation expenses, he should be reimbursed for three reasons.[2] First, Mr. Platt maintains that budget constraints cannot form the basis for denying an employee relocation expenses, citing our decision *David C. Goodyear*, 56 Comp. Gen. 709 (1977). Second, he maintains that the move was for the benefit of the Government since, before he applied for the job, an official vacancy announcement was published and circulated which indicated that the vacancy was to be filled pursuant to the merit promotion program. Lastly, he contends that since other Government agencies normally reimburse employees for such moves, he too should be reimbursed.

We shall consider the question of Mr. Platt's entitlement first. Reimbursement of travel and relocation expenses upon an employee's change of station under 5 U.S.C. §§ 5724 and 5724a (1976) is conditioned upon a determination by the head of the agency concerned or his designee that the transfer is in the interest of the Government

[1] We assume that the intent was to exclude all transfer related expenses under 5 U.S.C. §§ 5724 and 5724a.

[2] The term "relocation expenses" is used herein as a shorthand reference to all transfer expenses authorized under 5 U.S.C. §§ 5724 and 5724a.

and is not primarily for the convenience or benefit of the employee, or at his request. In this connection see para. 2–1.3, Federal Travel Regulations (FPMR 101–7) (May 1973). See also *Michael J. DeAngelis*, B–192105, May 16, 1979; and *Paul J. Walski*, B–190487, February 23, 1979.

The regulation, however, does not furnish any guidance to agencies as to the factors to be considered in making that determination. In order to assist agencies, we offered the following guidance in *Dante P. Fontanella*, B–184251, July 30, 1975:

> Generally, however, if an employee has taken the initiative in obtaining a transfer to a position in another location, an agency usually considers such transfer as being made for the convenience of the employee or at his request, whereas, if the agency recruits or requests an employee to transfer to a different location it will regard such transfer as being in the interest of the Government. Of course, if an agency orders the transfer and the employee has no discretion in the matter, the employee is entitled to reimbursement of moving expenses.

See *Rosemary Lacey*, B–185077, May 27, 1976, where the same guidance is set forth.

In applying the Federal Travel Regulations and our guidance to specific cases, we have recognized that the determination of whether a transfer is in the interest of the Government or primarily for the convenience or benefit of the employee or at his request is primarily a matter within the discretion of the employing agency. B–186684, February 2, 1977; B–184251, July 30, 1975; and B–143845, July 26, 1961. We do not believe that we should overturn an agency's determination unless it is arbitrary or capricious or clearly erroneous under the facts of the case.

In several cases, we have denied relocation expenses on the ground that the transfers in question were lateral transfers to positions without greater promotion potential and, therefore, were outside the merit promotion program. Hence, we sustained the agencies' determinations that the transfers were for the employee's convenience. *Jack C. Stoller*, B–144304, September 19, 1979; *Paul J. Walski*, B–190487, February 23, 1979; *Ferdinando D'Alauro*, B–173783.192, December 21, 1976.

We have allowed relocation expenses on merit promotion transfers where an agency's own regulations provided that such transfers are in the Government's interest. Thus, in *Stephen P. Szarka*, B–188048, November 30, 1977, an Air Force employee was selected for a position in California that had been advertised by an agency-wide vacancy announcement under the merit promotion program. When the selection was made, the employee was informed that he would have to pay his own expenses of transferring from Florida. We overruled the agency's determination that the transfer was for the employee's benefit because the Air Force, by regulation, had determined the transfers

under the merit promotion program were in the interest of the Government.

We have been advised that the Commission on Civil Rights does not have any agency regulations on the subject of relocation expenses and merit promotion transfers. Thus, we are faced in this case with the basic question of whether, in the absence of agency regulations mandating payment of relocation expenses under the merit promotion program, employees who relocate their permanent duty station pursuant to selection under the merit promotion program must be considered to be transferred in the interest of the Government.

The Commission on Civil Rights bases its denial of reimbursement of relocation expenses to Mr. Platt on several grounds. The first is that he was not recruited nor requested to transfer by the Commission since it had merely issued a vacancy announcement and had no personal contact with him or any other person who submitted an application. The second ground asserted by the Commission is that Mr. Platt took the initiative in applying for a new job in a new city, accepted the job offer with the condition that there would be no reimbursement for relocation expenses, and therefore must be considered to have relocated for his own convenience. In the alternative the Commission states that Mr. Platt should be denied recovery as a matter of pure contract law principles since he had accepted the written offer of a position with knowledge that he would not be paid relocation expenses.

We need not discuss the Commission's alternative argument because the issue is not one of contract law. Rather the question is one of employees' rights under the governing statutes and regulations.

It is evident that the wide dissemination of vacancy announcements is a means of attracting qualified eligibles for vacant positions. The primary purpose of the merit promotion program is "to ensure systematic means for selection for promotion according to merit." 5 C.F.R. § 335.103 (1979). Through open competition eligible persons are given the opportunity to compete for vacancies, and agencies are able to reach a wider pool of applicants, and refer the best qualified candidates to a selecting official. The fact that employees have to apply for such vacancies, or that the promotion may be, and usually is, also in the employee's best interest, does not change the fundamental truth that the purpose and intent of merit promotion is to serve the Government's interest by obtaining the best qualified persons for vacant positions.

In regard to the Commission's determination not to authorize reimbursement in response to a directive to reduce travel costs, we stated in our decision *David C. Goodyear*, 56 Comp. Gen. 709 (1977), cited

by Mr. Platt, that FTR para. 2–1.3 required an agency to make a determination as to whether an employee's transfer is in the interest of the Government or primarily for the convenience or benefit of the employee. We then held:

> The Navy's statement that "budget constaints" did not at that time permit payment of relocation expenses except in manpower shortage categories, misconstrues the purpose and scope of the requirement to make a determination as to whether a particular transfer is in the interest of the Government. The requirement in FTR para. 2–1.3 refers to determining whether or not the *transfer* is in the interest of the Government. No provision is made to permit such determination, in effect, to be predicated on the cost of relocation expenses * * *. Thus, "budget constraints" cannot form the basis for denying an employee relocation expenses if his transfer has been found to be in the Government's interest.

We believe the agency decision in this case is based on improper understanding of our decisions. The primary reasons given by the agency for the denial of the request for transfer expenses were (1) budget constraints, and (2) that it did not recruit or request the employee to transfer, but that he initiated the action by applying for the job. In our decision *David C. Goodyear*, 56 Comp. Gen. 709 (1977) we held that budget constraints cannot form the basis for denying an employee relocation expenses if his transfer has been found to be in the Government's interest. Further, in *Dante Fontanella*, B–184251, July 30, 1975, we stated that if the agency recruits or requests an employee to transfer to a different location it will normally regard such transfer as being in the interest of the Government. Our view is that when an agency issues an announcement of an opening under its Merit Promotion Program that such action is a recruitment action within the scope of *Fontanella*. Thus, the fact that an employee requests the position as a result of such announcement is not a proper basis to conclude that the transfer is at the request of or primarily for the convenience of the employee. With respect to the budget constraint aspect, the policy of the agency was to restrict travel and transportation to reduce the amount spent for such purposes during the fiscal year 1980. One policy restriction imposed by the agency was "[w]e will not pay for transportation or the movement of household goods of any person hired from outside the agency." That budget retsraint may not, under *Goodyear*, serve as a basis for denial of the claim by Mr. Platt if the transfer is otherwise in the Government's interest.

Thus, on the record before us we find no appropriate basis for a determination by the agency that the transfer was at the request of or primarily for the convenience of the employee. Rather, the record strongly suggests the transfer was in the interest of the Government. Accordingly, we believe the agency should make a new determination in the case taking cognizance of the clarification of *Fontanella* as set

forth above. Absent some other basis than those heretofore advanced by the agency, our view is that the appropriate determination by the agency under the facts of the case is that the transfer was in the interest of the Government.

[B-199794]

Leaves of Absence—Sick—Recredit of Prior Leave—Reemployment—After Congressional Office Position

Former General Accounting Office (GAO) employee worked more than 3 years in Congressional office before accepting position with National Aeronautics and Space Administration (NASA). Although employee could not earn or use accrued sick leave in Congressional position, such employment is Federal service and is not considered break in service. Sick leave accrued in GAO position should be credited for use by NASA in accordance with 5 C.F.R. 630.502(e).

Matter of: Anthony J. Gabriel—Recredit of Sick Leave following Congressional employment, September 2, 1980:

This decision is in response to a request from The Honorable Eldon D. Taylor, Inspector General, National Aeronautics and Space Administration (NASA), concerning the entitlement of Mr. Anthony J. Gabriel, a NASA employee, to recredit of sick leave earned prior to a period of Congressional employment. The question presented is whether Congressional employment constitutes a break in Federal service for the purpose of the regulations governing recredit of unused sick leave.

Mr. Gabriel was formerly employed by the General Accounting Office (GAO) in a position covered by the Annual and Sick Leave Act, 5 U.S.C. §§ 6301 *et seq.*, and prior to his resignation on January 15, 1977, he had accrued 1,808 hours of sick leave. Mr. Gabriel was then employed by the Appropriations Committee of the House of Representatives until April 30, 1980, at which time he was employed by NASA in a position covered by 5 U.S.C. §§ 6301 *et seq.* Mr. Gabriel's sick leave was not transferred or made available for his use while he was employed by the House Appropriations Committee since the Committee does not have a sick leave system and such Congressional employment is not covered by 5 U.S.C. §§ 6301 *et seq.* See 5 U.S.C. § 6301(2)(B)(vi). The question raised by NASA is whether Mr. Gabriel's sick leave may be recredited since there has been a period of more than 3 years between Mr. Gabriel's employment in positions covered by the statutory leave system.

Under the authority of 5 U.S.C. § 6311, the Office of Personnel Management (OPM) has issued regulations governing the recredit of sick leave. See 5 C.F.R. § 630.502 (1980). These regulations provide, in pertinent part, as follows:

(b)(1) Except as provided in paragraph (b)(2) of this section, an employee who is separated from the Federal Government or the government of the District

of Columbia is entitled to a recredit of his sick leave if he is reemployed in the Federal Government or the government of the District of Columbia, without a break in service of more than 3 years.

* * * * * * *

(e) An employee who transfers to a position to which he cannot transfer his sick leave is entitled to a recredit of the untransferred sick leave if he returns to the leave system under which it was earned, without a break in service of more than 3 years.

As to what constitutes a "break in service," our Office has held that it means as actual separation from the Federal service. See 54 Comp. Gen. 669 (1975); and 47 *id.* 308 (1967). The fact that an employee does not accrue leave in a position is not determinative of his entitlement to later recredit of prior accrued sick leave. 31 Comp. Gen. 485 (1952).

Although Congressional employment is not subject to the statutory leave system, such employment is Federal service. See, for example, 5 U.S.C. §§ 2105 and 8331(1). Therefore, we conclude that Congressional employment does not constitute a break in service as contemplated under 5 C.F.R. § 630.502. We have been informally advised by officials at OPM that they concur in this opinion.

Accordingly, since Mr. Gabriel has not undergone a break in service, his sick leave should be recredited by NASA under the provisions of 5 C.F.R. § 630.502(e).

[B-194983]

Public Utilities—Government Use—Damage, Loss, etc. Claims—Government Indemnification

General Services Administration (GSA) may procure power under tariff or contract requiring customer to indemnify utility against liability arising from delivery of power. GSA has authority to procure power for Government under tariffs. Where no other practical source exists, tariff requirement is applied uniformly to purchases, without singling out Government, and risk of loss is remote, GAO will interpose no objection to existing practice of agreeing to tariff, with indemnity requirement, nor to proposed contract with similar indemnity provision. However, GSA should report situation to Congress.

Matter of: Government indemnification of public utilities against loss arising out of sale of power to Government, September 3, 1980:

This decision concerns the propriety of agreement by the General Service Administration (GSA) to certain indemnity provisions in procuring public utility services for Government agencies and establishments pursuant to section 201(a) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S. Code 481(a). GSA states in its request for our decision:

Increasingly, the public utilities are attempting to insert an indemnity provision which, among other things, holds the Government liable to protect and save the utility companies harmless and indemnified from injury or damage to persons and property occasioned by the provision of the utility services.

A typical indemnification provision reads as follows:

"Customer assumes all responsibility for the electric power and energy delivered hereunder after it leaves company's lines at the point of delivery, as well

as for the wires, apparatus and appurtenances used in connection therewith where located at or beyond the point of delivery; and Customer hereby agrees to protect and save Company harmless and indemnified from injury or damage to persons and property occasioned by such power and energy or by such wires, apparatus and appurtenances located at and beyond said point of delivery, except where said injury or damage shall be shown to have been occasioned by the negligence of Company or its contractors. Further, Company shall not be responsible for injury or damage to anyone resulting from the acts of the employees of Customer or of Customer's contractors in tampering with or attemping to repair and/or maintain any of Company's lines, wires, apparatus or equipment located on Company's side of the point of delivery; and Customer will protect, save harmless and indemnify Company against all liability, loss, cost, damage and expenese, by reason of such injury or damage to such employee or to any other person or persons, resulting from such acts of Customer's employees or contractor."

GSA also points out that:

> In many instances, the public utilities will not consent to any contract without an agreement by the Government to indemnify or protect the public utility from liability in case of injury or property damage. * * *
>
> The companies argue that they are required to include liability or indemnity provisions by the tariffs under which they provide utility services. They hold that they cannot legally provide the services without such protection.

With respect to the latter argument, the Supreme Court has ruled several times that such provisions in the rate schedule cannot preclude the Government from negotiating contracts for utility service which would omit the indemnification provision. (See *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (1958); *Paul* v. *United States*, 371 U.S. 245 (1963); *United States* v. *Georgia Public Service Commission*, 371 U.S. 285 (1963).)

GSA has been for sometime and is now procuring electricity under tariffs which include indemnity provisions of the kind now proposed to be included in contracts. The Acting Administrator is concerned that, since the proposed clause contains no limitation on the maximum liability of the Government, he is precluded by law from entering into contracts with these clauses. He is aware of our long line of decisions which hold that, unless otherwise authorized by law, an indemnity provision in a contract which subjects the United States to a contingent and undetermined amount of liability would violate 31 U.S.C. § 665(a) (the Anti-deficiency Act) and 41 U.S.C. § 11 (the Adequacy of Appropriations Act) since it can never be said that sufficient funds have been appropriated to cover such contingencies. See, for example, 7 Comp. Gen. 507 (1928); 16 *id.* 803 (1937); and 35 *id.* 85 (1955). See also *California-Pacific Utilities Co.* v. *United States*, 114 Ct. Cl. 703, 715–716 (1971).

In 54 Comp. Gen. 824 (1975), we proposed that a clause be inserted in any contract providing for assumption of risk for contractor-owned property which limits the amount of such risk to appropriations available for indemnity payments at the time a loss arises, with no implication that the Congress will be required to appropriate funds to make up for any deficiency. This solution would be unacceptable

to the utilities, according to GSA, because there is no real assurance that they would be protected in the event of a large award for personal injury.

As a possible solution, GSA's letter suggests adding the following proviso to the proposed indemnification clause:

> Provided, however, that nothing herein shall bind or obligate the Government for any liability beyond that for which it would be liable under the Federal Tort Claims Act.

The precise effect of this proviso is unclear. If the intent is to restrict the Government's liability to the liability it would incur even without the indemnification clause, *i.e.*, liability under the Federal Tort Claims Act (FTCA) to the victim of the United States' negligence, then we find it unobjectionable. However, the proviso would not make funds available to indemnify the utility for payments which it might make to the victim, should the victim choose to seek recovery from the utility instead of from the United States.

The problem cannot be resolved without new legislation if we adopt an overly technical and literal reading of the Anti-deficiency Act in this situation. We do not think such a reading is appropriate under these circumstances. GSA is authorized to procure utility services for the Government and to do so under utilities' tariffs. The procurement of goods or services from State-regulated utilities which are virtually monopolies is unique in important ways. As a practical matter, there is no other source for the needed goods or services. Moreover, the tariff requirements, such as this indemnification undertaking, are applicable generally to all of the same class of customers of the utility, and are included in the tariff only after administrative proceedings in which the Government has the opportunity to participate. The United States is not being singled out for discriminatory treatment nor, presumably, can it complain that the objectionable provision was imposed without notice and the opportunity for a hearing.

Under the circumstances, we have not objected in the past to the procurement of power by GSA under tariffs containing the indemnity clause and there is no reason to object to the purchase of power under contracts containing essentially the same indemnity clause. As noted already, this has of necessity been the practice in the past. The possibility of liability under the clause is in our judgment remote. In any event, we see little purpose to be served by a rule which prevents the United States from procuring a vital commodity under the same restrictions as other customers are subject to under the tariff if the utility insists that the restrictions are non-negotiable. However, because the possibility exists, however remote, that these agreements could result in future liability in excess of available appropriations, GSA should inform the Congress of the situation.

[B-197356]

Military Personnel—Dislocation Allowance—Members Without Dependents—Unable to Occupy Assigned Quarters—Home Port Change—Expense Reimbursement in Lieu of Allowance

A naval officer without dependents is not entitled to a dislocation allowance when he is required to obtain non-Government quarters because his ship is declared uninhabitable due to overhaul and repair upon the ship's arrival at a new home port. However, an officer in this situation is entitled to reimbursement under the provisions of 10 U.S.C. 7572(b) for expenses incurred incident to obtaining private quarters.

Matter of: Dislocation allowance—Lt. (jg.) Gary W. Westfall, September 5, 1980:

This is in response to a request for an advance decision as to whether Lieutenant (jg.) Gary W. Westfall, a member without dependents, is entitled to a dislocation allowance incident to obtaining off-base quarters in connection with a change in home port of his ship. The answer is no.

This request for decision was presented by the Central Disbursing Officer, Naval Supply Center, Oakland, California, and was forwarded to this Office by endorsement of the Per Diem, Travel and Transportation Allowance Committee dated January 4, 1980, and has been assigned PDTATAC Control No. 80-1.

The record indicates that the home port of the U.S.S. *Pollack* was changed from San Diego, California, to Mare Island Naval Shipyard in Vallejo, California, for regular overhaul effective March 21, 1979. However, the ship did not actually leave San Diego until April 18, 1979, because of a change in the shipyard overhaul commencement date. When the ship arrived at Vallejo on April 21, 1979, the Commanding Officer declared the ship uninhabitable due to conditions incident to the vessel's overhaul and repair. The member, who was permanently attached to the vessel and who had been living aboard, was forced to obtain off-base quarters because no Government quarters were available.

Under the provision of 37 U.S.C. 407(a) a member without dependents is entitled to a dislocation allowance when he is transferred to a permanent station where he is not assigned to Government quarters.

Section 411(a) of title 37, United States Code (1970), provides in pertinent part that for the administration of specified sections of that title, including section 407, the Secretary concerned shall define the words "permanent station." The definition shall include a shore station or the home yard or home port of a vessel to which a member of a uniformed service who is entitled to basic pay may be ordered. It provides further that an authorized change in the home yard or home

port of such a vessel is a change of permanent station (section 411dd)).

A definition of permanent station is contained in Appendix J of Volume 1 of the Joint Travel Regulations promulgated pursuant to section 411(d) of title 37, United States Code. For the member, himself, the ship is his permanent station. In cases where a member has dependents, the permanent station includes the home port of the vessel for the purposes of transportation of dependents and household goods.

Thus, a member without dependents who is assigned to quarters on a ship is at his permanent station. If the quarters are declared uninhabitable when there is no change in the home port, the member is not entitled to a dislocation allowance on moving into non-Government quarters. Likewise, when his permanent station, the ship, is assigned to a different home port and he continues to be assigned quarters on the ship until declared uninhabitable, he is not entitled to the dislocation allowance. See B–184289, September 16, 1975, involving an identical factual situation.

This is distinguishable from the case of a member without dependents who receives a permanent change of station and on reporting to a vessel is not assigned quarters on the ship because they have been declared uninhabitable and as a result becomes entitled to a dislocation allowance. See 48 Comp. Gen. 480, 485 (1969). In such a case the member did change his duty station while in this case the ship remains the member's duty station.

Accordingly, in the circumstances of Mr. Westfall's case he is not entitled to a dislocation allowance.

However, section 7572(a) of title 10, United States Code, provides that the Secretary of the Navy may provide lodging accommodations when Government quarters are not available where the member is deprived of quarters on board ship due to repairs. Subsection (b) of this section provides that any officer of a naval service who is deprived of quarters on board ship due to repairs and who is not entitled to a basic allowance for quarters may be reimbursed for the expenses incurred in obtaining quarters under regulations prescribed by the Secretary of the Navy. Paragraph 30212 of the Department of Defense Military Pay and Allowances Entitlements Manual provides for reimbursement for the expenses associated with obtaining quarters not to exceed the applicable basic allowance for quarters where the officer is not receiving basic allowance for quarters.

Accordingly, Mr. Westfall may be reimbursed in accordance with 10 U.S.C. 7572(b) only, and he is not entitled to a dislocation allowance under 37 U.S.C. 407(a). The voucher accompanying the request for decision will be retained here.

[B-180095]

Unions—Federal Service—Dues—Allotment For—Agency Failure to Discontinue—Recoupment of Payments—Benefit to Employee Consideration.

Accounting and Finance Officer inquiries whether Government is required to reimburse employees for union dues allotments which were continued after employees were no longer part of a bargaining unit. Reimbursement is not required even though not stopping the allotments in accordance with 5 C.F.R. 550.322(c) was an agency error because employees have a responsibility to notify agency of improper allotment withholding and because agency action merely paid dues for employees who were union members and owed dues. Employees are not entitled to reimbursement for allotment payments which inure to their benefit. B-194692, July 24, 1979. For same reason there is no requirement to recoup allotment payments from union. 54 Comp. Gen. 921 (1975) and B-180095, Dec. 8, 1977, modified (amplified).

Matter of: Recoupment of Union Dues—Fort Stewart/Hunter Army Airfield, September 8, 1980:

This decision is in response to a request by a Finance and Accounting Officer at Headquarters, 24th Infantry Division and Fort Stewart, Fort Stewart, Georgia, regarding the recovery of dues paid to a union through allotments after union members were no longer a part of the bargaining unit represented by the union. We have concluded that the erroneously withheld allotments need not be paid to the employees since they have a duty to advise the agencies if an allotment is being erroneously withheld and since the dues payments were owed the union and inured to the benefit of the employees. Therefore, no action need be taken to recoup the erroneous allotments from the unions.

The facts of the case may be summarized as follows: Headquarters, 24th Infantry Division and Fort Stewart, the United States Army Medical Department Activity, and the United States Army Communications Command Detachment, all located at Fort Stewart/Hunter Army Airfield, Georgia, and hereafter called employer, entered into a written Agreement pursuant to Executive Order 11491, as amended, with Local No. 1922 of the American Federation of Government Employees, hereafter called union. The Agreement obligated the employer to withhold voluntarily allotted union membership dues in accordance with applicable regulations.

Under 5 U.S.C. 5525 Federal employees may make allotments of their pay under policies and procedures prescribed by the head of the agency. These policies and procedures are coordinated by the Office of Personnel Management under authority delegated by the President. See 5 U.S.C. 5527 and section 2(b), Executive Order No. 10982, December 25, 1961, as amended, 5 U.S.C. 5527 note. Regulations relating to labor union dues allotments are contained in 5 C.F.R. 550.321 to 550.324 (1977). Under these regulations, particularly subsection 550.321(a), an employee is permitted to make an allotment for

dues to a labor organization when the employee is a member of a labor organization which has exclusive recognition in the unit in which he is employed and the agency has agreed in writing to do so. Section 550.322(c) requires the agency to discontinue the allotment when the employee is reassigned or promoted outside the unit for which the labor organization has been accorded exclusive recognition. The problem here arises because the employer, through administrative error on its part, continued to deduct and transmit dues to the union on the basis of allotments of employees who were no longer in the bargaining unit covered by the Agreement. In total, $11,106.50 was erroneously transmitted to the union from the allotments of 71 employees between January 9, 1972, and June 18, 1977.

In light of our decision 54 Comp. Gen. 921 (1975), the finance and accounting officer has requested answers to several questions dealing with allotments to labor organizations which have been continued after employees leave the bargaining unit. The holding in 54 Comp. Gen. 921 was upheld by the Court of Claims in *Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO* v. *United States*, 215 Ct. Cl. 125 (1977). In that case an employee's allotment had been continued after he left the bargaining unit. The agency, upon discovery of the error, refunded the erroneous deductions to the employee and recovered the funds by setting off the amount of $80.33 from the next payment of dues allotments to the union. The conclusion reached was that the Government could recoup erroneously deducted allotments from subsequent allotment payments due the union. It was determined that an arbitrator's award of $80.33 to the union in payment of money so withheld could not be implemented.

At the outset we note that the instant case differs from the situation in 54 Comp. Gen. 921 in that the agency has not paid the employees the erroneous allotment deductions nor recovered any money from the union. Further, the legal question involved has been the subject of a decision in the United States District Court for the Northern District of Alabama, *American Federation of Government Employees Local 1858 (AFL-CIO)* v. *Clifford Alexander, Secretary of the Army*, Civil Action No. 78-W-5023-NE, decided April 14, 1978, with final judgment entered February 12, 1979. In that case the union sued for and was granted an injunction to restrain defendant from setting off against current allotment checks to the union and dues of two union members who had been promoted out of the bargaining unit but whose voluntary dues allotment had been continued. In that case the allotments had not been returned to the employees.

In 54 Comp. Gen. 921 the employees concerned had been refunded the erroneous deductions of union dues and we did not question that

action since the deductions were clearly erroneous. Further, the Office of Personnel Management in its report to us on this case stated that "the agency is solely responsible for terminating allotments for employees who leave the bargaining unit covered by the agreement." The report concludes that the Government must refund the erroneous deductions unless recovery is waived by the employee.

Although we must agree that allotments were erroneously withheld in these circumstances, we do not believe that the Government is required to pay over the erroneously withheld allotments to the employees. It is the primary responsibility of an agency to cancel allotments of union dues when an employee is no longer in the bargaining unit, but the employee should not be relieved of the duty to advise the agency promptly if allotments are being improperly withheld.

We are particularly constrained to that view because employees may be members of a labor organization whether or not they are members of a bargaining unit covered by a written agreement. Therefore, when an employee leaves a unit covered by a bargaining agreement, only the right to have his union dues paid by voluntary allotment ends. His union membership continues until he takes some action to terminate it. If through administrative error the allotment continues to be paid to the union, the employee is presumed to have knowledge of the fact his allotment has continued since in most cases the allotment is shown on Leave and Earnings Statements each pay period. Thus, the employee is or should be aware that his union dues are being paid by allotment, and he is in a position to know that such deductions are improper. In any case the employee does not lose the money in question since it is owed to the union. Further, the union is not being unjustly enriched, since it is entitled to dues from its members. See *Matter of Sergeant Richard C. Rushing, USA*, B–194692, July 24, 1979, in which it was held that the individual "would not be entitled to a refund [of an allotment] if he had an interest in, or the proceeds from the allotment inured to his benefit."

It is our position that, to the extent that the proceeds of the allotments inured to the benefit of the employees in this case in that their union dues were paid, there is no requirement to reimburse the employees. Further, in view of the difficulties which such reimbursements cause, they should not be made unless an individual case presents facts which would justify such action.

Since we have determined that the Government is not required to reimburse the employees, there is no need to recoup the money from the union.

Decisions 54 Comp. Gen. 921 (1975) and B–180095, December 8, 1977, are amplified accordingly.

[B-192267]

Foreign Differentials and Overseas Allowances—Education for Dependents—Maximum Rate—Administrative Discretion—Trust Territory of the Pacific Islands

Under chapter 270 and section 912.1 of the Standardized Regulations, the High Commissioner of the Trust Territory of the Pacific Islands has the discretionary authority to establish the rate of the overseas educational allowance, 5 U.S.C. 5924(4)(A), received by Department of the Interior employees assigned to the government of the Trust Territory of the Pacific Islands below the maximum rate established by the Department of State Standardized Regulations, section 920, for the geographical areas of the Trust Territory. His exercise of this discretion based on budgetary constraints is not improper.

Matter of: Carl M. Bauer, September 10, 1980:

The issue presented concerns the authority of the High Commissioner of the Trust Territory of the Pacific Islands to establish the rate of the overseas educational allowance received by Department of the Interior, Office of Territorial Affairs, employees assigned to the government of the Trust Territory of the Pacific Islands (TTPI). Specifically, we are asked whether the High Commissioner may establish the education allowance at a rate below that indicated at section 920 of the State Department Standardized Regulations for the geographical area of the TTPI. For the following reasons the High Commissioner has such authority.

The question arises from a claim presented to our Claim Group by Mr. Carl M. Bauer, an employee of the Department of the Interior, Office of Territorial Affairs, assigned to the government of the TTPI and stationed in Saipan. Since the issues raised by Mr. Bauer's claim are novel and potentially affect all overseas Federal employees, we are rendering a decision in this instance.

Mr. Bauer, and his family reside in Saipan. During the school year 1977-78, Mr. Bauer's youngest daughter attended high school at the Canadian Academy, Kobe, Japan. Mr. Bauer's daughter attended this school under the provisions of section 272.3 of the Department of State's Standardized Regulations (Government Civilians, Foreign Areas) (GC, FA). When seeking reimbursement for his daughter's away-from-post educational expenses Mr. Bauer was informed that based on budgetary constraints the High Commissioner had established the maximum away-from-post dependent educational allowance to be $5,300, for all Federal employees assigned to the government of the TTPI and stationed within the geographical area of the TTPI. The rate established by the High Commissioner was less than the amount Mr. Bauer had spent for his daughter's education and less than the rate established by the Department of State in section 920 of the Standardized Regulations for the geographic area of the TTPI.

Mr. Bauer questions whether the High Commissioner of the TTPI has the authority to establish the rate for an away-from-port dependent eduactional allowance below the maximum rate prescribed by the Department of State. In questioning the High Commissioner's authority Mr. Bauer points out that other Department of the Interior employees not assigned to the government of the TTPI but working for the Office of the Comptroller for Guam and assigned to Saipan are receiving the maximum rate for the overseas educational allowance.

At the outset a brief discussion concerning the Trust Territory of the Pacific Islands is necessary. The United States became the administering authority of the TTPI when the President of the United States, on July 18, 1947, approved the Trusteeship Agreement between the United States and the Security Council of the United Nations. At first, the Secretary of the Navy had administrative authority for the islands. However, in 1951 adminisration of the islands was transferred to the Department of the Interior. Executive Order No. 10265, 16 Fed. Reg. 6419 (1951). In legislating to implement the Trusteeship Agreement Congress authorized the President to vest the administrative power conferred on the United States by the Trusteeship Agreement "in such person or persons" to be exercised "in such manner and through such agency or agencies as the President may direct or authorize." Act of June 30, 1954, 68 Stat. 330, as amended, 48 U.S.C. 1681(a) (1976). By Executive Order No. 11021 (1962), the President redelegated his authority for civil administration of the entire Trust Territory to the Secretary of the Interior. The Secretary of the Interior, in turn, delegated executive authority for the Trust Territory to the High Commissioner. See Secretarial Order No. 2918, part II, section 1, 34 Fed Reg. 157 (1969). The High Commissioner is appointed by the President and confirmed by the Senate Act of May 10, 1967, 81 Stat. 15, codified, 48 U.S.C. 1681a (1976).

We should point out that the Secretary of the Interior's delegation of his authority to the High Commissioner is proper. See 5 U.S.C. 302 (1976) giving the Secretary of the Interior broad power to delegate his authority in matters of personnel administration. In addition, Executive Order 11021 specifically provides that the Secretary's administrative authority for the TTPI may be exercised by his designee. One of the responsibilities delegated to the High Commissioner is to exercise the personnel management authority of the Secretary of the Interior over all Department of the Interior employees assigned to the government of the TTPI. Part 205, Department of the Interior's Department Manual, chapter 8. This delegation encompasses the Secretary of the Interior's authority concerning the payment of overseas

allowances under 5 U.S.C. 5924 (1976) and the Standardized Regulations.

Various overseas allowances are authorized to be paid to civilian employees of the United States located in foreign areas by the Overseas Differentials and Allowances Act of September 6, 1960 (Act), now codified in 5 U.S.C. 5921 *et seq.* (1976). One of these allowances is an education allowance which is a part of the cost-of-living allowances authorized by 5 U.S.C. 5924 (1976). The pertinent part of section 5924 provides that:

> The following cost-of-living allowances may be granted, when applicable, to an employee in a foreign area:
>
> * * * * * * *
>
> (4) An education allowance or payment of travel costs to assist an employee with the extraordinary and necessary expenses, not otherwise compensated for, incurred because of his service in a foreign area or foreign areas in providing adequate education for his dependents, as follows:
> (A) An allowance not to exceed the cost of obtaining such kindergarten, elementary and secondary educational services as are ordinarily provided without charge by the public schools in the United States, plus, in those cases when adequate schools are not available at the post of the employee, board and room, and periodic transportation between that post and the nearest locality where adequate schools are available, without regard to section 529 of title 31 [31 USCS § 529]. The amount of the allowance granted shall be determined on the basis of the educational facility used.

Section 5922(c), title 5, United States Code, bestows broad powers to regulate overseas allowances and differentials for civilian employees of the Government on the President. He in turn has delegated this authority to the Secretary of State by Executive Order No. 10903, January 9, 1961, as amended, 5 U.S.C. 5921 note (1976). The Secretary of State, acting under this authority, issued the Department of State Standardized Regulations.

We have consistently held that the granting of allowances under the Overseas Differentials and Allowance Act is a discretionary matter. In 35 Comp. Gen. 289 (1955) we specifically held that the granting of an education allowance is permissive. See *Matter of Brookshire*, B–196809, May 9, 1980, and cases cited therein for examples of other allowances which are discretionary.

With regard to overseas allowances the Department of the Interior has recognized that the Department of State is responsible for establishing allowances and differentials for employment in designated foreign areas and for prescribing the rates for all foreign area differentials and allowances. Part 370, Department of the Interior Department Manual, chapter 591, subchapter 2.1B and 2.2B. Moreover, the Department Manual states that persons in Mr. Bauer's position must be paid foreign differentials and allowances. Part 370, Department of the Interior Department Manual, chapter 591, subchapter 3.1.

Since Mr. Bauer has been granted an education allowance, the issue which remains to be addressed is whether he is entitled to educational expenses based on the maximum rate prescribed in the Standardized Regulations, or whether the High Commissioner acted within the scope of his authority in prescribing a reduced maximum of $5,300.

The State Department's regulations governing payment of the education allowance are set forth at Chapter 270 of the Standardized Regulations. Section 274.11, in discussing the amount of that allowance, provides:

> An employee normally may be granted for each school year, or fraction thereof, on behalf of his/her child in grades 1–12, the rate indicated in section 920 for his/her post, grade and educational facility selected * * *. However, the officer designated to authorize allowances is required to authorize smaller amounts when he/she determines that the employee's expenses for education justify such lesser amounts.

Although section 274.11 specifies the circumstances in which an amount smaller than the rate indicated at section 920 must be paid, Chapter 270 does not define the circumstances under which a reduced allowance may be paid. However, the following portion of section 912.1 makes it clear that authorization of an amount lower than the section 920 rate is a matter within the administrative discretion of the authorized official:

> * * * For the education and the supplementary post allowance the employee receives either the rate indicated in section 920 or 941.3 or a lower amount at the option of the officer designated to authorize allowances. * * *

Thus, in addition to being required to authorize a lower amount when justified by the employee's expenses, the designated official also has the discretion to authorize a reduced amount in other circumstances.

The Department of the Interior has suggested that section 013 of the Standardized Regulations confirms its authority to prescribe a reduced education allowance when justified by budgetary constaints. That section states that "[w]hen authorized by law, the head of an agency may * * * grant * * * cost of living allowances * * * to employees of his/her agency and require an accounting thereof, subject to the provisions of these regulations and the availability of funds." This regulation is addressed specifically to the initial determination to grant an allowance. It does, however, point out the appropriateness of considering funding availability in establishing an employee's entitlement to cost of living and other specified allowances. While the regulations applicable to certain other overseas differentials and allowances limit the circumstances in which the rate or maximum set forth in the Standardized Regulations may be reduced, in view of the discretion afforded by section 912.1 in establishing the education allowance, we find no impropriety in the High Commissioner's determination, based on funding considerations, to establish a maximum rate of $5,300 for the education allowance.

As was stated in the beginning, Mr. Bauer contends that he should receive the maximum rate since other Department of the Interior, Office of Territorial Affairs, employees stationed in Saipan are receiving the maximum. We should point out that the employees to whom Mr. Bauer is referring are assigned to the Office of the Comptroller of Guam.

The position of the Government Comptroller for Guam was established by section 5 of the Act of September 11, 1968, Pub. L.. 90–497, now codified at 48 U.S.C. 1422d (1976). Under this Act the Office of the Comptroller for Guam is under the control of the Secretary of the Interior. Department of the Interior, Office of Territorial Affairs, employees are assigned to the Comptroller's Office.

Mr. Bauer's situation, however, is distinguishable from that of the employees assigned to the Comptroller's Office. First, separate appropriations are made for the Trust Territory of the Pacific Islands and for the Office of the Comptroller for Guam. Thus, Mr. Bauer's compensation and allowances are paid from different funds. Secondly, the Secretary of the Interior has delegated his authority over the Comptroller's office to the Assistant Secretary Policy, Budget and Administration, Department of the Interior, rather than to the High Commissioner of the Trust Territory of the Pacific Islands. Thus, within the Office of Territorial Affairs the Trust Territory of the Pacific Islands and the Comptroller's Office are treated as separate entities.

As discussed above, the statute and the regulations only pave the way for employees in the same geographical area to receive education allowances at the same rates. Since the regulations give the designated official discretion to set a lower rate, and since the High Commissioner and the Assistant Secretary—Policy, Budget and Administration—have been delegated authority over distinct functions within the Office of Territorial Affairs, we find no illegality in the fact that these two officials have exercised their discretion differently.

Accordingly, the High Commissioner of the Trust Territory of the Pacific Islands has authority to establish rates for the overseas educational allowance below the rate prescribed by the Department of State in the Standardized Regulations. Mr. Bauer is only entitled to receive the rate established by the High Commissioner.

[B–198274]

Contracts—Termination—Not in Government's Best Interest—Small Business Set-Aside—Ineligible Bidder/Offeror Award

Because any interference with awarded contract might impair agency's ability to perform all required tasks before 1981 White House Conference, and since protester does not appear to be immediately in line for award on termination of

contract, General Accounting Office (GAO) will not recommend termination of contract even if awardee on small business set-aside contract is finally found to be other than small business.

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

Protest against inclusion of alternate late proposal provision in request for proposals is untimely because it was not filed with GAO until more than 10 days after date set for receipt of initial proposals.

Contracts—Protests—Timeliness—Basis of Protest—Date Made Known to Protester—Information Not for Official Disclosure

Protest against application of late proposal provision to competitor's proposal and alleged "sham" permitted by consideration of late proposal is untimely because protest was not filed with GAO until more than 10 days after protester knew of facts giving rise to bases of protest, even though facts were not for official disclosure.

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

Significant issue exception to GAO's Bid Protest Procedures is not applicable where protester admits wording of contract clause in question permits protested action.

Matter of: Capital Systems Group, Inc., September 11, 1980:

Capital Systems Group, Inc. (Capital), protests the Department of Health and Human Services' (HHS) award of a contract to Prospect Associates (Prospect) under request for proposals (RFP) No. NIH AG 79-04. The RFP was issued as a 100-percent small business set-aside procurement for the National Institute on Aging to support the 1981 White House Conference on Aging.

In its protest to our Office, Capital argues that: (1) the contract should be terminated because Prospect has been determined to be other than small business for this procurement; (2) the RFP should not have included the alternate late proposal provision permitted by by Federal Procurement Regulations (FPR) § 1-3.802-2 (1964 ed. amend. 193); (3) even if this provision was properly included in the RFP, the "technical advantage" exception of the provision was improperly applied to allow consideration of the late proposal submitted by Prospect; (4) Prospect is in fact a front for a large business and to permit it to compete is a "sham on the procurement process"; and (5) even if its protest to the General Accounting Office (GAO) is untimely, the protest raises a significant issue that GAO should consider under the significant issue exception to its timeliness rules.

For the reasons indicated below, we find several of Capital's grounds of protest untimely; moreover, despite the fact that Prospect may not be a small business, we are unable to recommend termination of Prospect's contract.

Background

The RFP was issued on March 9, 1979, with proposals due, after four amendments, on August 24, 1979. Fourteen proposals were received by that date and were shortly thereafter submitted to the technical evaluation team. Eventually, a suspense date of November 9, 1979, was established for the evaluation team to determine which proposals were technically acceptable. Meanwhile, on October 3, 1979, Capital protested the inclusion of CDP Associates' (CDP) proposal in the review because, according to Capital, CDP had become a large business as of its new fiscal year. The contracting officer then referred the question of CDP's size status to the Small Business Administration (SBA). However, on October 11, 1979, CDP withdrew its proposal. Then, on October 15, 1979, Prospect submitted a late proposal indicating that CDP would be a subcontractor.

The RFP contained the alternate provision for the consideration of late proposals as authorized by the above regulation. This provision permits the consideration of a late proposal if:

> It offers significant cost or technical advantages to the Government, and it is received before a determination of the competitive range has been made.

HHS determined that Prospect's late proposal could be considered under this provision. Then, on November 9, 1979, the technical evaluation team found four firms, including both Capital and Prospect, technically acceptable. On December 20, 1979, the contracting officer determined these four firms to be in the competitive range for discussions.

Beginning in January 1980, negotiations were conducted with all offerors in the competitive range. Then, by letter dated February 22, 1980, to HHS, Capital protested Prospect's status as a small business because of claimed affiliation with CDP. Capital's letter also made the following arguments: (1) In the event its "size protest fails," Capital may "feel compelled to question whether * * * Prospect's [late proposal offers] either significant cost or technical advantages to the Government"; and (2) Prospect's late proposal lists "CDP [as] a major subcontractor * * * [in order to permit] CDP to continue to maintain a major role in the performance of * * * any resultant contract."

HHS referred the protest to SBA and, by letter dated February 29, 1980, notified Capital of this action. Negotiations were continued, and on March 24, 1980, HHS received best and final offers from all offerors. Then, on March 28, 1980, Capital filed its protest with our Office. Finally, on April 9, 1980, SBA's Philadelphia Regional Office issued a determination that Prospect was a small business concern for

purposes of this HHS procurement. Capital then appealed this decision to SBA's Size Appeals Board.

On June 4, 1980, HHS awarded the subject contract to Prospect. On June 6, 1980, SBA's Size Appeals Board reversed the regional office decision and held that Prospect was other than a small business. Nevertheless, on August 3, 1980, the Size Appeals Board informed Prospect's attorney that the "case will be reconsidered" pursuant to Prospect's request.

Small Business Statutes

Although we have recommended that an agency terminate a contract award where the SBA has decided that the awardee was not a small business (See, for example, *R. E. Brown Co., Inc.* B-193672, August 29, 1979, 79-2 CPD 164), we do not believe a similar recommendation should be made here even if SBA's Size Appeals Board affirms its prior decision on reconsideration. We so conclude because we cannot question HHS's implicit position that any disruption of Prospect's contract might "seriously impai[r] HHS's ability to perform all the required tasks before the 1981 conference." Moreover, unlike the cited case, Capital apparently would not necessarily be immediately in line for any possible award upon termination.

Other Grounds of Protest

A. Late Proposal Provision

Our Bid Protest Procedures provide that a protest based upon alleged improprieties in a solicitation which are apparent prior to the date set for bid opening or the closing date for the receipt of initial proposals must be filed prior to such date. See 4 C.F.R. § 20.2(b)(1) (1980).

Here, the date set for the receipt of initial proposals was August 24, 1979. However, Capital did not file a protest with our Office challenging the propriety of the RFP's late proposal provision until March 25, 1980. Under our Bid Protest Procedures, therefore, this ground of protest is clearly untimely and not for consideration on the merits.

B. Application of Late Proposal Provision and "Sham Issue"

Our Bid Protest Procedures also provide that any protest not covered under section 20.2(b)(1) must be filed with our Office not later than 10 working days after the "basis for the protest" is known or should have been known. *See* 4 C.F.R. § 20.2(b)(2) (1980). A "basis for protest" exists if: (1) a protester's interests are "directly threatened under a then-relevant factual scheme"; and (2) the "agency con-

veys to the protester its intent on a position adverse to the protester's interest." *Brandon Applied Systems, Inc.*, 57 Comp. Gen. 140 (1977), 77-2 CPD 486.

It is clear that as of the date of the February 22 letter, Capital, as noted above: (1) believed Prospect's proposal did not deserve consideration under the "significant cost or technical advantage" exception of the late proposals clause; and (2) knew that Prospect was proposing CDP as a major subcontractor for the work. Nevertheless, Capital's February 22 letter expressly disavowed any intent to lodge a protest about these facts since Capital insists they were only "rumors" as of that date.

Conceding that all of these facts were not for official disclosure since the negotiated procurement was before award as of February 22, we still consider that these facts constituted "bases of protest" as of that date under the above definition. Merely because a protester insists that it does not intend to file a protest cannot be held to extinguish base(s) of protest if, in fact, those bases exist. Moreover, it is our view that the facts recited in Capital's February 22 letter sufficiently threatened Capital's interests as of that date as to all later bases of protest subsequently filed with our Office; further, given the accuracy of these facts, it is beyond question that the source of Capital's knowledge must be sufficiently highly placed within HHS so that Capital should have reasonably accepted the facts as "official" from the beginning notwithstanding the breach of secrecy involved. Capital therefore must be charged as of February 22 with notice of bases of protest as to the above grounds of protest.

Further, although Capital insists it was not given details surrounding HHS's determination of Prospect's technical advantage as of February 22, it is our view that this position is inconsistent with the position implicit in its February 22 letter that Prospect's proposal did not deserve consideration under the "cost or technical advantage exception" provision in question. In these circumstances, this position implies a knowledge of facts sufficiently detailed to give rise to a basis of protest notwithstanding Capital's continuing request to HHS for additional details regarding HHS's decision to allow Prospect's late proposal into the competition.

Assuming, for the sake of discussion, that Capital should not be charged with all these bases of protest as of February 22, we nevertheless believe that Capital may be charged with notice of all these bases of protest as of March 6, 1980, the date on which Capital admits to knowledge of a February 29 HHS letter. This HHS letter informed Capital that its size protest had been referred to SBA. Specifically, HHS stated its understanding that Capital was "protestin[g]

the consideration of Prospect * * * as a possible recipient of award under the RFP" and informed Capital that Prospect's size status had been referred to SBA. Thus, we believe this letter expressly confirmed Capital's chief "rumor"—namely, that Prospect indeed was competing for the award. We consider that the explicit confirmation of this chief "rumor" should have reasonably led Prospect to an implicit realization that its other "rumored" facts were also correct and, for practical purposes, "official," thereby giving notice of all bases of protest now asserted. Indeed, even Capital admits that, when an HHS representative informed it by telephone on March 25, 1980, of the pendency of Capital's size protest, it was put on notice of all bases of protest later protested to our Office. In our view, the March 25 phone conversation conveyed no more information than was already known by Capital as a result of its receipt of HHS's February 29 letter.

Capital also argues that despite the February 29 letter, it was still not certain that Prospect had submitted a proposal. It cites FPR § 1-1.703-2(a) (1964 ed. amend. 192) for the proposition that once a contracting officer receives a size protest, he has absolutely no discretion, but must refer the matter to SBA regardless of whether the firm that has been challenged has submitted a proposal or not. Thus, Capital contends that it did not receive information that confirmed its belief that Prospect was one of the offerors until March 25, 1980.

We do not agree. Section 1-1.703-2(a) of the Federal Procurement Regulations provides:

> (a) *Any bidder or offeror or other interested party may challenge the small business status of any other bidder or offeror on a particular procurement* * * * Any contracting officer who receives a timely protest * * * shall promptly forward such protest to the SBA * * *. [Italic supplied.]

This provision does not require the contracting officer to refer all size status protests to SBA, but only those affecting a firm that also happens to be a bidder or offeror for the "particular procurement" involved.

Therefore, since HHS's letter of February 29, 1980, informed Capital that its size protest had been referred to SBA, Capital knew, or should have known, that Prospect was a competitor. Thus, as explained above, all the above grounds of protest should have been filed with our Office, at the latest, no later than 10 days after Capital's receipt (on March 6) of HHS's letter of February 29, 1980. But as indicated above, we did not receive Capital's protest until March 28, 1980. Under our Bid Protest Procedures, therefore, these other grounds of protest are untimely filed and not for consideration on the merits.

Significant Issue

Capital argues that even if the protest is untimely, it presents a significant issue under section 20.2(c) of our Bid Protest Procedures

and should be considered under this exception to our timeliness rules. Capital contends that its protest "goes to the very heart of the competitive negotiation system of the Uninted States government." It believes that, regardless of the exact language of the RFP's late proposal provision, HHS should not be allowed to accept a proposal submitted 53 days late.

The significant issue exception is limited to matters which are of widespread interest to the procurement community. *Wyatt Lunber Company*, B–196705, February 7, 1980, 80–1 CPD 108. Since Capital admits the present wording of the clause permits consideration of a late proposal before the competitive range has been determined (which is the factual situation here), we do not consider the issue to be "significant."

[B–199793]

Telephones—Private Residences—Prohibition—Coast Guard Services—Cuban Refugee Immigration Into Florida

Although official duties of the District Commander of the Seventh Coast Guard District require that he be available 24 hours a day to respond to problems arising from the Cuban Refugee Freedom Flotilla, 31 U.S.C. 679 prohibits the District Commander from being reimbursed by the Government for the costs associated with installing and maintaining a telephone in his residence.

Matter of: Telephone Usage—Private Residence, September 11, 1980:

The issue is whether the District Commander of the Seventh Coast Guard District is entitled to be reimbursed for the costs associated with installing and maintaining a telephone in his office at his quarters in order to conduct official business. In light of the express statutory provision of 31 U.S.C. 679 (1976) prohibiting payment of such costs, the District Commander may not be reimbursed.

The question was presented by letter of July 25, 1980, from Ms. Velma M. Jones, Authorized Certifying Officer, Seventh Coast Guard District.

The District Commander of the Seventh Coast Guard District is in charge of the Cuban Refugee Freedom Flotilla in the Florida Straits. His duties require that he be available at all times for daily contact with the various local, state and Federal agencies involved.

Presently, the District Commander has a telephone in his quarters for his and his family's personal use and for which he personally pays. However, since the District Commander must be available 24 hours a day the extra telephone activity at his residence has created a burden on his immediate family to the extent that they can neither place nor receive personal calls. Thus, to alleviate this situation the District

Commander had a telephone to be used for official business installed in his office at his quarters. It is for this telephone which reimbursement is sought.

Section 679, title 31, United States Code (1976), applies to this situation. That section provides as follows:

> Except as otherwise provided by law, no money appropriated by any Act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments, except for long-distance telephone tolls required strictly for the public business, and so shown by vouchers duly sworn to and approved by the head of the department, division, bureau, or office in which the official using such telephone or incurring the expense of such tolls shall be employed: *Provided*, That the cost of installation and use of telephones in residences leased or owned by the Government of the United States in foreign countries for the use of the Foreign Service may be allowed from Government funds, under such regulations as may be prescribed by the Secretary of State, except that the restrictions in this section relating to long-distance tolls shall also apply to telephones installed in such official residences.

We have consistently held that 31 U.S.C. 679 constitutes a mandatory prohibition against the payment of costs associated with the installation of telephones in quarters occupied as private residences by Government officers or employees even though the telephones were extensively used for the transaction of public business and from an official standpoint the telephones were desirable or necessary. See B–175732, May 19, 1976; B–130288, February 27, 1957; 33 Comp. Gen. 530 (1954); 11 *id.* 87 (1931); and 4 *id.* 19 (1924). Moreover, we have held that using a room in a private residence as an "office" where a regular office with a telephone is available elsewhere does not constitute an exception to the prohibition of 31 U.S.C. 679. 21 Comp. Gen. 997 (1942); 7 *id.* 651 (1928). Exceptions have been made only when the private residence in question serves as the *only* location available under the circumstances for the conduct of official business. See e.g., 4 Comp. Gen. 891 (1925) permitting an isolated lighthouse keeper to have a telephone installed in his combined office and home at Government expense. See also 19 Comp. Dec. 212 (1912); 19 *id.* 350 (1912).

Since the District Commander is already provided with an office by the Coast Guard, we do not feel that the present situation falls within the above-stated exception. It is unfortunate that his family may suffer some inconveniences due to the nature of his duties in connection with the Cuban refugees. However, the relief sought may not be granted in light of the statutory prohibition of 31 U.S.C. 679.

Accordingly, the District Commander may not be reimbursed by the Government for the costs associated with installing and maintaining a telephone in his office in his residence in order to carry out his official duties.

[B-197602]

Pay—Retired—Survivor Benefit Plan—Spouse—Annulment of Widow's Remarriage—Annuity Reinstatement Date

Where the beneficiary of Survivor Benefit Plan annuity payments remarried before the age of 60 causing her annuity payments to be terminated and the second marriage was subsequently annulled, beneficiary is entitled to have her annuity payments reinstated effective as of the first day of the month in which the decree annulling her remarriage was rendered. See 10 U.S.C. 1450(b) (1976).

Matter of: Jean B. Ford, September 12, 1980:

The issue in this case is whether a Survivor Benefit Plan (SBP) beneficiary, whose annuity was terminated as a result of a subsequent marriage is entitled to have her SBP annuity reinstated effective from the date her subsequent marriage was decreed annulled or from the time the annuity was initially discontinued. For the reasons stated below, the annuitant is entitled to begin receiving her SBP annuity effective the first day of the month in which the decree annulling her remarriage was rendered.

The question was presented for an advance decision by the Chief, Accounting and Finance Division, Directorate of Resource Management, Headquarters Air Force Accounting and Finance Center, and has been assigned Air Force submission control No. DO-AF-1337 by the Department of Defense Military Pay and Allowance Committee.

Mrs. Jean B. Ford began receiving an SBP annuity after the death of her first husband, Technical Sergeant DeWayne G. Ford, USAF, retired, on July 17, 1976. On October 16, 1978, Mrs. Ford remarried and informed the Air Force of this on October 30, 1978. Her annuity was discontinued on March 31, 1979. The annuity should have been terminated in October 1978, and as a result an overpayment of the annuity was made. This marriage was subsequently annulled on September 10, 1979, by the District Court, 57th Judicial District, Bexar County, Texas. While there is no doubt that Mrs. Ford is a proper beneficiary to receive SBP annuity payments there is a question as to the effective date of the reinstatement.

The provisions relating to the SBP are found at 10 U.S.C. 1447 *et seq.* (1976). Under 10 U.S.C. 1450(b) an annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost. Section 1450(b) also provides that an annuity for a widow shall be paid to the widow while the widow is living or if the widow remarries before reaching age 60, until the widow remarries. In the present case since Mrs. Ford remarried prior to reaching age 60, she was no longer entitled to receive her SBP as of October 1, 1978.

Section 1450(b) further provides for the resumption of the SBP annuity if the subsequent marriage is terminated by death, annulment,

or divorce. If the subsequent marriage is terminated then payment of the annuity is resumed effective as of "the first day of the month in which the marriage is so terminated."

Although the above-cited language seems clear, the Accounting and Finance Officer asks whether Mrs. Ford's annuity payment is to be reinstated from October 1, 1978, the date the annuity payment was stopped due to her second marriage, or from September 1, 1979, the first day of the month in which her second marriage was terminated. The basis for the Air Force's question is our decision, 54 Comp. Gen. 600 (1975), in which we held that an annuity under the Retired Serviceman's Family Protection, 10 U.S.C. 1431 *et seq.* could be reinstated under certain state law effective the date the annuity payments were terminated by the marriage, since the annulment operated to void the marriage from its inception.

In other words the question is, does the legal significance of an annulment operate to void the marriage from its inception, for the purposes of the SBP, notwithstanding the language of 10 U.S.C. 1450(b) to the contrary.

Under the RSFPP, a beneficiary loses entitlement to the annuity when he or she remarries. There is no provision under that Plan for the reinstatement of the annuity. Accordingly, it is necessary to examine the effect of an annulment under pertinent state law to establish whether an annuity can be reinstated and to determine the proper date to be used in reinstating the annuity.

Subsection 1450(b) of title 10, U.S. Code, specifically provides for the reinstatement of the annuity payments in the case of termination of the subsequent marriage and further provides that the annuity will be reinstated on the first day of the month in which the marriage is terminated. Thus, there is no need to examine state law in such cases since the Congress has specifically stated the condition under which an annuity may be reinstated and the effective date of the reinstatement, whether the marriage is terminated by death, divorce, or annulment.

Accordingly, Mrs. Ford is entitled to have her SBP annuity reinstated effective September 1, 1979, the first day of the month in which her remarriage was decreed annulled. Her SBP account should be adjusted accordingly.

[B-199005]

Bids—Acceptance Time Limitation—Extension—After Expiration

Bidder which limited bid acceptance period to 30 days, as permitted by solicitation, may not be permitted to revive bid by exending acceptance period after expiration of 30-day period because acceptance of bid would give protester unfair advantage and be prejudicial to other bidders that offered standard 60-day acceptance period.

Matter of: Timberline Foresters, September 12, 1980:

Timberline Foresters (Timberline) protests the Department of Agriculture Forest Service's failure to request an extension of the acceptance period of its bid and award of a contract at a higher price to Kimball Forestry Consultants (Kimball) for item 2 under invitation for bids (IFB) No. R2-80-43. We find the protest timely filed but without merit.

The IFB, a total small business set-aside, is for Stage II timber inventory in three districts (items 1-3) of the Shoshone National Forest. Bid opening was held on February 28, 1980. Timberline, the third low bidder on item 2, limited its bid acceptance period to 30 calendar days, as permitted by the solicitation, instead of the standard 60-day acceptance period. However, Kimball, the fourth low bidder on the item, agreed to the 60-day bid acceptance period.

Following bid opening, the Forest Service unsuccessfully sought information upon which to make a responsibility determination about the apparent low bidder for all three bid items and later referred the matter to the Small Business Administration (SBA). *See* Federal Procurement Regulations (FPR) § 1-708-2 (1964 ed. amend. 192); *Tennessee Apparel Corporation*, B-194461, April 9, 1979, 79-1 CPD 247. Timberline's bid expired on March 29, 1980. Upon SBA's advice that the bidder in question had failed to timely apply for a certificate of competency, the Forest Service awarded item 2 to Kimball on April 24, 1980, since the second low bidder was ineligible for award and Timberline's bid had expired.

Timberline complains that it was neither notified that the Forest Service anticipated delay in making the award nor was given an opportunity to extend the acceptance period prior to the expiration of its bid. The protester states that upon request an extension would have been granted and concludes that as the lower bidder on item 2 it should have been awarded the contract.

The Forest Service takes the position that Timberline's protest to our Office more than 7 weeks after the firm's bid expired and 4 weeks after the award to Kimball is not timely filed in accordance with our Bid Protest Procedures, 4 C.F.R. § 20.2 (1980). Although the protestor could have checked with the procuring activity before its bid expired if it had a continuing interest in being considered for the award, we think that the mere expiration of its bid did not put Timberline on notice of a basis of protest because no award has been made and Timberline believed that it could revive its bid upon request. Similarly, we cannot agree with the Forest Service that the April 24 award to Kimball required the filing of a protest within 10 working days. The agency provided notice of the award to the successful bid-

ders by letter dated May 6, 1980. The record, however, does not disclose the date upon which Timberline either received the notice or learned that the award was made to Kimball. Where, as here, doubt exists as to when a protestor knew or should have known the basis for its protest, we resolve that doubt in favor of the protestor. *Memorex Corporation*, 57 Comp. Gen. 865, 867 (1978), 78-2 CPD 236; *Dictaphone Corporation*, B-193614, June 13, 1979, 79-1 CPD 416. We therefore consider the protest timely filed.

The protest is, nevertheless, without merit. Contrary to the protestor's assertion, we do not believe that the contracting officer was required to advise Timberline of any delay in the award or to request extension of the acceptance period prior to the expiration of its bid. We have held that the regulatory provision, FPR § 1-2.404-1(c) (1964 ed. amend. 121), to which the protester apparently refers, was not intended to apply to situations in which only one of several acceptable bids was inadvertently allowed to expire, but to situations where failure to request extensions would require readvertisement. 42 Comp. Gen. 604, 607 (1963).

By limiting its bid acceptance period to 30 days, Timberline not only took the risk that the Government might not be able to make award within that time, but also avoided the risk of increased performance costs during the following 30-day period which Kimball assumed by granting a 60-day bid acceptance period. 48 Comp. Gen. 19 (1968). The contract was in fact awarded to Kimball during that period. Timberline's bid could not properly have been extended after the expiration of its 30-day acceptance period because that would have afforded the protester an unfair advantage over Kimball and other bidders that offered a longer acceptance period. *Peck Iron and Metal Company, Inc.*, B-195716, October 17, 1979, 79-2 CPD 265; *Mil-Std Corporation*, B-197610, March 7, 1980, 80-1 CPD 182.

The protest is denied.

[B-193144]

Attorneys—Fees—Agency Authority to Award—Discrimination Complaints—Rehabilitation Act of 1973

Equal Employment Opportunity Commission (EEOC) may provide in its regulations for administrative payment of attorneys fees to prevailing party in Federal employee complaints filed under Rehabilitation Act of 1973, as amended, since scope of regulatory and judicial authority is same as granted under Title VII of Civil Rights Act of 1964, as amended.

Attorneys—Fees—Agency Authority to Award—Discrimination Complaints—Age Discrimination in Employment Act of 1967

EEOC may provide in its regulations for administrative payment of attorneys fees to prevailing party in Federal employee complaints filed under Age Discrimination in Employment Act (ADEA) of 1967, as amended. Scope of au-

thority granted to EEOC to regulate is virtually the same as granted in Title VII of Civil Rights Act of 1964, as amended, and legislative history of 1978 amendments to ADEA shows no intent to deprive prevailing Federal employees of right available to non-Federal employees to receive attorneys fees awards.

Matter of: Equal Employment Opportunity Commission—Administrative Payment of Attorneys Fees, September 15, 1980:

We have been asked whether the Equal Employment Opportunity Commission (EEOC) may include, in its regulations, provisions for the payment at the administrative level of attorneys fees to prevailing parties in "handicap" and "age" discrimination cases. For the reasons set forth below, we hold that the EEOC, if it chooses to do so, may provide for payment of attorneys fees to prevailing parties at the administrative level in those cases.

The EEOC has issued interim revised regulations implementing Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e–16 *et seq.* (Title VII), which include provisions for the payment of attorneys fees at the administrative level. 45 Fed. Reg. 24130 (1980). They wish to include provisions for the payment of attorneys fees in connection with complaints brought under the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701 *et seq.*, and the Age Discrimination in Employment Act (ADEA) of 1967, as amended, 29 U.S.C. §§ 621 *et seq.* By letter of May 16, 1978, B–167015, to the Attorney General, we indicated that if the Civil Service Commission, which was then charged with the task of drafting the Title VII regulations, chose to provide for the administrative payment of attorneys fees in those cases, we would not object to such regulations. By Reorganization Plan No. 1 of 1978, 43 F.R. 19807, 92 Stat. 3781, February 23, 1978, the EEOC was given the authority to administer and/or enforce, among others, Title VII of the Civil Rights Act of 1964, as amended; the Rehabilitation Act of 1973, as amended; and the Age Discrimination in Employment Act of 1967, as amended.

The Rehabilitation Act of 1973 was amended by Public Law 95–602, November 6, 1978, 92 Stat. 2955, adding, *inter alia*, 29 U.S.C. § 794a, which provides, in pertinent part, that:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

* * * * * * *

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This section makes it doubly clear that a prevailing party may be awarded attorneys fees, as section 706(k) of Title VII authorizing attorneys fees in court actions is included in those sections incorporated by reference. The statutory authorization for promulgating the implementing regulations under the Rehabilitation Act is the same as the statutory authorization for promulgating implementing regulations under Title VII. We have already indicated that we will not object to Title VII regulations which authorize administrative payment of attorneys fees. Similarly, if the EEOC chooses to authorize administrative payment of attorneys fees for cases under the Rehabilitation Act of 1973, we would not object to such regulations.

Unfortunately, the question raised regarding the ADEA may not be disposed of as easily. When the ADEA was originally enacted in 1967, it did not apply to Federal employees. It does not create a separate enforcement mechanism. Rather, 29 U.S.C. § 626(b) adopts by reference the powers, remedies and procedures of the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 211(b), 215, 216, and 217. The right to recover attorneys fees is specifically set out in section 216(b). Through the FLSA Amendments of 1974, Public Law 93-259, April 8, 1974, 88 Stat. 55, 74 (29 U.S.C. 633a), the ADEA was made applicable to the Federal Government.

In the 1974 Amendments, the only additions to the then-existing procedural and enforcement structure were to provide, in language virtually identical to that used in Title VII, for the enforcement of the Act for Federal employees by the Civil Service Commission (CSC), with a grant to CSC of the same wide-ranging authority to issue regulations that was given in Title VII. These provisions were codified in 29 U.S.C. § 633a(b). It should also be noted that a Federal employee in section 633a(c) was given the right to bring "a civil action in any Federal district court of competent jurisdiction for such legal and equitable relief as will effectuate the purposes of this chapter." Similar language is used in section 626(c) to give the right to bring a civil action to all other individuals covered by the ADEA. These Amendments did not change the definition of the class covered by the ADEA, i.e., individuals who were 40 to 65 years of age.

The ADEA was next amended by the Age Discrimination in Employment Act Amendments of 1978, Public Law 95-256, April 6, 1978, 92 Stat. 189. This Act did several things. It changed the definition of the protected class, for individuals who were not employees of the Federal Government, to people who were 40 to 70 years of age. For Federal employees, or applicants for Federal employment it extended the Act's coverage to anyone over 40. Some very specific exemptions for tenured college professors and policy-making executives were

created. It also confirmed, at least for non-Federal employees, the right to a jury trial.

The 1978 Amendments also added section 633a(f) which provides that:

> Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

Section 631(b) defines the protected class of Federal employees as those over 40 years of age.

A literal reading of section 633a(f) would appear to limit the remedies and enforcement provisions to those described in section 633a. In that section there is no specific authority to award attorneys fees to complainants. We are not convinced that this provision must be read that literally.

In *Moysey* v. *Andrus*, 21 FEP Cases 836 (D. D.C. 1979), the court, along with the merits of the claim, had to deal with the issue of whether or not Federal employees could file a class action under the ADEA. The defense argued that the FLSA provisions governed and under those provisions an individual may be a party-plaintiff only if he gives his written consent. The plaintiff argued that under section 633a(f) the restraints on class actions imposed by the FLSA no longer applied to suits by Federal employees and that the normal class action procedures under the Federal Rules of Civil Procedures should be applied. The court, after reviewing the legislative history of section 633a(f), held that the FLSA procedural provisions were incorporated through a section other than 633a; therefore, section 633a(f) eliminated their applicability to Federal employee cases. The court's interpretation of section 633a(f) is literal, and apparently applies to both procedural and substantive rights.

In *Harris* v. *United States Department of the Treasury*, 489 F. Supp. 476 (N.D. Ill. 1980), the court more narrowly construed the language of 633a(f) in holding that a Federal employee was entitled to a jury trial in an ADEA action. In footnote 11 of the decision the court discusses the meaning of section 633a(f):

> As the defendants admits, it is reasonable to assume that the purpose of § 633a(f) was to establish that "*substantive* rights and obligations for Federal employers would be different in some situations from those for private employers." Defendants' Memorandum in Support of Motion to Strike at 15a (emphasis supplied). For example, § 623 provides certain defenses for private employers which are unavailable to government employers. There is no indication that § 633a(f) was intended to establish different procedures by which public and private employees could vindicate their substantive rights under the ADEA. 489 F. Supp. at 480.

Compare *Nakshian* v. *Claytor*, 22 FEP 41 (D.C. Cir. 1980), also confirming the right of a Federal employee to a jury trial. The fact that

the *Moysey* and *Harris* cases reach differing conclusions as to the meaning of section 633a(f) would seem to indicate that the section is not as simple to interpret as it might seem.

Prior to the 1978 Amendments, the right of the prevailing party to receive attorneys fees was clear because of the incorporation by reference of the FLSA procedures. If section 633a(f) is interpreted as it was in *Moysey*, then the right to attorneys fees, even in the District Court, for Federal employees under the ADEA depends upon a finding that the langauge of section 633a(c), providing for "such legal and equitable relief as will effectuate the purposes of this chapter," gives the court the authority to award attorneys fees. This would be contrary to the general rule that attorneys fees may be awarded against the Federal Government only when specifically authorized. *Alyeska Pipeline Service* v. *Wilderness Society*, 421 U.S. 240 (1975). For non-Federal sector employees, the right to attorneys fees depends not on such a broad interpretation of section 626(c), the analog of 633a(c), but on the FLSA procedural rights.

The right of a prevailing party to receive an award of attorneys fees is an important right. Clearly prevailing parties in "handicap" discrimination cases and in Title VII cases may receive attorneys fees awards. Thus, prior to the ADEA Amendments of 1978 the remedies available for all three types of discrimination complaints included a right in the prevailing party to receive an award of attorneys fees. We find nothing in the 1978 Amendments or their legislative history that indicates that the Congress intended to eliminate the right of a prevailing Federal employee in an ADEA case to receive an award of attorneys fees. In fact, both the 1974 and 1978 Amendments generally broadened the rights of Federal employees, and to construe section 633a(f) to eliminate the right to receive attorneys fees runs counter to this widening of their rights. The fact that the general statements in both sections 626(c) and 633a(c) that a court of competent jurisdiction may grant "such legal or equitable relief as will effectuate the purposes" of the ADEA were not revised by the 1978 Amendments seems to indicate that the Congress did not intend to significantly lessen the remedies available to Federal employees by eliminating their right to an award of attorneys fees.

Based on the above, we are inclined to interpret section 633a(f) as did the court in *Harris* v. *United States Department of the Treasury*, as an indication of differing substantive rights and obligations. As with the procedural right to a jury trial addressed in *Harris*, we do not believe section 633a(f) was intended to deprive Federal employees of an important part of the remedy available to non-Federal employees under the ADEA—the right to receive attorneys fees. Since

we believe that Federal employees may be awarded attorneys fees by courts in ADEA cases, just as in Title VII cases, and since the language granting the authority to regulate and enforce the ADEA is virtually the same as it is in Title VII, we hold that the EEOC may include provisions in ADEA regulations for the payment, at the administrative level, of attorneys fees to a prevailing party.

[B-195903]

Subsistence—Per Diem—Reduction—Quarters Furnished—On Board Vessels—Department of Defense Employees

Insofar as applicable to non-lodging portion of per diem, the "3 days in port" rule of 50 Comp. Gen. 388 (1970) was not affected by enactment of section 853 of Defense Appropriation Act, 1978, restricting use of appropriated funds to pay lodging cost when Government quarters are available. Since October 1, 1977, amendment to 2 JTR 4552-3b(6) to reflect appropriation restriction did not define per diem entitlement when meals were procured ashore, the "Government Quarters Available" rate of per diem prescribed by 2 JTR 4552-3d should be paid after the third day in port for period from Oct. 1, 1977, until Dec. 1, 1978.

Matter of: Ernest F. Saker—Temporary Duty Aboard Vessels—Per Diem, September 15, 1980:

The question presented is what method the Naval Oceanographic Office should have used to determine the amount of per diem payable to its employees who were on temporary duty assignments aboard ships outside the continental United States (CONUS) for the periods during which these ships were in port. For the reasons stated below, we hold that for the period in question, October 1, 1977, to December 1, 1978, the Naval Oceanographic Office should compute the per diem payments for employees involved by paying one-half of the locality per diem rate for all in-port periods beyond 3 days.

The issue was presented by a letter from the Disbursing Officer, Naval Oceanographic Office, dated July 26, 1979, forwarding a travel voucher submitted by Mr. Ernest F. Saker, a civilian employee of that office. Mr. Saker served on temporary duty assignments aboard survey vessels between October 1, 1977, and December 1, 1978. The question is how his per diem should be computed.

Prior to October 1, 1977, the method to be used in computing per diem for Naval Oceanographic employees on temporary duty assignments aboard ships outside CONUS was set out in Volume 2 of the Joint Travel Regulations (2 JTR), paragraph C4552-3b(6) which provided that:

Aboard Government Ships. The per diem rates in subpar. 2c are prescribed for travel and temporary duty aboard a Government ship outside the continental United States. In the event the traveler uses commercial quarters during stopovers in port, the following per diem rates are applicable for the stopover period:

1. when assigned to extended voyages of 7 or more consecutive calendar days, the rate of per diem for the first 3 days in port is the appropriate $2 or $4 rate

prescribed in subpar. 2c, increased by the actual charges for meals, if any, and rounded to the next higher dollar, and the rate of per diem beginning with the 4th day in port is the appropriate rate prescribed in Appendix A (a 24-hour period is treated as a day);

2. when assigned to voyages of less than 7 consecutive calendar days, the appropriate per diem rate prescribed in Appendix A;

3. when quarters aboard ship are not available during stopover in port involvin voyage of 7 days or more, the appropriate per diem rate prescribed in Appendix A.

If an employee for his personal convenience uses available accommodations aboard a Government ship while the ship is in port, the appropriate $2 or $4 per diem rate prescribed in subpar. 2c, increased by the actual charges for meals, if any, and the resulting amount rounded to the next higher dollar is applicable for the stopover period. When an employee reports to a Government ship for temporary duty while the ship is in port, he is paid the same per diem rate as all other employees assigned to duty aboard the ship. The rule in par. C4553-3a will be observed when computing the per diem for the day the per diem rate changes. In port increased per diem rates will continue through the quarter day in which the ship sails.

The "subpar. 2c" referred to above is 2 JTR para. C4552–2c, applicable to travel within CONUS. Prior to October 1, 1977, that paragraph provided:

Government Ship. Except as limited in subpar. 3b(6), a per diem rate of $2 is prescribed for travel and temporary duty aboard a Government ship when meals and quarters are furnished without charge, and a per diem rate of $4 is prescribed when the traveler is required to pay for quarters. Neither rate is subject to further reduction. When the traveler is required to pay for meals, the appropriate $2 or $4 rate of per diem will be increased by the actual charges for meals and the resulting amount will be rounded to the next higher dollar. Receipts for actual charges for meals will not normally be required but may be required in individual cases. In the event that the traveler must maintain commercial quarters ashore for use following the completion of one or more short trips at sea, the rates of per diem prescribed in this subparagraph will be increased, before rounding to the next higher dollar, by the actual daily commercial cost of quarters maintained ashore during the period of travel aboard the Government ship.

Paragraphs C4552–3b(6) and C4552–2c mutually refer to each other and must be read together to understand the rules for computation of per diem of civilian employees serving tours of temporary duty aboard ships while in port whether in or outside CONUS. These sections, when read together, reflect the "3 days in port" rule established in our decision 50 Comp. Gen. 388 (1970). In holding that employees could not be required to occupy quarters aboard vessels during periods exceeding 3 days in port that decision drew no distinction between ports within and those outside CONUS. The way in which the rule is set out in 2 JTR may be less than clear, but the overall meaning was recognized by the Court of Claims in *Boege* v. *United States*, 206 Ct. Cl. 560 (1975), and we understand that prior to October 1, 1977, the "3 days in port" rule was applied whether or not the port was in CONUS.

Effective October 1, 1977, section 853 of the Department of Defense (DOD) Appropriation Act, 1978, Public Law 95–111, September 21, 1977, 91 Stat. 908, was enacted. Under that section employees of the

DOD could be required to use available Government quarters while on temporary duty assignments or face a reduction in their per diem or actual subsistence allowance. This section rendered the "3 days in port" rule in the above-quoted section moot as to the lodgings portion of the per diem payment. Section 853 provided that:

> * * * None of the funds appropriated by this Act or available in any working capital fund of the Department of Defense shall be available to pay the expenses attributable to lodging of any person on official business away from his designated post of duty * * * when adequate government quarters are available, but not occupied by such person.

Following the enactment of this restriction on the use of appropriated funds, several paragraphs in 2 JTR were amended by Change 146, December 1, 1977, effective October 1, 1977, to incorporate its limitations. The most extensive amendment was to paragraph C4552–3b(6) which, after revision, provided that:

> *Aboard Government Ships.* The per diem rates in subpar. 2c are prescribed for travel and temporary duty aboard a Government ship outside the continental United States. When an employee reports to a Government ship for temporary duty while the ship is in port, he is paid the same per diem rate as all other employees assigned to duty aboard the ship.

The reference to "subpar. 2c" was still to paragraph C–4552–2c which was also revised. The only revision, however, was the deletion of the phrase "Except as limited in subpar. 3b(6) * * *" from the beginning of the paragraph. With these revisions, 2 JTR no longer contained any provisions implementing the "3 days in port" rule.

From October 1, 1977, until December 1, 1978, the regulations did not specifically define the per diem entitlement of employees who procured their meals ashore. We have been advised that when the ships were in port, as a general rule, Naval Oceanographic Office employees on temporary duty aboard those ships could continue to eat their meals on the ships if they chose to do so. The Naval Oceanographic Office was charged by the commands operating the vessels only for the meals actually eaten by their employees while the ships were in port. There was no specific guidance in either paragraph C4552–2c or in paragraph C4552–3b(6) as to how per diem was to be computed when meals were procured ashore and no mention of the "3 days in port" rule. Whether the employees actually used the quarters on board the vessels was irrelevant since the appropriation restriction meant that, under any circumstances, only the subsistence portion of the per diem could be paid.

We have not modified or overruled the "3 day in port" rule. While 2 JTR was amended effective October 1, 1977, to reflect the fact that the lodgings portion of per diem could not be paid, even after 3 days in port, the amendments failed to incorporate the 3 days in port rule insofar as it pertains to the other elements of per diem entitlement.

Understandably, the Naval Oceanographic Office was unsure of the manner in which it should compute per diem for its employees who were on temporary duty assignments aboard vessels while those vessels were in port. The documentation furnished in connection with Mr. Saker's claim indicates that the Naval Oceanographic Office felt that the rate of per diem established under 2 JTR C4552–3d for "Government Quarters Available" should be paid, at least after the third day in port. As in effect subsequent to October 1, 1977, that paragraph provided:

Government Quarters Available. When Government quarters are available with or without a charge to the traveler, the prescribed per diem rate will be 50% of the applicable overseas per diem locality rate for the area. When a charge for the use of Government quarters is paid by the traveler, the per diem payable will be increased in an amount equivalent to the charge for quarters. The resultant amounts not to be rounded off to the next higher dollar. The period of applicability of the rate prescribed by this subparagraph will be as indicated in par. C4553–3b. In no case will the total per diem payable exceed the applicable overseas per diem locality rate for the area.

All of the above sections remained unchanged until paragraph C4552–3b(6) was amended by Change 158, December 1, 1978, to provide that:

Aboard Government Ships. The per diem rates in subpar. 2c are prescribed for travel and temporary duty aboard a Government ship outside the continental United States. When an employee reports to a Government ship for temporary duty while the ship is in port, he is paid the same per diem rate as all other employees assigned to duty aboard the ship. When the employee procures meals ashore at personal expense, after the third day in port, reimbursement is authorized in the amount of 14% of the locality per diem rate for the port for each meal procured, not to exceed three meals daily (50 Comp. Gen. 388).

This change, at least for stopovers in ports outside CONUS, returned the "3 days in port" rule to 2 JTR. Change 167 dated September 1, 1979, amended paragraph C4552–2c to incorporate a similar version of the "3 days in port" rule to travel within CONUS.

The December 1, 1978 change to paragraph C4552–3b(6), however, did not clarify the manner in which per diem was to be computed during the preceding 14 months. In response to inquiries by the Naval Oceanographic Office, the Chief of Naval Operations, by letter dated November 20, 1978, advised that the revision to paragraph 4552–3b(6) reflected a change in DOD policy and could not be applied retroactively. This response, however, did not explain what in fact the policy was during the 14-month period in question. The same lack of clarification exists as to the policy in effect prior to September 1, 1979, for stopovers at points within CONUS.

The current provisions of 2 JTR now, more clearly than at any other time, provide for the application of the "3 days in port" rule to other than the lodgings portion of per diem in all ports no matter where they are located. These most recent amendments accurately reflect the sense of our holding in 50 Comp. Gen. 388 (1970). Consist-

ent with the sense of that decision and with DOD's current implementation authorizing per diem for meals ashore after the third day in port, we believe that the regulations in effect between October 1, 1977, and December 1, 1978, applicable to stopovers outside CONUS, should be read in the manner suggested by the Naval Oceanographic Office to authorize per diem after the third day in port at the rate prescribed by 2 JTR C4552–3d for "Government Quarters Available." This construction is consistent with the fact that there is nothing to indicate that the October 1, 1977 changes to 2 JTR were for any purpose other than to bring the regulations into accord with the restriction on the use of appropriated funds to pay for lodgings when Government quarters were available. For the period from October 1, 1977, to September 1, 1978, the provisions of 2 JTR for travel within CONUS should be similarly construed.

Therefore, for the period in question, October 1, 1977, to December 1, 1978, when Mr. Saker and employees on temporary duty aboard vessels procured meals ashore after the third day in port, for ports outside CONUS, their per diem should be computed in accordance with paragraph C4552–3d. For ports inside CONUS, if the lodgings-plus system is applicable, and meals are procured ashore after the third day in port, an average cost of lodgings of zero should be used. For ports covered by the actual expense system, actual expenses for meals procured ashore after the third day in port should be paid.

[B–197402]

Travel Expenses—Military Personnel—Mode of Travel—Sailboat—Privately Owned

A service member authorized reimbursement of the cost of transoceanic transportation used when performing travel upon PCS who traveled by privately owned sailboat may be reimbursed only necessary expenses directly connected with the operation of the vessel (fuel, oil and docking fees), provided they do not exceed the amount which would have been paid by the sponsoring service for available Government transportation.

Matter of: Captain William I. Parrish, USN, September 16, 1980:

The Disbursing Officer, Personnel Support Activity, Pensacola, Florida, requests an advance decision concerning payment on a voucher submitted for reimbursement of expenses incurred in transoceanic travel by a privately owned boat or vessel in connection with a permanent change of station (PCS). The request, forwarded by the Navy Accounting and Finance Center, has been assigned Control No. 80–4 by the Per Diem, Travel and Transportation Allowance Committee.

The member is entitled to reimbursement of actual expenses limited

to those expenses directly connected with the operation of the privately owned boat or vessel used in the transoceanic travel not to exceed the cost of Government air transportation or Government procured air transportation.

Captain William I. Parrish was authorized travel by Government air transoceanic travel at personal expense upon PCS from Kenitra, Morocco, to Pensacola, Florida, in accordance with paragraph M4159–5 of Volume 1, Joint Travel Regulations (1 JTR), with reimbursement of the cost of transoceanic transportation actually used when performing circuitous travel not to exceed the total amount he would have been entitled to for travel between his old and new permanent duty stations via the direct route. Incident to these orders, he used a privately owned sailboat to make the PCS.

The submission questions whether or not there is an entitlement to reimbursement for actual expenses incurred. The itemized voucher lists these expenses as diesel fuel, $200; lube oil, $30; food and consumable stores, $778.83; transit insurance for the voyage, $500; and mooring and docking fees, $30.68. The Navy Accounting and Finance Center endorsement indicates that reimbursement of actual expenses should be limited to fuel, oil and docking fees not to exceed the cost of Government air or Government procured air for the transoceanic travel. No comparative cost of air transportation is furnished.

The travel of members of the uniformed services at Government expense is governed by section 404 of title 37, United States Code, which authorizes the payment of travel and transportation allowances to members upon a PCS under regulations prescribed by the Secretaries concerned. It has also been held that there is a statutory assumption by the Government of an obligation to pay the necessary travel expenses without such express authorization for the payment of commuted allowances, which constitutes construed authority for reimbursement on an actual expense basis. See 47 Comp. Gen. 405 (1968).

In accordance with such authority, paragraph M4159–5 of 1 JTR, provides in effect that when a member performs circuitous travel involving transoceanic travel the member is entitled to reimbursement for the cost of the transportation utilized not to exceed transportation by Government aircraft or vessel or Government procured transportation or transportation procured at personal expense, depending on the circumstances involved.

The provisions of 1 JTR, dealing with permament change-of-station travel to, from, or between points outside the United States do not specifically provide what expenses are considered actual expenses when a member is authorized to use his privately owned boat for travel from a point outside the United States to a point within

the United States. However, other provisons of 1 JTR, while not specifically applicable to travel outside the United States, do specifically set forth what are considered actual expenses when a member is authorized to use his privately owned boat. In such cases reimbursement is limited by the regulation to fuel, oil, and docking fees. See 1 JTR, paragraph M4203–3(g), and 47 Comp. Gen. 325 (1967).

In that regard it is our view that the limitation on the actual expenses with regard to privately owned boats contained in 1 JTR, paragraph M4203–3(g), would be applicable in determining actual expense incurred in connection with a transoceanic crossing. Thus, it is our view that the member is entitled to reimbursement on an actual expense basis not in excess of the regulatory limitations.

Accordingly, the purchase of diesel fuel and lube oil for the transoceanic travel, as well as payment of moving and docking fees, were necessary expenses directly connected with the operation of the privately owned sailboat payable under the authority of paragraph M4159–5 of 1 JTR, provided they do not exceed the cost of air transportation authorized. However, expenditures for insurance and food and consumable stores used in the trip for personal expenses and there is no authority in the regulation for their payment.

It would appear, however, that Captain Parrish may be entitled to per diem computed in accordance with 1 JTR 4204–1 on a constructive travel basis.

The voucher submitted with the request is returned for payment, if otherwise correct, in accordance with this decision.

[B–196326]

Indian Affairs—Contracts—Bureau of Indian Affairs—Indian Self-Determination Act—Compliance Determination

Indian Self-Determination Act requires Federal agency to include in prime contract for benefit of Indians provision requiring prime contractor to afford preference to Indian-owned firms in award of subcontracts to greatest extent feasible, and requirement is not satisfied by compliance with Buy-Indian Act.

Procurement — Statutory Changes — Implementation — Effective Date of Application — Preference to Indian Concerns

Where almost 5 years elapses from time of enactment of statute before regulation is promulgated requiring Federal agency to include in prime contract for Indians' benefit subcontracting preference for Indian firms, agency may not be excused from implementing statutory requirements because regulation was published after bid opening.

Matter of: J & A, Inc., September 22, 1980:

J & A, Inc. (J&A) protests the award of a contract by the Army Corps of Engineers (Corps) under a solicitation for the replacement of an above-ground natural gas distribution system in Barrow,

Alaska, with an underground gas system. Pursuant to the terms of an agreement between the Department of the Interior's Bureau of Indian Affairs (BIA) and the Corps, the Corps advertised, awarded and is to administer the construction contract for BIA. The basis for protest is that the Corps did not comply with section 7(b) of the Indian Self-Determination Act, 25 U.S.C. § 450e(b)(2) (1976), in that the prime contract did not include a requirement that Indian organizations and Indian-owned firms be given preference, to the greatest extent feasible, in the award of subcontracts where the prime contract with the Federal Government is for the benefit of native Americans. J&A, which alleges that it would be eligible for the cited preference in view of its 51-percent Indian ownership urges this Office to require the Corps to add to the contract the Indian preference in subcontracting provision published at 44 Fed. Reg. 62514 (October 31, 1979) by the Secretary of the Interior to implement the statute. The provision was published after bids on the prime contract were opened; a contract subsequently was awarded notwithstanding the protest.

The protest is sustained.

As an initial matter, the issue of whether the protester is an "interested party" under our Bid Protest Procedures, 4 C.F.R. part 20 (1980), has been raised. We simply point out that J&A, as an eligible subcontractor, has a sufficiently direct and substantial economic interest in urging that the Indian preference should have been included in the contract to qualify as an interested party for purposes of filing a bid protest. See *Donald W. Close and Others*, 58 Comp. Gen. 297 (1979), 79-1 CPD 134; *Optimum Systems, Incorporated—Subcontract protest*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

With respect to the substantive issue raised in the protest, section 7(b) of the Indian Self-Determination Act states in pertinent part:

> Any contract * * * pursuant to this Act * * * or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians shall require that to the greatest extent feasible—
>
> * * * * * * *
>
> (2) preference in award of subcontracts * * * in connection with the administration of such contracts * * * shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.

It is not disputed that the contract in this case is for the benefit of Indians.

The Corps' position essentially is that its responsibility with respect to promoting Indian participation in the project was fulfilled by complying with the Buy Indian Act, 25 U.S.C. § 47 (1976), in awarding the prime contract. The Buy Indian Act, which like section 7(b) of the Indian Self-Determination Act reflects Congress' intent to

further Indian participation in Federal programs conducted for Indians, states:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

The Department of the Interior's policy with respect to implementing the above statute requires that before taking any procurement action, contracting officers determine whether there are any qualified Indian contractors within the normal competitive area that could meet the requirement. Only if none are found may non-Indian contractors be solicited; a qualified contractor for purposes of this policy is one that is totally Indian-owned. 20 Bureau of Indian Affairs Manual (Supp. 2).

To comply with the Buy Indian Act policy, the Corps requested that BIA investigate the availability of Indian contractors that might be able to perform the prime construction contract. After a 3-month investigation, BIA was able to identify only two potential Indian contractors. However, the Corps investigated the potential contractors and found that they did not have the requisite field experience. Accordingly, the Corps advertised the project without restriction.

We do not agree that compliance with the Buy Indian Act and the corresponding BIA implementing regulations through reliance on BIA's investigations relieved the Corps of its responsibilities under section 7(b) of the Indian Self-Determination Act. The Buy Indian Act "preference" as implemented by the Department of the Interior involves the setting aside by the Government of procurements for participation by firms that are 100-percent Indian-owned, and thus the implementing regulations necessarily require a survey of the competitive area to determine the feasibility of such a set-aside in a particular case. In contrast, section 7(b) of the Indian Self-Determination Act simply mandates that Federal contracts for the benefit of Indians require the prime contractor to afford preference in subcontract awards to firms that may be only 51-percent Indian-owned. Thus the statutes contemplate different preferences and different universes of potential recipients of these preferences. Further, whereas the Buy Indian Act imposes a duty on the Federal Government in the initial procurement stage, the Indian Self-Determination Act requires only that the prime contract require the preference to be implemented by the contractor. In view thereof, we cannot agree that simply because it may not be feasible to set a procurement aside for 100-percent Indian contractors, the requirements of the Indian Self-Determination Act that the prime contract impose a duty on the prime contractor regarding the award of subcontracts can be ignored.

We recognize that, as stated at the outset of this decision, the Secre-

tary of the Interior did not promulgate the Indian preference in subcontracting provision to implement section 7(b) until after bids were opened. However, while we have recognized that the implementation of a statute by the Executive branch takes a reasonable time, B-114835, October 19, 1979, we note that almost 5 years from the enactment of the statute passed before the statute's requirement was implemented. In addition, almost 2 years passed from the time we specifically recommended to the Department of the Interior that it definitize the statutory preference. See *Department of the Interior—request for advance decision*, 58 Comp. Gen. 160, 167 (1978), 78-2 CPD 432.

Under the circumstances, we do not believe that the publishing of the Secretary of the Interior's implementing preference provision after bid opening here excuses the failure of the agency to impose the contractual duty on the prime contractor required by law in the award of subcontracts. Therefore, we sustain the protest.

Nonetheless, section 7(b) of the Indian Self-Determination Act only requires the preference in the award of subcontracts "to the greatest feasible extent." We have stated that such language confers broad discretionary authority and thus does not *require* subcontract awards to Indian-owned firms. *Id.* We note that the prime contract has been awarded to a joint venture that includes a native American concern. Moreover, while the record indicates that all subcontracts already have been awarded to non-Indian firms, the prime contractor asserts that it did give first consideration to Indian-owned enterprises, including J & A, but found them technically unacceptable.

Accordingly, we find that the Congress' purpose reflected in the Indian Self-Determination Act has been substantially met in the procurement despite the nonexistence of an express preference requirement in the prime contract. In view thereof, we will not recommend any remedial action with respect to this procurement.

By separate letter, we are advising the Secretary of the Army of the above-discussed procurement deficiency.

[B-199138]

Contracts — Specifications — Qualified Products — Acceptability — Evaluation Propriety

Fundamental question which must be addressed when compliance with Qualified Products List (QPL) clause is at issue is whether essential needs of Government, as reflected in QPL, will be satisfied by offered product.

Contracts—Specifications—Qualified Products—Status—Repackaging Effect—What Constitutes "Repackaging"

Transferring product which is qualified in bulk form into pressurized containers is not simply "repackaging" since product in pressurized form is subject to specialized QPL tests additional to those established for product in bulk form.

Contracts — Specifications — Qualified Products — Packaging Requirements—Pressurized Form of Qualified Bulk Product—Status as Qualified End Item

Where product offered by protester had not been subjected to additional specialized QPL tests established for product in form offered by protester and called for by invitation for bids (IFB), protester was not offering to supply qualified end item as required, and agency acted reasonably in rejecting protester's bid as nonresponsive.

Contracts—Specifications—Interpretation—Oral Advice

Contention that protester was misled by agency personnel concerning need for QPL qualification of product is without merit since IFB provided that oral explanations were not binding and erroneous advice given by agency personnel cannot act to estop agency from rejecting nonresponsive bid as it is required to do so by law.

Matter of: Trident Industrial Products, Inc., September 23, 1980:

Trident Industrial Products, Inc. protests the rejection of its bid under invitation for bids (IFB) No. 6PR-W-JO751-B2-F, issued by the General Services Administration (GSA). GSA rejected the bid because it found that Trident did not satisfy the requirements of the "Qualified Products List" (QPL) clause of the IFB. For the reasons set forth below, we deny the protest.

The solicitation called for three items of corrosion preventive, one in bulk form in five gallon cans and two in pressurized form in 16 ounce aerosol cans. Trident was the low bidder on items numbers 2 and 3, and aerosol cans. Trident offered to furnished aerosol cans which it filled with corrosion preventive purchased in bulk from a QPL listed manufacturer.

The QPL clause of the IFB reads as follows:

Qualified products:

(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 opening of offers, been tested and approved for inclusion in the qualified products lists identified below. Manufacturers who wish to have a product tested for qualification are urged to communicate with the office designated below.

* * * * * * *

(b) The offeror shall insert, * * * the name of the Qualified Source of material, product designation, and QPL test or qualification number of each product offered. Qualified products may be packaged in any container which has the identifying label or markings of the Qualified Source of material and complies with the packaging requirements cited in the Bid Schedule. Any offer which does not identify the Qualified product offered will be rejected.

The relevant packaging and packing requirement cited in the QPL clause required the use of a 16 ounce aerosol can, and stated that "the aerosol containers shall be packed in fiberboard boxes to insure delivery at destination, to provide for redistribution by the initial receiving activity, and shall be acceptable by common carrier under National Motor Freight Classification and Uniform Freight Classification."

GSA points out that the QPL clause contained in the solicitation

was revised to its present form in November 1979 to allow repackagers to furnish the product of a qualified manufacturer in accordance with our decision in *Methods Research Products Company*, 59 Comp. Gen. 43 (1979), 79-2 CPD 272. In that case we held that the essential needs of the Government are for the end item being procured rather than for the containers holding the end item so that the QPL status of the qualified product should not generally be regarded as affected by a nonmanufacturing step such as repackaging the end item.

The protester in *Methods Research Products Company* (MRP) had purchased adhesive in five gallon drums from a qualified manufacturer and repackaged it into bottles and cans. The QPL clause in use at that time was viewed by GSA as requiring that qualified products must be delivered in the manufacturer's containers. The stated reason for this requirement was to ensure product integrity. We found this argument to be without merit because the packaging did not relate to the QPL status of the offered product and concluded that the repackaging restriction under the circumstances present was unduly restrictive of competition.

In the instant case, Trident proposed to furnish the corrosion preventive compound of a qualified manufacturer, but intended to fill and pressurize the aerosol cans itself. The contracting officer rejected Trident's bid because Trident was not itself a qualified aerosol manufacturer, *i.e.*, the filled aerosol can was not a qualified product.

The decision to reject Trident's bid is asserted by GSA to be consistent with the RFP since it was based on the contracting officer's conclusion that filling and pressurizing the cans is a manufacturing process rather than a packaging process, and that the filled and pressurized can was the product or end item under the QPL. According to the contracting officer, the conclusion that filling and pressurizing the cans is a manufacturing process is indicated by the need for an approved formula showing the amounts of corrosion preventive and type and amounts of propellant, as well as for testing and approval of the type and size of valve and activator.

At the outset, we believe that GSA has placed undue emphasis on the manufacturing process discussed in MRP. That discussion related to a paragraph in GSA's QPL clause which is no longer used and was in way of explanation of a prior GAO decision which GSA had apparently relied on in establishing the portion of the QPL clause in question.

In MRP, we indicated that the status of a qualified product generally will be affected by an additional manufacturing step but not by repackaging. We noted that one exception to the latter would be where the original packaging served a special function in the use of the

product. We did not mean to imply, however, that these are the only considerations relevant to determining whether a product is qualified as required.

Rather, the fundamental question which must be addressed when compliance with a QPL clause is at issue is whether the essential needs of the Government, as reflected in the QPL, will be satisfied by the offered *product*.

In this case, the IFB called for two items of corrosion preventive in pressurized form and stated that QPL qualification was required for all items. The relevant QPL lists products qualified under Military Specification MIL-C-0081309C dated August 30, 1973, as amended. This specification establishes tests for Class 1 (bulk) and Class 2 (pressurized) corrosion preventive. Class 2, exclusive of propellant, is subject to the same tests as Class 1 but, significantly, is also subject to additional specialized tests when in pressurized cans with propellant. This is reflected in the QPL which specifies the type and class of corrosion preventive for which each manufacturer is qualified.

Thus, the QPL qualification of the product in pressurized form is dependent upon its ability to pass the additional specialized tests applicable to it. These tests establish a number of criteria peculiar only to the pressurized cans. Accordingly, we do not believe that transferring the basic product, which is qualified in bulk form, into pressurized containers amounts to nothing more than repackaging a qualified product or that it has no affect on the qualified status of the end product. Since the pressurized product offered by Trident had been subjected only to those tests established for the basic material but not the additional specialized tests for the product in aerosol cans, we conclude that Trident was not offering to supply the qualified product called for by the IFB. We therefore believe that GSA acted reasonably in rejecting Trident's bid as nonresponsive.

In support of its position that rejection of its bid was improper, Trident alleges that it was misled by GSA contracting personnel who advised that Trident would be fully qualified as a bidder simply by conforming to the formulations specified for the product in pressurized form. GSA responds that while contracting personnel did explain to Trident that some confusion existed over whether Trident must acquire QPL qualification under our decision in MRP, they never told Trident it did not have to be qualified under the QPL. GSA asserts that in fact, Trident was informed that to be on the "safe side" it should seek such qualification.

In any event, as GSA points out, this Office has held that where the IFB states that oral explanations are not binding, reliance of the bidder on an oral explanation is at the bidder's own risk and also that

erroneous advice given by agency personnel cannot act to estop an agency from rejecting a nonresponsive bid as it is required to do so by law. *Klean-Vu Maintenance, Inc.*, B-194054, February 22, 1979, 79-1 CPD 126; *CFE Air Cargo, Inc.*, B-185515, August 27, 1976, 76-2 CPD 198. Paragraph 3 of Standard Form 33A, which was incorporated by reference into the instant solicitation, clearly states that oral explanations or instructions given before award will not be binding and that any explanation desired regarding the meaing or interpretation of the solicitation must be requested in writing. Furthermore, GSA correctly found Trident's bid to be nonresponsive. Accordingly, we find no merit to Trident's argument that it was misled by GSA contracting personnel.

The protest is denied.

[B-197297]

Contracts—Protests—Notice—To Contractors

Contention that protester was not given opportunity to respond to earlier protest is without merit since record shows that protester met with agency officials after prior protest was filed to discuss protest and protester's contract was not canceled until 2 weeks later.

Contracts—Awards—Protest Pending

General Accounting Office (GAO) will not question agency decision to make award prior to resolution of protest where decision to do so was made in accordance with applicable regulations.

Contracts — Negotiation — Awards — Erroneous — Evaluation of Proposals

Upon discovery that protester's proposal did not meet mandatory request for proposals (RFP) requirement, agency canceled contract erroneously awarded to protester. Protester contends, alternatively, that: (1) RFP requirement was ambiguous; (2) reevaluation using tariff prices for meeting disputed mandatory requirement would still result in award to protester. GAO concludes: (1) RFP requirements was not ambiguous; (2) original award should not have been made to protester.

Contracts—Cancellation—Termination for Convenience of Government *v.* Cancellation—Finality of Administrative Findings—Contract Disputes Act of 1978 Effect

GAO will not decide whether cancellation or termination for convenience was proper method to terminate contract improperly awarded to protester. Appropriate forum for deciding issue is agency board of contract appeals since the facts are in dispute.

Matter of: New England Telephone and Telegraph Company, September 25, 1980:

New England Telephone and Telegraph Company (NET) protests against the Internal Revenue Service's (IRS) cancellation of NET's contract (for the lease and maintenance of a Dimension 2000 Private Branch Exchange system at the IRS Service Center in Andover, Mas-

sachusetts) and subsequent award of a contract for this requirement to Rolm New England (Rolm)—the only other offeror.

The central issues in this protest are: (1) whether the IRS properly determined that the original award to NET was illegal and, therefore, subject to cancellation rather than termination for convenience; and (2) whether the work in question should have been resolicited rather than awarded to Rolm. For the reasons set forth below, we conclude that the IRS improperly awarded the original contract to NET. However, we do not believe it appropriate for us to decide the question of the correct method of ending NET's contract. We also conclude that the subsequent award to Rolm under this solicitation was proper and, therefore, resolicitation was not required here.

Background

Request for proposals (RFP) No. 79–3 was issued by the IRS on April 9, 1979. The RFP solicited proposals for the acquisition and maintenance of telephone systems for the IRS Service Center in Andover, Massachusetts, and for the IRS National Computer Center in Martinsburg, West Virginia, and stated that one or more contracts would be awarded. The successful offerors would be required to design, install, and maintain the telephone system at the designated IRS facility for a 10-year period. The solicitation indicated that firm-fixed-price contracts would be awarded for lease, lease-to-ownership, or outright purchase of the telephone system. The initial contract was to terminate on September 30, 1979, but since known requirements covered a 10-year period, the contract could be extended for as long as 120 months at the option of the IRS.

The RFP called for fixed prices for the initial contract period and for each option year, and proposals were to be evaluated on the basis of firm-fixed prices for the total 10-year system's life. Preproposal conferences were held at the Martinsburg facility on May 4, 1979, and at the Andover facility on May 11, 1979. On September 27, 1979, contract No. TIR 79–106 was awarded to NET for the lease and maintenance of a Dimension 2000 Private Branch Exchange system to fulfill the Andover telephone requirement. The initial contract expired on September 30, 1979, and the contract option was exercised to extend the contract until September 30, 1980.

On December 13, 1979, the IRS received a letter from Rolm charging that "insufficient, inaccurate price information was submitted, and that improper equipment was offered" by NET and that there were inconsistencies between the contract awarded to NET and the requirements of the RFP. On December 28, 1979, Rolm filed a protest with our Office against the contract awarded to NET for the Andover

telephone requirement. In its protest to us, Rolm alleged, among other things, that the award to NET had been improper because:

1. NET had proposed rotary dial instruments rather than tone dial (i.e., push button) instruments as required by the RFP. Also, NET's proposal omitted line charges for each tone instrument.

2. NET's proposal did not include multiline equipment charges (specifically, line illumination charges) as required by the RFP.

3. NET had failed to disclose that, under its proposed two-tier rate structure, both maintenance charges (Tier B) and equipment charges (Tier A) could be increased during the 10-year period of the contract. Accordingly, these prices were not fixed as called for in the RFP.

The IRS issued a "stop work" order to NET on January 2, 1980, while an analysis of Rolm's protest was undertaken. On January 4, 1980, the IRS held a meeting with representatives of NET and the American Telephone and Telegraph Company (AT&T) (NET's parent corporation) to discuss the protest allegations. Rolm's allegations were discussed and responses were elicited from NET's representatives. The award to NET was reexamined by the contracting officer in light of Rolm's protest and the responses given by NET at the January 4 meeting. Subsequently, the IRS concluded that the contract had been illegally awarded to NET.

By letter dated January 17, 1980, the contracting officer notified NET that its contract was canceled because of "material misrepresentations, mistakes and omissions" contained in NET's proposal. NET protested to our Office against the cancellation of its contract on January 28, 1980. On February 1, 1980, during the pendency of NET's protest, the IRS awarded a contract for acquisition and maintenance of a Dimension 2000 Private Branch Exchange system at the Andover facility in accordance with a lease-to-ownership plan proposed by Rolm in response to RFP 79-3. On February 11, 1980, Rolm withdrew its protest in our Office.

Procedures Attending Rolm Award

NET argues that the IRS never gave NET an opportunity to respond to the allegations raised by Rolm in its earlier protest. Instead, NET contends that the IRS simply adopted Rolm's unsubstantiated allegations and prematurely canceled NET's contract. Furthermore, NET argues that the award of a contract to Rolm prior to resolution of NET's protest by our Office was improper under our Bid Protest Procedures, 4 C.F.R. part 20 (1980), and section 1-2.407-8(b) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 68).

Under section 20.3(a) of our Bid Protest Procedures and section 1-2.407-8(a)(3) of the FPR (1964 ed. amend. 139), parties having

a clear interest in a protest should be notified by the contracting agency that a protest has been filed in our Office and given the bases therefor, so that they may have an opportunity to submit their views and any relevant information on the protest to the contracting officer and our Office. In the present case, the IRS convened a meeting with NET representatives on January 4, 1980, and discussed the bases of Rolm's protest with them. NET was given an opportunity to respond to Rolm's allegations at that meeting, and there is no indication that the IRS failed to furnish NET with the written materials concerning Rolm's protest. Since NET's contract was not canceled until January 17, NET had sufficient time to comment and submit any relevant documentation on the matter before cancellation was effected. Thus, the IRS complied with the policy goals of these provisions.

Regarding the award to Rolm during the pendency of NET's protest, FPR § 1-2.407-8(4)(iii) (1964 ed. amend. 68) provides that an award may not be made prior to resolution of a written protest unless the contracting officer determines a prompt award will be advantageous to the Government. The contracting officer made such a determination on January 31, 1980, obtained approval at a higher level within the IRS, and notified our Office on February 1, 1980, of his intention to award to Rolm pending resolution of NET's protest in accordance with FPR § 1-2.407-8(b)(3) (1964 ed. amend. 68). Therefore, since the contracting officer acted in accordance with applicable regulations, the decision to proceed with award in spite of NET's protest is not subject to objection by our Office. Moreover, even if these procedural requirements were not met, the legality of the award to Rolm would not be affected. *SAI Comsystems Corporation*, B-196163, February 6, 1980, 80-1 CPD 100. Accordingly, this point of NET's protest is denied.

Propriety of Cancellation

Section "F" of the RFP contained the mandatory requirements for the phone system to be installed. In the solicitation as originally issued, offerors were given the option of providing either rotary dial instruments or tone dial instruments. Section F.2.13 of the RFP originally stated:

> Unless otherwise stated herein, provide tone or rotary dial switching equipment and instruments, whichever is the least cost to the Government. If a rotary dial system is proposed, then unless otherwise stated herein, provide enough switching equipment to process calls from at least 20 lines equipped for tone dialing.

Amendment No. 1, issued May 23, 1979, "removed" the above provision and "inserted" new paragraph F.2.13 which reads:

> Provide tone switching equipment and instruments.

NET admits that it offered rotary dial instruments, but argues that the RFP did not specify that tone dial rather than rotary dial instruments were required. Specifically, NET contends that the RFP must be considered ambiguous as to a mandatory requirement for tone dialing because it did not contain the phrases "touch tone" or "tone dial."

There are admitted technical differences between rotary and tone instruments. Rotary instruments operate on an electrical impulse system while tone instruments operate through tone generated frequencies. All parties agree that tone instruments are more expensive than rotary instruments. Moreover, it is clear that the original and new paragraphs F.2.13 were to cover the same technical areas of the RFP; also, all offerors were aware that the original paragraph F.2.13 contained the phrase "tone dial."

Given these circumstances, we conclude that the wording of the amendment reasonably conveyed the IRS's intent that tone dial instruments were required and that rotary dial instruments would not be acceptable. Accordingly, the original award to NET was in error since that determination was based on the assumption that NET had, in fact, complied with the material RFP requirement concerning the mandatory use of tone dial instruments.

Further, we agree with the IRS's argument that it had no way of reasonably discovering the error prior to award since the error could have been discovered only by asking NET whether its proposed price covered tone dial instruments or by asking appropriate regulatory authorities for NET's tone dial prices. We agree that the IRS was under no duty to pursue these inquiries in light of the RFP requirement for tone dial instruments which reasonably led the IRS to assume that NET's price, in fact, covered these instruments.

When this award error became obvious in light of Rolm's protest, the IRS reevaluated the proposals using NET's tariff rates (as fixed under Massachusetts law) for tone dial instruments and related line charges. The IRS reports that, when NET's proposal price is increased for "tone dial corrections," Rolm rather than NET is the successful offeror under the RFP's award provision, which stated that price would count 80 percent of the award decision. NET's failure to comply with the tone dialing requirement, according to the IRS, lowered its proposed price by approximately $62,000 over the projected 10-year life of the system. Considering the total evaluated proposed prices of Rolm ($758,933) and NET ($808,343) it is clear that the pricing effect of the tone charges was material and, as noted above, affects the relative standing of the offerors. NET has not challenged these calculations which were set forth in a May 22, 1980, IRS report, made available to NET. Accordingly, and recognizing that NET has

the burden of showing that these calculations were erroneous, we conclude that the original award should have been made to Rolm.

NET argues that, even if the IRS improperly awarded NET's contract, the IRS could not legally cancel that contract rather than terminate it under the Termination for Convenience clause of the contract. Accordingly, NET contends that it is entitled to appropriate termination costs.

The Court of Claims has held that "the binding stamp of nullity" should be imposed only when the illegality is "plain" or "palpable." *John Reiner & Co.* v. *United States*, 325 F.2d 438, 440 (163 Ct. Cl. 381 (1963)). In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor, or if the contractor was on direct notice that the procedures being followed were violative of such requirements, then the award may be canceled without liability to the Government except to the extent recovery may be had on the basis of *quantum meruit*. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contact may only be terminated for the convenience of the Government. *See* 52 Comp. Gen. 215, 218 (1972), and cases cited therein.

The IRS argues that the contract awarded to NET was plainly or palpably illegal under the *Reiner* standard. In support of its cancellation of the contract, the IRS argues that NET contributed to the erroneous award in several ways and that NET was on direct notice that the contract awarded was not in accordance with the RFP requirements.

The IRS alleges that NET submitted its proposal in bad faith, offering rotary dial instruments even though NET knew from the face of the solicitation that tone dial instruments were required. The IRS also argues that NET knew about the tone dialing requirement by means other than the RFP. IRS insists an NET representative and a representative of AT&T were informed at preproposal conferences that all references to rotary dialing had been eliminated and that tone dial instruments would be required. However, the NET representative states that he has no recollection of any such IRS statement and denies that any representative of AT&T informed him of the IRS requirement for tone dialing.

The IRS also argues that the contract should be viewed as void because of NET's failure to quote "line illumination charges" for the work. NET replies that it reasonably omitted these charges because

the RFP did not stipulate the number of lines on which the charges were to be based (a prerequisite, in NET's view, for an informed price for these charges) but instead indicated that the "exact selection of equipment" would not take place until after award—thus suggesting that the decisions as to the final number of lines and corresponding charges were to be postponed until after award. In reply, the IRS insists that NET should have submitted charges based on the assumption that "at a minimum, 270 lines would require line illumination and the associated charges."

The IRS also insists that NET improperly failed to inform the IRS that the company's Tier "A" (equipment charges) prices were subject to a unique escalation factor set forth under applicable Massachusetts tariff rates. The IRS notes that the RFP provided a common escalation factor for evaluation purposes only for Tier "B" (maintenance charges). Because NET knew that its Tier "A" prices were also subject to escalation, the IRS argues that NET should have informed the IRS of this fact so that an additional 7-percent pricing evaluation factor could have been added to NET's proposed price. The IRS insists that NET knew that the IRS was not aware of NET's Tier "A" escalation circumstance and that NET, therefore, because of its superior knowledge, had a duty to disclose this unique escalation factor. NET argues that it clearly informed the IRS in its proposal that it had to use a two-tier tariff plan under Massachusetts law and that, therefore, its prices were not truly "fixed" as required by the RFP. NET points out that, on September 27, 1979, the contracting officer signed a "Memorandum of Understanding" which recognized that NET's prices were subject to increase if mandated by appropriate regulatory agencies.

Conclusion

Ordinarily, the determination whether a contract should be terminated for the convenience of the Government is an administrative decision which rests with the contracting agency and is not subject to review by our Office. However, it is appropriate for us to review the validity of the procedures leading to award of the contract to the terminated contractor. See *Electronic Associates, Inc.*, B–184412, February 10, 1976, 76–1 CPD 83, and cases cited therein. Accordingly, we have reviewed the procedures leading to the award to NET and, as indicated above, we find the award to have been made improperly. On the other hand, however, deciding whether cancellation or termination for convenience was the correct method to rectify the improper award here is a matter for resolution under the contract disputes procedures in this case.

Even though we decided whether a contract had been properly canceled on the basis of illegality in 52 Comp. Gen. 215, *supra*, we do not think such a decision would be appropriate here. First, 52 Comp. Gen. 215 was decided before the enactment of the Contract Disputes Act of 1978, Pub. L. No. 95–563, 92 Stat. 2383 (41 U.S. Code 601 note), which gives NET the right to be heard on this issue by the agency board of contract appeals. Moreover, on this matter, in the present case, there is a factual dispute as to whether an NET representative was told at the preproposal conference that rotary dial instruments would not be accepted. We believe that the proper forum for resolving such factual disputes is the agency board of contract appeals.

That NET has a forum for resolving the propriety of the cancellation and this factual dispute is implicit in section 8(d) of the Contract Disputes Act of 1978 (41 U.S.C. 607) which reads:

> * * * the agency board is authorized to grant any relief that would be available to litigant asserting a contract claim in the Court of Claims.

As stated by the Armed Services Board of Contract Appeals in *Starlite Services, Inc.*, ASBCA No. 22894, March 9, 1979, 79–1 BCA 13, 743:

> * * * To the extent that the appellant seeks to recover for a breach attributable to defective specifications * * * the Board lacks jurisdiction to award such relief under an appeal filed prior to 1 March 1979. However, under the provisions of the Contract Disputes Act of 1978, P.L. 95–563, the Board has been vested with authority to render such latter relief with respect to claims filed or pending before a contracting officer on or after 1 March 1979.

Accordingly, we believe the issue of cancellation versus termination for convenience to be a contract administration problem, and thus, NET must be left to its remedy under the act for resolving the propriety of the cancellation.

Resolicitation

NET argues that the IRS should have resolicited the work in question rather than making an award to Rolm once NET's contract ended. NET bases this argument on the controversies regarding line illumination charges and Tier "A" escalation. These controversies, NET asserts, raise "questions [as to] whether * * * IRS * * * [had] definite standards against which it could measure NET and the other bidder."

We cannot conclude that the IRS was required to resolicit in this circumstance. In an analogous, area, we have held that an agency is not required to cancel an advertised solicitation merely because of defective specifications. See *Hild Floor Machine Company, Inc.*, B–196419, February 19, 1980, 80–1 CPD 140, wherein we stated that

cancellation of a defective IFB after bid opening may be inappropriate when award will serve the Government's actual needs and there is no showing of competitive prejudice. We see no reason why this reasoning should not apply here, even though the procurement was negotiated.

NET has not shown how it was prejudiced concerning the line illumination charges controversy since Rolm's evaluated price including these charges is lower, as noted above, than NET's evaluated price without these charges. However NET would price these charges—including even a "no-cost" for the service—would not affect the relative standing of the offerors. Also, we do not see how NET could have been prejudiced concerning the Tier "A" escalation controversy since the IRS evaluated (as shown in the IRS's May 22 report) NET's proposal based on the Tier "A" price proposed by NET without taking into account possible future Tier "A" increases. Moreover, it is clear that the award to Rolm is serving the Government's actual needs since all required, priced services are being furnished. Therefore, we conclude that the IRS was not required to resolicit the services in question.

The protest is denied in part and dismissed in part.

[B-196659]

Bids—Responsiveness—Determination—on Basis of Bid as Submitted at Bid Opening—Responsive Bid Subsequently Qualified—Effect on Bid Status

Where bid as submitted conforms to invitation's requirements, subsequent submission by bidder cannot affect bid's responsiveness.

Contracts — Specifications — Defective — Estimated Quantities—Single Priee Requested

Basic formal advertising principle that award must be made on basis of bids as submitted contemplates that material elements of contract obligation be set at bid opening so that bidder cannot elect whether to accept or reject award after bids have been exposed.

Matter of: Garrett Enterprises, Inc., September 29, 1980:

Garrett Enterprises, Inc. (Garrett) protests the Naval Facilities Engineering Command's (Navy) award of an indefinite quantity-type contract for sewer maintenance services to William F. Gavin, Inc. (Gavin) under invitation for bids (IFB) No. N62472-79-B-4620. Garrett contends that Gavin's bid was qualified and thus nonresponsive, and that the bid was unbalanced. We believe that notwithstanding the protester's arguments, the solicitation was defective and that the award to Gavin was improper.

The solicitation included a Schedule of Prices which listed 132 items of work, an estimated quantity for each, and spaces to enter unit prices, extended prices and a total bid. However, firms were to submit only total bid prices before the opening date. The low bidder on that basis then would have 10 days after bid opening as a prerequisite for award to submit a completed Schedule of Prices; the sum of the extended bid prices for each line item listed therein had to equal the total bid initially submitted. If approved by the Officer in Charge of Construction, the Schedule of Prices would "be part of the contract and provide the basis for payments and for any withholding." The invitation further stated:

> * * * unbalancing in the Schedule of Prices submitted shall be cause for withholding approval and requiring submission of a balanced schedule, and may be cause for rejection of the bid.

The Navy received four bids as follows:

Steam Systems, Inc.	$207,141.00
Gavin	229,400.00
Garrett	250,524.00
Schaeffer Environmental	273,898.76

Steam Systems, Inc. was permitted to withdraw its bid due to a mistake.

Since Gavin then was the low bidder, it was advised to submit a completed Schedule of Prices. With its Schedule, Gavin submitted an attachment explaining the scope of the work priced. The Navy requested that Gavin rescind the unsolicited attachment because it was, in the Navy's view, "inappropriate." Gavin agreed, and the Navy approved Gavin's Schedule of Prices and awarded the contract to the firm.

Garrett contends that the attachment submitted with Gavin's bid showed that the unit prices were computed on a basis other than that prescribed in the IFB. Garrett argues that the bid thus was nonresponsive, *i.e.*, it did not represent an offer to perform, without exception, the exact thing called for in the invitation.

However, it is fundamental that the responsiveness of a bid must be determined on the basis of the bid submitted at bid opening. *Fire & Technical Engineering Corp.*, B–192408, August 4, 1978, 78–2 CPD 91. Thus, Gavin's attachment to the Schedule of Prices, submitted *after* bid opening, cannot be considered to affect the bid's responsiveness to the invitation as issued.

Nevertheless, we find that the procurement procedure used here was improper. The statutory provisions governing contract awards in formally advertised procurements, 10 U.S.C. § 2305(c) (1976), re-

quires award based on the bid determined to be "most advantageous to the United States, price and other factors considered." That provision contemplates that the solicitation and the responding bids establish, at bid opening, the material terms of the contractor's obligation—those factors which should define the bid's responsiveness—in order to make the award determination. *Storage Technology Corporation—Reconsideration*, 57 Comp. Gen. 395, 398 (1978), 78-1 CPD 257; *Computer Network Corporation*, 55 Comp. Gen. 445, 451 (1975), 75-2 CPD 297. Here, however, the only relevance of the submission required at bid opening—the total bid price—was for the initial determination of the firm eligible for award.

The contract to be awarded here was an indefinite quantity one with the issuance of work orders setting a particular performance obligation. The IFB cautioned that the Government made no representation as to the actual amount of work to be ordered other than that its value would be somewhere between $50,000 and $400,000. Clearly then, the critical factors in determining the most advantageous bid under 10 U.S.C. § 2304(c), as well as in administering the contract, were the unit prices of work to be performed in response to a work order, and they therefore should have been required to be submitted at bid opening.

Further, the effect of the failure to require unit prices at bid opening, thereby essentially leaving the bidder with no real obligation based on the bid as submitted to perform any item of work at any particular price, was to give the bidder the option to accept or reject an award after bids were opened and prices exposed; the firm could at its whim refuse to submit a completed Schedule of Prices, or could submit an unacceptable one after seeing the results of the competition. This reservation of control over the bid's acceptability after its submission consistently has been criticized as being clearly inimical to the advertised procurement process. See, e.g., *Computer Network Corp.*, *supra*.

Finally, reserving the right after bid opening to require a bidder to "resubmit" acceptable Schedule prices in the event of "unbalancing" improperly contemplates negotiation of the material contract terms in an otherwise formally advertised procurement.

The Navy explained the rationale for requiring that only a total bid price be submitted at bid opening, with the unit and extended prices furnished within 10 days thereafter, in a report on an earlier protest to our Office:

> When an IFB contains 40 to 50 bid items which involve the multiplication of a unit times an estimated quantity, the number of arithmetical errors in the preparation of bids increases substantially. On many occasions, this Command

has found it necessary to reject low bids, and procurements have been delayed by protests against award. Under a single recent IFB, each of the 12 bidders had arithmetical errors in their bid item computation. The Navy has also made awards to low bidders not realizing that there were discrepancies between the total bid price and the unit prices set out in the bid schedule; this creates substantial post-award embarrassment when a protestor points out that award may have been made to the wrong bidder * * *. The preferred approach is to utilize a single bid item and, after bid opening but before award, obtain a schedule of prices.

We would suggest that if this Navy Command finds that there are particular problems in procurements of this nature with respect to mistakes in bidding and the inadvertent acceptance of erroneous bids, it highlight in its invitations the fundamental burden of the bidder to properly prepare its bid, and the substantial limitations on the withdrawal and correction of bids based on claims of mistake. *See* Defense Acquisition Regulation § 2–406 (1976 ed.). In addition, we would recommend an even more diligent application than usual of the contracting officer's affirmative duty to adequately review bids and request verification if a discrepancy is noted. See *Dunbar & Sullivan Dredging Co.*, B–188584, December 23, 1977, 77–2 CPD 497. We view the procedure used here in an attempt to dispense with the need for basic arithmetical computations by the parties as an inappropriate substitute for what is a basic responsibility of every bidder and every contracting officer.

Parenthetically, we point out that the procedure simply is not even effective for the stated purpose, since the low total bidder still may claim mistake after submitting the Schedule of Prices or the Navy still may accept an erroneous bid. For example, the bidder lower than Gavin in the instant procurement asserted a mistake in its bid as submitted and was permitted to withdraw.

Accordingly, the Navy should have required the submission of the Schedule of Prices at bid opening.

In our view, this fundamental defeat in the procurement generally would necessitate corrective action with respect to the award. However, since less than one month remains in the basic contract term, we could recommend only that the Navy not exercise its option in the present contract. We understand, in this regard, that the Navy does not plan to exercise the option but instead plans to resolicit. We are recommending that in future procurements the Navy insure that the material elements of the contractor's obligation be established at bid opening, *i.e.*, that the Schedule of Prices be submitted at that time.

In light of the above, we find it unnecessary to further consider Garrett's contention that the attachment to Gavin's Schedule of Prices qualified the bid, or that Gavin's unit prices were unbalanced.

[B-198297]

General Accounting Office—Jurisdiction—Contracts—Grants-in-Aid—Cooperative Agreements

General Accounting Office will consider complaint by bidder on solicitation issued by recipient of Federal financial assistance through cooperative agreement.

Contracts—Awards—Federal Aid, Grants, etc.—State Law Compliance—Bid Responsiveness—Licensing-Type Requirement

Recipient of Federal financial assistance through cooperative agreement properly rejected bid submitted by firm that at bid opening lacked certificate of responsibility required at bid opening by recipient's solicitation and state law.

Matter of: Xcavators, Inc., September 29, 1980:

Xcavators, Inc. complains that the Deer Creek Water Management District (District), a Mississippi public agency, improperly rejected Xcavators' bid for a contract to perform channel clearing services in connection with a watershed work plan formulated by the District and the Soil and Conservation Service, Department of Agriculture (Service). The District rejected Xcavators' bid because at the time bids were opened Xcavators lacked a current state Certificate of Contractor Responsibility required by the invitation for bids for Mississippi law.

The District receives substantial Federal funding from the Service under the Watershed Protection and Flood Prevention Act, as amended, 16 U.S.C. §§ 1001–1009 (1976 & Supp. I 1977), which authorizes the Secretary of Agriculture "to cooperate and enter into agreements with and furnish financial and other assistance to local organizations." 16 U.S.C. § 1003. In this case, the Service in exercising that authority entered into a "cooperative agreement" with the District in accordance with the Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. §§ 501–509 (Supp. I 1977), whereby the Service agreed to fund a substantial portion of the watershed work plan.

Initially, we point out that in 1975 we stated in a Public Notice that pursuant to our statutory obligation and authority under 31 U.S.C. § 53 (1976) to investigate the receipt, disbursement, and application of Federal funds we would undertake reviews concerning the propriety of contract awards made by "grantees" in furtherance of "grant" purposes. 40 Fed. Reg. 42406. Our stated purpose was to determine whether there had been compliance with applicable statutory and regulatory requirements, and with grant terms. The term "grant" used therein was intended to describe an agreement, other than a contract

resulting from a Federal agency's direct procurement action, which required significant Federal funding and imposed certain conditions for payment upon the recipient. See *E. P. Reid, Inc.*, B–189944, May 9, 1978, 78–1 CPD 346.

Subsequently, the Federal Grant and Cooperative Agreement Act of 1977, in order to clarify the differences between Federal procurement relationships and the various Federal assistance relationships, specifically characterized the terms "contract," "grant agreement," and "cooperative agreement," and required agencies to properly define the instruments they use in accordance with those characterizations. With respect to grant agreements and cooperative agreements, when no substantial Federal involvement during performance of the contemplated activity is anticipated the agency must use the former, 41 U.S.C. § 504; if substantial Federal agency involvement during performance is anticipated, the agency must enter into a cooperative agreement. 41 U.S.C. § 505; see *Burgos & Associates, Inc.*, 58 Comp. Gen. 785 (1979), 79–2 CPD 194.

Thus, the only basic distinguishing factor between grants and cooperative agreements under the statute is the degree of Federal participation during performance. There is no meaningful difference between the two for purposes of the review contemplated by our Public Notice. Accordingly, we will review complaints concerning the propriety of contract awards made by recipients of Federal financial assistance through cooperative agreements as well as through grant agreements, provided, of course, that substantial Federal funding is involved.

We now proceed to discuss the background and merits of Xcavators' complaint.

The District's invitation for bids, No. MISS–DC–2, stipulated that no bid shall be opened or considered unless the bider has a current certificate of responsibility issued by the Mississippi State Board of Contractors, or a similar certificate issued by a similar board of another state, and the certificate's number is affixed to the bid's container. This certification requirement stems from Mississippi Code Annotated § 31–3–151 (1972), which provides that:

> No contract for public works or public projects costing in excess of $25,000 shall be issued or awarded to any contractor who did not have a current certificate of responsibility at the time of the submission of the bid * * *. Any contract issued or awarded in violation of this section shall be null and void.

The envelope containing Xcavators' bid indicated that Xcavators possessed certificate of responsibility number 3779, and therefore on February 29, 1980, Xcavators' bid was opened with several others. Xcavators was the low bidder. However, the District subsequently

learned from the Mississippi State Board of Contractors that Xcavators' certificate of responsibility number 3779 had expired at the close of 1979 and Xcavators did not receive a new certificate of responsibility (or renew the old one) until March 4, 1980, four days after bid opening. The District therefore rejected Xcavators' bid and proposed to accept the next lowest bid subject to the Service's approval, obtained shortly thereafter.

Xcavators complains that it substantially complied with Mississippi Code § 31–3–15 by securing a certificate of responsibility only 4 days after bid opening, and that in any event the Mississippi statute contravenes the principle of Federal procurement law that the requirement in an invitation that a bidder have a particular license to be eligible for a contract award involves the bidder's responsibility, *i.e.*, the ability to meet the contractual obligation, which may be established after bid opening. See *What-Mac Contractors, Inc.*, 58 Comp. Gen. 767 (1979), 79–2 CPD 179.

In this respect, Xcavators observes that Attachment O to Office of Management and Budget (OMB) Circular A–102, which sets forth terms and conditions for use with cooperative agreements with state and local governments, provides that "Grantees may use their own procurement regulations which reflect applicable State and local law," provided in part that procurement transactions are conducted "in a manner to provide, to the maximum extent practicable, open and free competition." Xcavators maintains that this provision mandates that the District follow the cited Federal licensing principle.

We first note that the cooperative agreement between the Service and the District does not incorporate the OMB Circular. The agreement only requires, as a condition to Federal financial assistance, that the District "receive, protect, and open bids, * * * determine the lowest qualified bidder and, with the written concurrence of the State Administrative Officer, make award." While the Service's Administrative Handbook references OMB Circular A–102 as applicable to all cooperative agreements, and the Service advises that "sponsors" (fund recipients) are "required" to follow the Handbook's provisions, it appears from the record that the requirement essentially is an informal one.

In any event, the policy reflected in Attachment O to OMB Circular A–102 and our cases in the area recognize that procurements conducted by recipients of Federal financial assistance generally should be in accordance with state law, see e.g., *The Eagle Construction Company*, B–191498, March 5, 1979, 79–1 CPD 144 (concerning state "buy-state"

preference statutes); *Burroughs Corporation*, B–194168, November 28, 1979, 79–2 CPD 376, so long as state and local requirements are consistent with the usually imposed Federal requirement that goods and services be obtained in such a way as to promote full and free competition consistent with the nature of the goods or services being procured. *See Fiber Materials, Inc.*, 57 Comp. Gen. 527 (1978), 78–1 CPD 422. We do not view the state's licensing requirements in issue here as being restrictive of competition since the license was readily available and all bidders were notified of the state requirement that it be obtained prior to bid opening.

As regards Xcavators' contention that it substantially complied with the statute, we are aware of no Mississippi court decisions which have permitted the acceptance of a firm's bid where the firm did not have a certificate of responsibility on the bid opening date.

Therefore, we believe the District properly rejected Xcavators' bid. The complaint is denied.

[B–200344]

General Accounting Office—Jurisdiction—Antitrust Matters

Debarment of bidders which pled guilty to anti-trust violations involving the submission of bids is within the discretion of procuring agency and not for initial decision by General Accounting Office.

Matter of: National Mediation Board, September 29, 1980:

An authorized certifying officer of the National Mediation Board (NMB) requests an advance decision as to whether certain firms which recently pled guilty to criminal violations of Federal anti-trust statutes should be debarred.

Six firms, including Alderson Reporting Company, Inc. (ARC) and Acme Reporting Company, Inc. (Acme), submitted bids in response to an invitation for bids issued by NMB for stenographic reporting services for fiscal year 1981. ARC is the apparent low bidder for this requirement. With the exception of Acme, all firms which submitted bids pled guilty to violations of Federal anti-trust statutes. Essentially, these violations involved conspiracies to submit noncompetitive bids for the provision of reporting services to the Government. Acme, pointing out that Federal Procurement Regulations (FPR) § 1–1.604 (a) (3) authorizes executive agencies to debar a firm for conviction under the Federal anti-trust statutes arising out of the submission of bids, requested that NMB debar all other bidders.

Although our Office has exclusive authority to debar firms for vio-

lations of the Davis-Bacon Act, 40 U.S.C. § 276a-2(a) (1976), see *Ryel W. Bodily and B&H Contractors*, B-196703, May 6, 1980, 80-1 CPD 328, debarment under the Federal anti-trust statutes is not for our initial consideration. Rather, the decision to debar for anti-trust convictions is within the discretion of the procuring agency. Moreover, the existence of the anti-trust convictions does not necessarily require that the firms be debarred. FPR § 1.1-604(b)(2). We cannot, therefore, determine for NMB whether the firms in question should be debarred. We do note, however, the serious consequences of debarment and emphasize that if NMB does initiate debarment proceedings it must comply with the procedural requirements delineated in FPR § 1-1.604-1.

Since NMB apparently is concerned only with this particular procurement as opposed to future requirements, it may be more appropriate for NMB to consider the convictions in assessing the responsibility of the low bidder, rather than doing so within the context of the more drastic action of debarment. The FPR requires that, to be considered responsible, a firm must have a satisfactory record of integrity and business ethics. FPR § 1-1.1203-1(d). An agency may properly consider anti-trust convictions in making determinations with respect to integrity. *Colonial Baking Company*, B-185305, July 20, 1976, 76-2 CPD 59. We cannot, however, determine for NMB whether ARC, or any of the other bidders, is responsible, since the question of whether a bidder's lack of integrity is sufficient to warrant a finding of nonresponsibility in a particular procurement is a matter primarily for determination by the procuring agency. 51 Comp. Gen. 703 (1972); *Kahn's Bakery, Inc.*, B-185025, August 2, 1976, 76-2 CPD 106. Of course, when a small business is involved, a nonresponsibility determination must be referred to the Small Business Administration which has conclusive authority to certify that a small business is responsible for a particular procurement. 15 U.S.C. 637 (Supp. I 1977).

Finally, for NMB's guidance on this matter, we point out that our Office recently dismissed in part and denied in part a protest against the award by the United States Tax Court of a reporting contract to ARC. See *National Reporting Company*, B-199497, August 22, 1980, 80-2 CPD 142.

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Government indemnification

General Services Administration (GSA) may procure power under tariff or contract requiring customer to indemnify utility against liability arising from delivery of power. GSA has authority to procure power for Government under tariffs. Where no other practical source exists, tariff requirement is applied uniformly to purchases, without singling out Government, and risk of loss is remote, GAO will interpose no objection to existing practice of agreeing to tariff, with indemnity requirement, nor to proposed contract with similar indemnity provision. However, GSA should report situation to Congress---- 705

Rule

As general rule, cost overruns and contract modifications within scope of original contract should be funded from appropriation available in year contract was made. Current appropriations may only be used if additional costs amount to new liability, not provided for in original contract. In instant case, original funds were "no-year" appropriations and are therefore available for both old and new obligations---- 518

Deobligation
Expiration of period of availability
Economy Act applicability

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

Interdepartmental services
Military Interdepartmental Procurement Requests (MIPRs)

Even if MIPR is deemed authorized by 10 U.S.C. 2308 and 2309 (1976), rather than section 601 of the Economy Act of 1932, as amended, 31 U.S.C. 686, the allotment of funds by Air Force to Corps of Engineers (Corps) for use in executing MIPR does not constitute an obligation until the Corps either enters into contract with a third party to execute the MIPR or incurs costs in administering the contract. See Defense Acquisition Regulation (DAR) 5–1108.2, .3---- 563

Printing and binding requisitions
Performance continuing beyond fiscal year

Fact that performance under Requisition for Printing and Binding extends over more than one fiscal year does not mean payments are to be split among fiscal years on basis of services actually performed. General rule is that payments under Government contracts are charged to fiscal year appropriation current at time legal obligation arises---- 386

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Mobile home inspection program Page
Section 620 of National Mobile Home Construction and Safety Standards Act of 1974, as amended by Housing and Community Development Act of 1979, constitutes permanent indefinite appropriation of mobile home inspection fees collected by Secretary of Housing and Urban Development. Funds will be available to pay costs of inspection program without any further action by Congress. B–114808, August 7, 1979, distinguished---- 215
Reimbursement
Government-furnished quarters
Rental charges
Payroll deduction
Forest Service Certifying Officer may use amounts remaining in appropriations as a result of payroll deduction for use of Government quarters, for maintenance and operation expenses of such quarters. 5 U.S.C. 5911(c) allows such deductions to remain in applicable appropriation and Forest Service's appropriations from which salaries are paid are available for such expenses---- 235
Interagency services
Merit Systems Protection Board services. (*See* **DEPARTMENTS AND ESTABLISHMENTS, Services between, Reimbursement, Merit Systems Protection Board services)**
State Department services overseas. (*See* **APPROPRIATIONS, State Department, Reimbursement)**
Interdepartmental services
Military Interdepartmental Procurement Requests (MIPRs)
Administrative and supervision cost recovery
In view of regulation providing that a procuring department should bear, without reimbusement therefor, the administrative costs incident to its procurement of supplies for another Department, the Air Force (AF) and the Corps of Engineers should consider whether any reimburesment is due the Corps for administrative and supervision expenses incurred in performing MIPR placed by AF. See DAR 5–1113---- 563
Restrictions
Contract services
Plant care and watering
Federal office buildings
Assigned *v.* public, etc. areas
Extent of prohibition against using appropriated funds for plant care and watering contracts with private firms, contained in fiscal year 1980 HUD Appropriation Act, is uncertain. However, violation of provision clearly occurs when appropriated funds are used for private maintenance contracts for office plants located in areas which are assigned work spaces of particular Federal employee or employees---- 428
State Department
Availability
Services for other agencies overseas
Housing pools
Department of State is authorized by 22 U.S.C. 846 to administer housing pool on behalf of agencies which have leased or wish to lease housing to be used by employees of various agencies involved in pool and may pay rent on behalf of agencies involved directly from its own appropriations

APPROPRIATIONS—Continued
State Department—Continued
Availability—Continued
Services for other agencies overseas—Continued
Housing pools—Continued Page

to be reimbursed by agency users on the basis of their share of total costs of State's operation of housing pool (including any operating, maintenance and utility costs paid by State) 403

Reimbursement
Overseas services to other agencies
Housing pools
Cost assessment

While a particular agency's personnel might not occupy specific unit of housing leased by the agency and contributed to housing pool administered by Department of State under 22 U.S.C. 846, agency's funds could be used to pay its share of the total costs attributable to its personnel's use of housing pool 403

Supplemental
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To correct "coercive deficiency"
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International cooperative agreements

The Congress, in the context of a supplemental appropriation bill, may give a Federal agency contract authority to assume liability for damages arising out of an international cooperative agreement. However, procedurally, this could be subject to objection as substantive legislation in an appropriation bill 369

Treasury Department
Bureau of Alcohol, Tobacco, and Firearms
Obligation of funds for strip stamp services

Regardless of whether Bureau of Alcohol, Tobacco and Firearms (ATF) places order for strip stamps with Bureau of Engraving pursuant to either 31 U.S.C. 686 or 26 U.S.C. 6801, it may obligate annual appropriations at the end of the fiscal year only to the extent stamps are printed, in process or a contract has been entered into by the Bureau with a third party to provide the stamps to ATF. 31 U.S.C. 686–1, 34 Comp. Gen. 708 (1955). However, we would not object to ATF's automatically obligating its next fiscal year's appropriation to cover the remainder of the order based on information provided by the Bureau on the extent to which it has filled the particular order as of the close of the fiscal year 602

ATOMIC ENERGY COMMISSION
Employees
Agency excepted from competitive service and General Schedule
Effect
Extended details

Employee of Atomic Energy Commission (AEC) and its successor, Energy Research and Development Administration (ERDA), appeals disallowance of claim based on *Turner-Caldwell* decisions for retroactive promotion and backpay. Claim is denied as AEC and ERDA, the employing agencies, were excepted from competitive service as well as from General Schedule and thus were not subject to the detail provisions of subchapter 8, chapter 300 of the Federal Personnel Manual. For this

ATOMIC ENERGY COMMISSION—Continued
Employees—Continued
Agency excepted from competitive service and General Schedule—Continued
Effect—Continued
Extended details—Continued Page

reason and because AEC and ERDA did not have a nondiscretionary agency policy limiting details or requiring temporary promotion after a specified period of detail, the remedy of retroactive temporary promotion with backpay is not available 384

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

Discrimination complaints
Age Discrimination in Employment Act of 1967
EEOC may provide in its regulations for administrative payment of attorneys fees to prevailing party in Federal employee complaints filed under Age Discrimination in Employment Act (ADEA) of 1967, as amended. Scope of authority granted to EEOC to regulate is virtually the same as granted in Title VII of Civil Rights Act of 1964, as amended, and legislative history of 1978 amendments to ADEA shows no intent to deprive prevailing Federal employees of right available to non-Federal employees to receive attorneys fees awards 728

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Equal Employment Opportunity Commission (EEOC) may provide in its regulations for administrative payment of attorneys fees to prevailing party in Federal employee complaints filed under Rehabilitation Act of 1973, as amended, since scope of regulatory and judicial authority is same as granted under Title VII of Civil Rights Act of 1964, as amended 728

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

Suits against officers and employees
Official capacity
Federal Bureau of Investigation (FBI) Agents and paid FBI informant may be reimbursed from FBI salaries and expenses appropriation for payment of attorneys fees assessed against them in their individual capacities in a civil action, providing it is administratively determined that the employees' obligation was incurred in the accomplishment of the official business for which the appropriation was made 489

AUTOMATIC DATA PROCESSING EQUIPMENT (*See* **EQUIPMENT, Automatic Data Processing Systems**)
AUTOMOBILES
Transportation. (*See* **TRANSPORTATION, Automobiles**)
BIDDERS
Qualifications
Experience
Service contracts
Elevator maintenance, etc. Page

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

Integrity, etc.
Administrative consideration
Antitrust violations

Debarment of bidders which pled guilty to anti-trust violations involving the submission of bids is within the discretion of procuring agency and not for initial decision by General Accounting Office 761

License requirement
State, etc. certifications

Recipient of Federal financial assistance through cooperative agreement properly rejected bid submitted by firm that at bid opening lacked certificate of responsibility required at bid opening by recipient's solicitation and state law 758

Qualified products procurement
Bidder *v.* product qualification

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

Small business concerns
Nonreferral for certification justification
Military procurement

Army contracting officer's failure to refer determination of nonresponsibility of small business to Small Business Administration, although consistent with applicable regulation, is contrary to Small Business Act. While contract award is not disturbed, General Accounting Office recommends that Defense Acquisition Regulation 1-705.4(c), covering Certificate of Competency procedures, be promptly revised to eliminate exception to referral requirement for proposed awards not exceeding $10,000, since amended Small Business Act provides for no such exception 637

Responsibility *v.* bid responsiveness
Information

Neither pertinent statute nor solicitation clause implementing statute indicates that failure to submit small business subcontracting plan will result in rejection of bid as nonresponsive. Article and statute only require bidder selected for award to submit plan. Therefore, matter relates to responsibility, not responsiveness, despite other solicitation statement that plan must be submitted with bid 614

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Unsuccessful

Anticipated profits Page

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

BIDS

Acceptance time limitation

Extension

After expiration

Bidder which limited bid acceptance period to 30 days, as permitted by solicitation, may not be permitted to revive bid by extending acceptance period after expiration of 30-day period because acceptance of bid would give protester unfair advantage and be prejudicial to other bidders that offered standard 60-day acceptance period 726

Responsiveness of bid

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

Ambiguous

Nonresponsive bid

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

Buy American Act

Brand name or equal product

Use of foreign brand name supplies as basis for brand name or equal procurement does not violate Buy American Act since Act does not totally preclude purchase of foreign equipment and in any event, Act has been waived for equipment manufactured in foreign countries in question ... 678

Price differential

Exclusionary items

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

"Buying in"

Not basis for precluding award

Allegation of buy-in does not provide basis upon which award may be challenged 533

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Cancellation. (*See* **BIDS, Discarding all bids**)
Competitive system
Confidentiality
Solicitation assurances
Propriety
Place of contract performance Page

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

Federal aid, grants, etc.
Compliance with requirements

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

Preservation of system's integrity
Invitation cancelled and reinstated

Bids which have expired because solicitation was canceled generally may be revived upon reinstatement. However, when original bids have been returned to bidders, propriety of revival depends on whether, under facts of particular case, integrity of competitive system has been compromised 573

Qualified products use

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

Discarding all bids
Acceptance after rejection

Rule that offer, once rejected, cannot subsequently be accepted does not apply when low bidder resubmits bid and extends acceptance period at Government's request 573

Issuance of new invitation pending protest

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

Reinstatement
Cancellation of invitation unjustified

When agency determines that it has "misinterpreted" order canceling all solicitations pending market analysis and survey of needs, solicitation should be reinstated 573

BIDS—Continued
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Reinstatement—Continued
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Bids which have expired because solicitation was canceled generally may be revived upon reinstatement. However, when original bids have been returned to bidders, propriety of revival depends on whether, under facts of particular case, integrity of competitive system has been compromised 573
Specifications
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Bidder qualifications
Where solicitation requires bidders to have three years experience in maintaining elevators similar to those covered by solicitation and to meet special training requirements, bidders must satisfy both criteria to be considered responsible. If one criterion was inadvertently included in solicitation and is not actual agency requirement, solicitation should be canceled as unduly restrictive 18
Estimates of Government
Faulty
Where contracting officer did not know that Government estimate was erroneous when bidder was requested to verify low bid based on estimate and other bids received, verification request was sufficient 363
Reasonableness
Contention—that IFB's estimated quantities were merely rounded-off figures from last year's IFB and did not reflect agency's best estimate—is not supported by record where it is shown that estimate was made in good faith and was based on number of anticipated hearings, procedural changes, and projected use of new public reference rooms. Moreover, all bids were evaluated on same estimates and there is no indication that any bidder received any advantage 338
Statutory restrictions
Protest by low bidder against reasonableness of Government estimate is denied where agency reviewed estimate pursuant to protester's objections and provided reasonable explanations supporting the estimate. Despite several revisions increasing the estimate, low bid still exceeded awardable range allowed by 33 U.S.C. 624 (1976). Accordingly, the invitation for bids was properly canceled pursuant to the statute 349
Revision
Reasonableness
After cancellation for price unreasonableness
Protester's allegation that, in order to make award, agency improperly increased its estimate from that of prior procurement canceled due to unreasonable bids is rejected where agency explains that increase reflects fuel costs, which increased 100 percent over the 8-months period and inconsistencies in protester's bidding pattern indicate that protester's bid may not have been correct 349
Evaluation
Discount provisions
Propriety of evaluation
To extent that protest is against responsiveness of awardee's bid containing 30-percent prompt-payment discount, it is without merit since solicitation did not restrict maximum prompt-payment discount 338

BIDS—Continued
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Information after bid opening
Status Page

Where agency rejects bid from defaulted contractor on reprocurement contract because bid price exceeds defaulted contract price, subsequent finding by General Accounting Office that initial contract was not binding on contractor because of contracting officer's failure to seek verification of bid price does not render improper rejection of reprocurement bid since at time of rejection agency had reasonable basis for its action---- 195

Information status
Submission
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Where bid as submitted conforms to invitation's requirements, subsequent submission by bidder cannot affect bid's responsiveness---------- 754

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

Erroneous

When agency determines that it has "misinterpreted" order canceling all solicitations pending market analysis and survey of needs, solicitation should be reinstated---------- 573

Revival of expired bids
Original bids returned to bidders

Bids which have expired because solicitation was cancled generally may be revived upon reinstatement. However, when original bids have been returned to bidders, propriety of revival depends on whether, under facts of particular case, integrity of competitive system has been compromised---------- 573

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

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

Clauses
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Confidentiality protection

While clause permitting bidders to make their proposed place(s) of contract performance confidential information ("except as inconsistent with existing law") may lessen or negate ability of competing bidders to

BIDS—Continued
Invitation for bids—Continued
Clauses—Continued
Place of performance—Continued
Confidentiality protection—Continued Page

challenge acceptability of other bids, contrary to fundamental concept of full and free competition, no objection will be made to award under resolicitation since none of bidders participating on resolicitation protested use of clause. However, recommendation is made that provision for confidentiality be deleted in future 140

Interpretation
Definitive responsibility criteria
Small business set-aside

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

Oral explanation

Contention that protester was misled by agency personnel concerning need for QPL qualification of product is without merit since IFB provided that oral explanations were not binding and erroneous advice given by agency personnel cannot act to estop agency from rejecting nonresponsive bid as it is required to do so by law 742

Late
Evidence of late receipt
Time/date stamp
Conflict with other evidence

Bid was not late because evidence clearly shows it arrived by certified mail at the Government office designated in solicitation for receipt of bids (bid opening room) before bid opening but was not time/date stamped until after bid opening. Exemption in late bid clause for bid arriving late because of Government mishandling after receipt of bid at Government installation has no application to case 189

Time of receipt determination
Evidence to establish

Where issue involves whether bid arrived on time in designated office before bid opening, all evidence in the record, aside from that furnished by bidder, may be considered 189

Letter accompanying bid
Part of bid

No legal requirement exists which prohibits bidder from clarifying printed descriptive literature with letter accompanying bid, and where low bidder offers equipment which meets specification requirements plus features which are not required, bid is acceptable 269

Mistakes
Allegation after award. (*See* **CONTRACTS, Mistakes**)
Correction
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Nonresponsive bid may not be considered for correction regardless of circumstances since to permit this would be tantamount to permitting submission of new bid 140

BIDS—Continued
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Unconscionable to take advantage
Award to low bidder after bid verification was not unconscionable, notwithstanding second low bid was about 130 percent more than low bid, since it is not established that contracting officer knew that Government was "essentially 'getting something for nothing' " ---- 363
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Where contracting officer did not know that Government estimate was erroneous when bidder was requested to verify low bid based on estimate and other bids received, verification request was sufficient ---- 363
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)
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In protest involving 8(a) procurement, bad faith is not shown merely by fact that procurement was set aside one day prior to bid opening. However, in future cases bidders should be put on notice of possible withdrawal of procurement for 8(a) purposes as soon as procuring agency learns of Small Business Administration's interest and bid opening should be postponed or suspended to allow time to resolve set-aside question ---- 122
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Since contracting agency found successful bidder to be responsible, there is no basis to question award merely because bidder allegedly submitted below-cost bid ---- 422
Item pricing
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Reasonableness
Administrative determination
Protest that prior solicitation should be canceled and items added to protester's current contract because of lower prices and resultant savings to Government is denied as contracting officer has determined prior prices to be reasonable and, therefore, DAR 2-404.1(b) (vi), permitting cancellation for unreasonable prices, is inapplicable ---- 184

BIDS—Continued

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

Qualified

Preprinted terms, etc.

"Waiver of Preprinted Information" clause effect Page

Low bid containing bidder's preprinted standard commerical terms and conditions, which are at variance with requirements of invitation for bids (IFB), may be considered for award in view of inclusion in IFB of "Waiver of Preprinted Information" clause which permits disregarding of preprinted information under conditions applicable here. However, General Accounting Office recommends clause not be utilized in future as it constitutes arbitrary convention which permits ignoring clear language of bid 347

Quantity limitation

Bid which offers larger quantity than specified in invitation is responsive where bid does not limit Government's right to make award consistent with needs at price below other bids received 296

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

Rejection

Discarding all bids. (**See BIDS, Discarding all bids**)

Responsiveness

Determination

On basis as of bid as submitted at bid opening

Responsive bid subsequently qualified

Effect on bid status

Where bid as submitted conforms to invitation's requirements, subsequent submission by bidder cannot affect bid's responsiveness 754

Responsiveness *v.* bidder responsibility

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 conern is not responsible 43

Small business concerns

Subcontracting plan requirement

Neither pertinent statute nor solicitation clause implementing statute indicates that failure to submit small business subcontracting plan will result in rejection of bid as nonresponsive. Article and statute only require bidder selected for award to submit plan. Therefore, matter relates to responsibility, not responsiveness, despite other solicitation statement that plan must be submitted with bid 614

Test to determine

Unqualified offer to meet all solicitation terms

Where successful bidder takes no exception to invitation's Davis-Bacon provisions, question of whether successful bidder will comply with Davis-Bacon Act is matter of contract administration and not for consideration under General Accounting Office's Bid Protest Procedures 422

BIDS—Continued

Sales

Cancellation. (*See* **SALES, Cancellation**)

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

Two-step procurement

Technical proposals

Discussion Page

Where protester in step one of two-step procurement does not respond timely to amendment having little impact on overall technical acceptability of proposal, but later states its compliance with amendment requirement when negotiations are reopened by subsequent amendment, agency's determination to exclude protester's step-two bid from consideration is unreasonable. Agency relied inappropriately on concept of responsiveness in determination which is inapposite to nature of step one—the qualification of as many proposals as possible under negotiation. B–190051, Jan. 5, 1978, modified in part 588

BONDS

Bid

Deficiencies

Expiration date of bond

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

BUREAU OF ENGRAVING AND PRINTING (*See* **TREASURY DEPARTMENT, Bureau of Engraving and Printing**)

BUY AMERICAN ACT

Applicability

Contractors' purchases from foreign sources

End product *v.* components

Determination by contracting officer that low offeror furnished a domestic end product is questioned because record discloses that comparison of costs to contractor of domestic and foreign components was not made. Contractor's compliance with certification should be reexamined 405

Supplies *v.* services in single contract

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

Defense Department procurement

Validity of award

Foreign competition

Absence of notice to potential contractors

Military department's failure to notify potential competitors that they may be in direct competition with United Kingdom firms does not invalidate procurement 249

BUY AMERICAN ACT—Continued

Defense Department procurement—Continued

Validity of award—Continued

Foreign competition—Continued

Absence of notice to potential contractors—Continued

Incorporation of Notice of Potential Foreign Source Competition in request for proposals is not prerequisite to application of exemption to Buy American Act. Failure to include notice in solicitation does not invalidate procurement. Requests for best and final offers are not solicitations but merely continuing negotiations not requiring inclusion of notice 298

Waiver

Public interest

Use of foreign brand name supplies as basis for brand name or equal procurement does not violate Buy American Act since Act does not totally preclude purchase of foreign equipment and in any event, Act has been waived for equipment manufactured in foreign countries in question 678

Competitive advantage consideration

Protester asserts that foreign offeror, exempted from Buy American Act, enjoys competitive edge because not subject to United States laws on equal opportunity, clean air, etc., resulting in unequal treatment of domestic offerors. While there may be some validity to this argument, the only mandated handicap enjoyed by American firms in competition with foreign firms is Buy American Act. Since Secretary of Defense determined that it would be inconsistent with public interest to apply Buy American Act, these alleged competitive advantages are not for consideration 298

CANAL ZONE

Status

Change effective October 1, 1979

Part of Republic of Panama

Department of State Foreign Service employee requests home leave in Panama Canal Zone. Home leave may not be authorized in Canal Zone since home leave may only be granted in continental United States or its territories and possessions and Panama Canal Treaty of 1977, effective October 1, 1979, provides that Republic of Panama has full sovereignty over Canal Zone. Since home leave for purposes of "re-Americanization" is compulsory under 22 U.S.C. 1148, employee should designate an appropriate location for this purpose 671

CERTIFYING OFFICERS

Responsibility

Interagency services

Expired agency's obligations

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

CHECKS

Payees

Airline space liquidated damages Page

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

CIVIL RIGHTS ACT

Discrimination complaints

Federal employees

Court leave. (*See* **LEAVES OF ABSENCE, Court, Entitlement, Complaints under Civil Rights Act**)

CLAIMS

Defenses

Doctine of *res judicata*

Air Force member who successfully sues in Federal District Court for reinstatement to active duty and damages may not recover on an administrative claim for backpay in excess of $10,000 jurisdictional limitation of district court under 28 U.S.C. 1346(a) (2). Since claim filed concerns same parties and issues, including amount of damages, as decided by district court, doctrine of *res judicata* precludes consideration of this claim.... 624

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Arising from cooperative agreements

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General statutory authority to carry out international programs does not necessarily carry with it authority to agree to settle foreign claims against the United States.... 369

Settlement by General Accounting Office

"Contract Disputes Act of 1978" effect

Express *v.* informal contractual commitments

Executive agencies should continue to refer demands for payment arising under informal commitments to General Accounting Office for settlement. Contract Disputes Act of 1978 does not conflict with statutory authority of GAO to pass upon propriety of expenditures of public funds. 232

Interagency debt collection

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

Statutes of limitation. (*See* **STATUTES OF LIMITATION, Military service suspension**)

COAST GUARD

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Basic quarters allowance

Entitlement

What constitutes "sea duty" Page

An amendment to Executive Order 11157 by Executive Order 12094 redefined sea duty for basic allowance for quarters (BAQ) purposes; however, the amendment did not affect the Secretaries of the armed services' authority to issue supplemental regulations not inconsistent with the Executive orders. A Coast Guard member contends that he is entitled to receive BAQ in light of the new definition, while on sea duty for over 3 months, during which he spent a few days on shore. Since the claimant would not be entitled to receive BAQ under the supplemental regulations issued by the Coast Guard and since those regulations rationally effectuate 37 U.S.C. 403(c), which prohibits payment of BAQ to member without dependents who is on sea duty for 3 months or more, and the Executive orders, the claim is denied 192

COASTAL ZONE MANAGEMENT ACT

Grants to States, etc.

Matching fund requirements

Statutory conflict

Local recipient of a grant under sections 305 and 306 of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*, may use community development block grant funds to pay the required local matching share even though section 318(c) of the Coastal Zone Management Act specifically prohibits use of Federal funds to meet local matching requirements. B-167694, May 22, 1978, modified 668

COLLEGE, SCHOOLS, ETC.

Tuition, etc. payments

Military personnel

Employee of Department of Army stationed in Korea who entered into a private arrangement with a private school for education of his daughter may not be reimbursed for the costs he incurred prior to Department of Defense's (DOD) contractual arrangement with the school. Authority for DOD providing for the schooling of dependents of employees stationed overseas, provisions in annual DOD appropriation acts, expressly provides that appropriations therefor are for expenditure in accordance with 10 U.S.C. 7204. That provision contemplates that needed arrangements for schooling are to be made by the Department concerned and that a parent has no authority to obligate the Government by a private agreement 581

Overseas employees

Dependents. (*See* **OFFICERS AND EMPLOYEES, Overseas, Dependents, Education**)

COMPENSATION
Additional
Night work. (*See* **COMPENSATION, Night work**)
Allotments
Union dues. (*See* **COMPENSATION, Withholding, Union dues**)
Backpay. (*See* **COMPENSATION, Removals, suspensions, etc., Backpay**)
Compensatory time. (*See* **LEAVES OF ABSENCE, Compensatory time**)
Double
Concurrent military retired and civilian service pay
Reduction in retired pay Page
The Dual Compensation Provisions in 5 U.S.C. 5532 reduce the retired pay entitlements of retired officers of Regular eomponents who are employed in civilian positions with the Federal Government. The fact that under a State community property law the spouse of the retiree is considered to be entitled to part of the retired pay does not permit that part of the member's retired pay to be excluded from dual compensation reduction since Federal law controls payment of such pay---------- 470
Dual Compensation Act
Concurrent military retired and service pay. (*See* **COMPENSATION, Double, Concurrent military retired and civilian service pay**)
Downgrading
Saved compensation
Effect of Civil Service Reform Act of 1978
Employee who held GS–13 position with Department of Energy (DOE) exercised statutory rights he had with former agency to reemployment in the GS–12 position he held with that agency prior to appointment with DOE, rather than undergo a transfer of function within DOE. He is not entitled to grade and pay retention under 5 U.S.C. 5361 *et seq.* since he was not placed in a lower grade position as a result of declining to transfer with his function. He chose to exercise his statutory rights of reemployment independent of any rights he may have had in connection with the transfer of function---------- 311
Lump-sum leave payments. (*See* **LEAVES OF ABSENCE, Lump-sum payments**)
National Guard technician
Promotions
Retroactive
Back pay
Detailed employees. (*See* **NATIONAL GUARD, Civilian employees, Technicians, Extended details, Retroactive promotion**)
Negotiation
Prevailing rate employees
Pay increase ceiling
Applicability
Bureau of Engraving and Printing trade and craft employees whose pay is set administratively under 5 U.S.C. 5349(a), "consistent with the public interest," were properly limited to 5.5 percent wage increase in fiscal year 1979. Although pay increase limitation in 1979 appropriation act did not apply to these Bureau employees, agency officials properly exercised discretion to limit pay increases in the public interest in accordance with the President's anti-inflation program. See court cases cited. The fact that similar employees of Government Printing Office received higher wage increases is not controlling since they were not covered by appropriation act limitation or President's determination---- 240

COMPENSATION—Continued

Night work

Intermittent overtime basis

Absence of fixed schedule

Discernible pattern requirement Page

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

Night differential

Overtime basis

Entitlement criteria

Intermittent overtime

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

Regular tour of duty requirement

Intermittent overtime status

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

Wage board employees. (*See* **COMPENSATION, Wage board employees, Night differential**)

Overpayments

Waiver. (*See* **DEBT COLLECTIONS, Waiver**)

Overtime

Administrative approval requirement

Nonexempt employee under Fair Labor Standards Act performed overtime during summer in exchange for compensatory time. Civil Service Commission made determination that employee is entitled to payment of overtime under FLSA; payment is proper with offset of the value of compensatory time granted. Since supervisor did not have authority to order or approve overtime, there is no entitlement to compensatory time under title 5, United States Code. Erroneous payments of compensatory time not used as offset may be considered for waiver under 5 U.S.C. 5584 246

Administrative workweek

Six-day/four-day

Several nurses, GS–7 and 9, employed by Bureau of Prisons were scheduled by supervisor as requested by the nurses to work 6 days in one administrative workweek and 4 days in other workweek during pay periods involved. If any nurses are covered by Fair Labor Standards Act they would be entitled to overtime compensation for work in excess of 40 hours a week. For those nurses not covered by FLSA and where warden, only official authorized to order or approve overtime, did not do so, there

COMPENSATION—Continued
Overtime—Continued
Administrative workweek—Continued
Six-day/four day—Continued Page

is no entitlement under 5 U.S.C. 5542 to compensate nurses for overtime hours worked. For those nurses not covered by FLSA, Bureau may treat additional workday in the 6-day workweek as an offset day in the related 4-day workweek eliminating any other adjustment 128

Customs employees. (*See* **COMPENSATION, Overtime, Inspectional service employees**)

Fractional hours
Rounding off authority
Irregular, unscheduled overtime

General Accounting Office has no legal objection to proposal of Director, Office of Personnel Management, to provide by regulation, under its authority in sections 5504, 5548, and 6101 of title 5, United States Code, that an agency may institute the practice of "rounding up" and "rounding down" to nearest quarter hour (or fractions less than a quarter of hour) for crediting irregular, unscheduled overtime work under sections 5542, 5544, and 5550 of title 5, United States Code 578

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

Immigration inspector entitled to overtime pay under 8 U.S.C. 1353a for 3.25 hours worked on Sunday morning and 3 hours worked Sunday night outside his 8-hour Sunday shift was properly paid 1-1/2 days' pay for time on duty of 6.25 hours, computed as an aggregate of the two periods of overtime work. Attorney General did not exceed his broad authority to determine what constitutes overtime services under 8 U.S.C. 1353a in prescribing a midnight-to-midnight cutoff for Sundays and holidays. Also, computation of overtime on second Sunday under similar circumstances was proper 110

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

Irregular, unscheduled
Fractional hours. (*See* **COMPENSATION, Overtime, Fractional hours**)

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

Part-time, intermittent, etc. employees
Compensatory time in lieu of. (*See* **COMPENSATION, Part-time employees, Overtime, premium pay, etc.**)

Prevailing rate employees
Wage board employees. (*See* **COMPENSATION, Wage board employees, Prevailing rate employees, Overtime**)

Traveltime
Administratively controllable

Where airline overbooked the Thursday night flight on which employee had reservations for return travel and rebooked him on the next available flight, employee is not entitled to overtime compensation or compensatory time off for his travel time under 5 U.S.C. 5542(b)(2)(B). Although agency did not have control over airline's actions which delayed employee's travel, the event that necessitated his travel—return to his permanent duty station—was subject to an administrative control. Employee's presence at his duty station the following workday was not an administratively uncontrollable event 59

COMPENSATION—Continued

Part-time employees

Overtime, premium pay, etc.

Compensatory time

Entitlement

Work over 40 hours Page

Except in limited circumstances where prohibited for nonexempt employees under the FLSA, part-time employees may be granted compensatory time off in lieu of overtime compensation for irregular or occasional overtime work performed in excess of 40 hours in an administrative workweek and 8 hours in a day. 5 U.S.C. 5542 and 5543. A part-time employee may not be granted compensatory time off simply because he works hours in excess of his regular part-time tour of duty 237

Penalty payment by airline

Acceptance by employee

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

Periodic step-increases

Service credits

Lump-sum leave period

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

Premium pay

Standby, etc. time

Regularly scheduled

Leave periods

Extended sick leave pending disability retirement

Federal Aviation Administration employee is not entitled to premium pay for standby duty while on extended sick leave pending disability retirement because there is no reasonable expectancy that he will perform standby service in the future. Moreover, since he is not entitled to such pay at date of separation and he would not have received it had he remained in the service, such pay may not be included in his lump-sum annual leave payment 683

Prevailing rate employees

Negotiated agreements

Boulder Canyon Project Adjustment Act

Applicability to employees of defunct Parker-Davis Project

Unless employees of the now defunct Parker-Davis Project are engaged in activities associated with the Hoover Dam, they are not covered by section 15 of the Boulder Canyon Project Adjustment Act, 43 U.S.C. 618n 527

COMPENSATION—Continued
Prevailing rate employees—Continued
Negotiated agreements—Continued
Boulder Canyon Project Adjustment Act—Continued
Savings' clauses in later legislation Page

Section 15 of the Boulder Canyon Project Adjustment Act, 43 U.S.C. 618n, which is specific legislation dealing with how the wages and compensation of Boulder Canyon Project employees may be set, has not been superseded by section 9(b) of Pub. L. No. 92-392. The two laws are complementary, the former describing how employee compensation is to be set and the latter guaranteeing continuance of certain negotiated labor-management contract provisions, regardless of restrictions in the compensation laws otherwise applicable to prevailing rate employees---- 527

Boulder Canyon Project employees' entitlements
Fringe benefits, etc. status

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

Promotions
Temporary
Detailed employees
Agency excepted from competitive service and General Schedule effect

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

Retroactive application

Federal Power Commission (FPC) employee was transferred with her position to Department of Energy (DOE) where she continued to perform same duties until detailed to a transferred higher-grade position. During detail the higher-grade position was reevaluated and reclassified without significant change as DOE position. The employee is entitled to a retroactive temporary promotion and backpay for period of detail beyond 120 days. Detail was not one to unclassified duties merely because former FPC position had not been reclassified as DOE position and was not interrupted by reclassification, but was a continuous detail to same position---- 662

COMPENSATION—Continued

Removals, suspensions, etc.

Backpay

Appointment delay Page

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

Back Pay Act of 1966

Allowances

Overseas employees

Civilian employee of Air Force stationed in Japan upon involuntary dismissal returned to United States. She contested dismissal and was reinstated to the position with backpay under 5 U.S.C. 5596. The backpay award includes allowances for housing and cost of living which are paid employees working in high cost areas overseas even though the employee is not present in that area during period of wrongful dismissal 261

Entitlement

Unjustified or unwarranted personnel action

Not affecting pay or allowances

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

Involuntary leave

Recrediting

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

Unjustified personnel action requirement

What constitutes termination of detail status

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

COMPENSATION—Continued
Removals, suspensions, etc.—Continued
Deductions from back pay
Lump-sum leave payment Page
Employee who was restored to duty following wrongful separation must have lump-sum leave payment deducted from backpay award. 57 Comp. Gen. 464 (1978). There is no authority to permit employee to elect option of retaining lump-sum payment and cancelling annual leave. 55 Comp. Gen. 48 and B–175061, March 27, 1972, overruled 395
Wage board employees
Conversion *v.* promotion/transfer to classified positions
Highest previous rate
Federal Aviation Administration and Federal Aviation Science and Technological Association seek our approval of averaging method for computation of highest previous rate upon promotion from Wage Grade position to General Schedule position where employee has worked rotating shifts and has received night differential. The averaging method was arrived at in order to complete action on United States District Court's Consent Order of Remand requiring the agency to include night differential in computing the highest previous rate. We have no objection to proposed method since pay rates under that method would not exceed those authorized under 5 C.F.R. Part 531 209
Prevailing rate employees
Increases
Prospective
Separation after wage survey date effect
A prevailing rate employee who separates after a wage survey is ordered but before the date the order granting the wage increase is issued and his accrued annual leave extends beyond the effective date of the increase is entitled to have his lump-sum leave payment paid at the higher rate for the period extending beyond the effective date of the increase, as long as the order granting the new wage rate is issued prior to the effective date set by 5 U.S.C. 5344(a) 494
Separation prior to effective date
A prevailing rate employee is on the rolls on the date a wage increase is ordered into effect but separates before the effective date of the increase. The period covered by his accrued annual leave extends beyond the effective date of the increase. He is entitled to receive his lump-sum annual leave payment, authorized under 5 U.S.C. 5551(a), paid at the higher rate for the period extending beyond the effective date of the increase. 54 Comp. Gen. 655 (1975), distinguished 494
Negotiated agreements. (*See* **COMPENSATION, Prevailing rate employees, Negotiated agreements**)
Overtime
Rate
Double basic hourly rate
In 1967, Corps of Engineers, North Pacific Division, and Columbia Power Trades Council, representing wage board employees at hydroelectric power plants negotiated a double overtime provision in their agreement. Double overtime was stopped by agency following our decision in 57 Comp. Gen. 259, February 3, 1978. In light of section 704 of Civil Service Reform Act which overruled our decision, and although wages are not negotiated, provision for double overtime is preserved by section 9(b) of Public Law 92–392. This decision is modified (extended) by 60 Comp. Gen. —— (B–180010.07, Nov. 7, 1980) 583

COMPENSATION—Continued
Removals, suspensions, etc.—Continued
Prevailing rate employees—Continued
Pay increase ceiling
Applicability Page

Bureau of Engraving and Printing trade and craft employees whose pay is set administratively under 5 U.S.C. 5349(a), "consistent with the public interest," were properly limited to 5.5 percent wage increase in fiscal year 1979. Although pay increase limitation in 1979 appropriation act did not apply to these Bureau employees, agency officials properly exercised discretion to limit pay increases in the public interest in accordance with the President's anti-inflation program. See court cases cited. The fact that similar employees of Government Printing Office received higher wage increases is not controlling since they were not covered by appropriation act limitation or President's determination---- 240

Withholding
Union dues
Written authorization for allotment
Revocability
Civil Service Reform Act effect

The Department of the Army received from an employee a signed authorization to have union dues allotted directly to a union. The employee then requested that the authorization be returned to her before any dues had been allotted to the union and the agency agreed. The union filed a grievance and the agency settled the grievance in favor of the union and the dues were allotted to the union. Under the Civil Service Reform Act, 5 U.S.C. 7115(a), an agency must honor a written authorization for allotment of union dues when it is received and the employee may not have the union dues returned to her---- 666

CONFLICT OF INTEREST STATUTES
Violation determinations
Grant award

Record does not indicate agency acted improperly in making grant award to firm whose President had applied for agency's Regional Director position where evaluation and grant selection were performed at agency's centralized administrative office rather than by relevant regional office--- 273

CONFLICT OF LAWS
Federal-State conflict. (*See* **STATES, Federal–State conflict**)

CONTRACTING OFFICERS
Determinations
Erroneous on basis of subsequent events

Where agency rejects bid from defaulted contractor on reprocurement contract because bid price exceeds defaulted contract price, subsequent finding by General Accounting Office that initial contract was not binding on contractor because of contracting officer's failure to seek verification of bid price does not render improper rejection of reprocurement bid since at time of rejection agency had reasonable basis for its action---- 195

Responsibility
Request for acceptance time extension

Bidder which limited bid acceptance period to 30 days, as permitted by solicitation, may not be permitted to revive bid by extending acceptance period after expiration of 30-day period because acceptance of bid would give protester unfair advantage and be prejudicial to other bidders that offered standard 60-day acceptance period---- 726

CONTRACTORS

Conflicts of interest

Avoidance Page

Determination that an award to particular firm would result in an organizational conflict of interest must be made by procuring activity, with which lies the responsibility for balancing Government's competing interest in preventing bias in performance of contract and awarding contract that will best serve Government's needs to the most qualified firm..... 355

Incumbent

Competitive advantage

Protester's objections—to five minor benchmark requirements on ground that they provide incumbent contractor undue advantage—are without merit, since (1) these items do not prohibit protester from competing, (2) there is no showing that requirements are in excess of agency's minimum needs or unreasonable, and (3) there is no showing that incumbent gained any advantage through unfair Government action or preference..... 444

Failure to solicit

"Testing of market" solicitation

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

License requirements. (*See* **BIDDERS, Qualifications, License requirement**)

Partnerships

Changes' effect

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

Responsibility

Administrative determination

Nonresponsibility finding

Based on prior unsatisfactory performance

Firm submitting best proposal when properly evaluated in accord with solicitation's evaluation criteria is not entitled to award of lease when agency determines that firm is nonresponsible. Further, nonresponsibility determination is reasonably based where agency cites firm's recent prior unsatisfactory performance on similar lease contract even though firm disputes agency's prior default termination and matter is still pending..... 686

Contracting officer's affirmative determination accepted

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

Advice to procuring agency

Qualified products procurement

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

CONTRACTORS—Continued
Responsibility—Continued
Contracting officer's affirmative determination accepted—Continued
Exceptions
Not supported by record Page

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

Ordinarily General Accounting Office (GAO) does not review protests against affirmative determinations of responsibility unless fraud is alleged on part of procuring officials or solicitation contains definitive responsibility criteria which have not been met. Standard is much the same as that followed by courts which view responsibility as discretionary matter not subject to judicial review absent fraud or bad faith. Since protester does not allege fraud or failure to apply definitive responsibility criteria, protester has failed to meet standard for review by GAO or courts 533

Whether awardee could deliver building for occupancy by scheduled date is matter of responsibility and General Accounting Office does not review affirmative determinations of responsibility except in circumstances not present here 686

Determination
Review by GAO

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

Foreign contractor

License requirements are matters of responsibility, at heart of which is question whether offeror can perform. We believe that requirement for license from Nuclear Regulatory Commission (NRC) in procurement involving nuclear by-products is satisfied by foreign offeror whose local representative has qualifying license from State of North Carolina, under State agreement with NRC, and which exempts representative from requirement for obtaining NRC-issued import license 298

Responsibility *v.* contract administration
Allegation of nonresponsibility after award

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

Time for determining

Contracting officer need not make determinations tantamount to affirmative determinations of responsibility on expected small business bidders before determining to set aside procurement for exclusive small business participation. Under Defense Acquisition Regulation 1-706.5 (a)(1), contracting officer has broad discretion and is only obligated to make informed business judgment that there is "reasonable expectation" of sufficient number of responsible small business bidders so that awards may be made at reasonable prices taking into account circumstances which exist at time determination to set aside is made 533

CONTRACTS

Aircraft. (*See* **AIRCRAFT, Contracts**)

Amounts

Estimates

Specific lot, job, etc.

Timber sales Page

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

Architect, engineering, etc. services

Contract or selection base

"Brooks Bill" application

Small business concerns

Procurement under 8(a) program

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

Grant-funded procurements

Brooks Bill not applicable per se

Grantee's solicitation requiring all responding architectural and engineering (A/E) professional services firms to furnish cost and pricing data, to be considered along with statement of qualifications in selection of A/E firm, is not shown to be contrary to terms of OMB Circular A-102, Attachment O, or Ohio law. A/E procurement procedures in 40 U.S.C. 541 (Brooks Bill), mandatory for Federal procurements for A/E services, are not *per se* applicable to grantee procurements 251

Awards

Abeyance

Small business concerns

Responsibility determination

Referral to SBA for COC

Agency did not act improperly in awarding contract to second low bidder prior to expiration of bids where small business low bidder was found to be nonresponsible and Small Business Administration (SBA) was unable to process certificate of competency (COC) prior to bid expiration which was considerably beyond 15-day period for processing COC set forth in Defense Acquisition Regulation (DAR) 417

Approval

Protest pending

Awards made pending resolution of protests before GAO were properly made where awards were approved at appropriate level above contracting officer and GAO was notified of intention to make awards 533

CONTRACTS—Continued
Awards—Continued
Cancellation
Erroneous awards Page

Upon discovery that protester's proposal did not meet mandatory request for proposals (RFP) requirement, agency canceled contract erroneously awarded to protester. Protester contends, alternatively, that: (1) RFP requirement was ambiguous; (2) reevaluation using tariff prices for meeting disputed mandatory requirement would still result in award to protester. GAO concludes: (1) RFP requirement was not ambiguous; (2) original award should not have been made to protester ---- 746

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

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

Discount considered
Multiple-award discounts

Procurement for expansion of computer system, wherein two of five items are sole source, and request for proposals, while prohibiting all or none offers, permits multiple-award discounts without any prohibition against unbalanced offers, is improper and recommendation is made that contract awarded be terminated and sole-source items be negotiated and competitive times be recompeted. This decision is modified by 59 Comp. Gen. 658 ---- 438

Erroneous
Anticipated profits, etc. claims

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

Evaluation improper

Contracting officer's refusal to accept bidder's clarification of preprinted descriptive literature was not reasonable where result was rejection of bid for equipment which met agency's minimum needs and award of contract at higher price ---- 269

Where record does not justify contracting officer's finding that competing proposals are essentially equal, award to offeror on basis of lower estimated cost is improper departure from stated solicitation evaluation factors which place emphasis on technical merit ---- 498

Performance
Substantial

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

CONTRACTS—Continued
Awards—Continued
Erroneous—Continued
Federal aid, grants, etc.
By or for grantee
Review
Failure to use agency protest procedure effect Page

Request to reinstate General Accounting Office (GAO) review of grant related procurement complaint is denied where complainant voluntarily did not first seek resolution of its complaint through established Environmental Protection Agency (EPA) protest process which is part of EPA grant administration function. Intent of GAO in conducting review of complaints under Federal grants is not to interfere with grantor agencies' grant administration function---- 243

Competitive bidding procedure
Foreign countries using AID funds

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

State law compliance

Grantee's solicitation requiring all responding architectural and engineering (A/E) professional services firms to furnish cost and pricing data, to be considered along with statement of qualifications in selection of A/E firm, is not shown to be contrary to terms of OMB Circular A–102, Attachment O, or Ohio law. A/E procurement procedures in 40 U.S.C. 541 (Brooks Bill), mandatory for Federal procurements for A/E services, are not *per se* applicable to grantee procurements---- 251

Bid responsivenes
Licensing-type requirement

Recipient of Federal financial assistance through cooperative agreement properly rejected bid submitted by firm that at bid opening lacked certificate of responsibility required at bid opening by recipient's solicitation and state law---- 758

Procedures leading to award
General Accounting Officer review

GAO will not decide whether cancellation or termination for convenience was proper method to terminate contract improperly awarded to protester. Appropriate forum for deciding issue is agency board of contract appeals since the facts are in dispute---- 746

Propriety
Price reasonableness
Unreasonably low prices

No legal basis exists to preclude award of lease to firm merely because it might lose money in performing---- 686

Protest pending

General Accounting Office (GAO) will not question agency decision to make award prior to resolution of protest where decision to do so was made in accordance with applicable regulations---- 746

CONTRACTS—Continued
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Because any interference with awarded contract might impair agency's ability to perform all required tasks before 1981 White House Conference, and since protester does not appear to be immediately in line for award on termination of contract, General Accounting Office (GAO) will not recommend termination of contract even if awardee on small business set-aside contract is finally found to be other than small business 717

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Agency did not act improperly in awarding contract to second low bidder prior to expiration of bids where small business low bidder was found to be nonresponsible and Small Business Administration (SBA) was unable to process certificate of competency (COC) prior to bid expiration which was considerably beyond 15-day period for processing COC set forth in Defense Acquisition Regulation (DAR) 417

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

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Executive agencies should continue to refer demands for payment arising under informal commitments to General Accounting Office for settlement. Contract Disputes Act of 1978 does not conflict with statutory authority of GAO to pass upon propriety of expenditures of public funds. 232

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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 1

Consideration
Absence

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

Cost reimbursement
Sewage services

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

Scope of contract requirement
Increased costs
Appropriation chargeable

As general rule, cost overruns and contract modifications within scope of original contract should be funded from appropriation available in year contract was made. Current appropriations may only be used if additional costs amount to new liability, not provided for in original contract. In instant case, original funds were "no-year" appropriations and are therefore available for both old and new obligations 518

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GAO will not decide whether cancellation or termination for convenience was proper method to terminate contract improperly awarded to protester. Appropriate forum for deciding issue is agency board of contract appeals since the facts are in dispute 746

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Where National Aeronautics and Space Administration (NASA) performed detailed analysis of effect on proposals of Service Contract Act wage determinations (received after Source Evaluation Board's (SEB) evaluation and just prior to SEB presentation to Source Selection Official) which demonstrated that wage determinations would not affect award selection, another round of best and finals was not required 316

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Competitive range formula
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Inclusion of initial proposal in competitive range was reasonable where major defect, failure to include written permission for use of Government-furnished equipment, is easily cured through discussions and engineering change proposal submitted as part of proposal is still under consideration 298

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Medical monitoring services Page

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Escalation

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

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Extent and content
Contracting agency does not fulfill duty to point out informational inadequacies in offeror's personnel and facilities areas merely by requesting offeror to furnish cost information pertaining to these areas. Offeror could not reasonably relate agency's request for cost detail to the specific informational inadequacies 548
Reopening negotiation justification
Where proposal in competitive range was found informationally inadequate, so that contracting agency could not determine extent of offeror's compliance with requirements, contracting agency should have discussed inadequacies with offeror, especially since solicitation did not specifically call for missing information but merely contained general request for information 548
Evaluation factors
Administrative determination
Protest against agency's technical evaluation of proposals is reviewed against General Accounting Office (GAO) standard that judgment of procuring agency officials, based on solicitation's evaluation criteria as to technical adequacy of proposals, will not be questioned unless shown to be unreasonable, an abuse of discretion or in violation of procurement statutes and regulations. Standard is not found to have been violated 158
All offerors informed requirement
Incumbent contractor provided agency with monetary estimate for follow-on contract. That amount became Government estimate and established maximum amount of funding available for project. Request for proposals, which did not reveal Government estimate, established evaluation scheme in which quality and experience factors far outweighed price. Initial proposals revealed that other competitors did not know importance of available funding. Since other competitors were placed at material disadvantage by not knowing Government estimate, all competitors were not treated equally and fairly. Protest sustained; General Accounting Office recommends that options not be exercised 80
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Where record does not justify contracting officer's finding that competing proposals are essentially equal, award to offeror on basis of lower estimated cost is improper departure from stated solicitation evaluation factors which place emphasis on technical merit ---- 498

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Contracting agencies may properly utilize evaluation factors which include experience and other areas that would otherwise be encompassed by offeror responsibility determination when needs of agencies warrant comparative evaluation of those areas. Modified by 59 Comp. Gen. 658 --- 438

Subjective judgment factor

Protest against use of subjective evaluation factors is denied because where evaluation factors are utilized in negotiated procurement, the use of such criteria and numerical scoring is merely an attempt to quantify what is subjective judgment about merits of various proposals. Modified by 59 Comp. Gen. 658 ---- 438

Discount terms

Procurement for expansion of computer system, wherein two of five items are sole source, and request for proposals, while prohibiting all or none offers, permits multiple-award discounts without any prohibition against unbalanced offers, is improper and recommendation is made that contract awarded be terminated and sole-source items be negotiated and competitive items be recompeted. This decision is modified by 59 Comp. Gen. 658 ---- 438

Evaluators
Allegations of bias, unfairness, etc.
Not supported by record

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

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Relative importance of price

Where record does not justify contracting officer's finding that competing proposals are essentially equal, award to offeror on basis of lower estimated cost is improper departure from stated solicitation evaluation factors which place emphasis on technical merit ---- 498

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Factors other than price—Continued

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Technical acceptability

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

Two-step procurement

Where protester in step one of two-step procurement does not respond timely to amendment having little impact on overall technical acceptability of proposal, but later states its compliance with amendment requirement when negotiations are reopened by subsequent amendment, agency's determination to exclude protester's step-two bid from consideration is unreasonable. Agency relied inappropriately on concept of responsiveness in determination which is inapposite to nature of step one—the qualification of as many proposals as possible under negotiation. B-190051, Jan. 5, 1978, modified in part---- 588

Government property use

Initial proposal which does not comply with Government-furnished equipment requirement in request for proposals and which incorporates engineering change proposal offering flat rather than spherical-ended tritium beads on rifle sight may not be rejected as nonresponsive. The rigid rules of bid responsiveness in advertised procurements do not apply to negotiated procurements---- 298

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Since record suggests agency's benchmark-based life-cycle cost approach might not have been sufficiently accurate to support selection of awardee's rather than protester's equipment, and since agency's needs appear to have changed, GAO recommends that agency conduct market survey to determine, before further contract options are exercised, if reliance on awardee's equipment is justified---- 640

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Leases. (*See* **LEASES, Negotiation**)
Offers or proposals
Best and final
Additional rounds

Request for second round of best and final offers was proper where offeror was not advised of deficiency in proposal which rendered offeror ineligible for award. Also, accepted engineering change proposal was provided to all offerors to equalize competition 298

Where National Aeronautics and Space Administration (NASA) performed detailed analysis of effect on proposals of Service Contract Act wage determinations (received after Source Evaluation Board's (SEB) evaluation and just prior to SEB presentation to Source Selection Official) which demonstrated that wage determinations would not affect award selection, another round of best and finals was not required 316

Recommended

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

Clarification, etc. *v.* revision

Information requested and obtained from all offerors, including protesters, after best and final offers—essential to evaluation of proposals—constituted reopening of negotiations and discussions with offerors. However, since discussions were limited in scope, were conducted with all offerors, and agency did not permit material changes in any proposals, no prejudice resulted to protester 316

Notification of offerors
Sufficiency

Agency's advice that common cutoff date for revised proposals was February 5, 1979, is equivalent of requesting "best and final" offers 316

Preparation
Costs
Arbitrary and capricious Government action

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

Recovery

Claim for proposal preparation costs is denied where record shows that protester was not arbitrarily treated, was not improperly induced to submit proposal where no contract was contemplated, or was not denied contract which it would have received 263

CONTRACTS—Continued
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Qualifications of offerors
License requirement
Foreign contractor Page

License requirements are matters of responsibility, at heart of which is question whether offeror can perform. We believe that requirement for license from Nuclear Regulatory Commission (NRC) in procurement involving nuclear by-products is satisfied by foreign offeror whose local representative has qualifying license from State of North Carolina, under State agreement with NRC, and which exempts representative from requirement for obtaining NCR-issued import license 298

Prices
"Best buy analysis"

Given closeness of scoring and inadequate negotiating approach, offeror having "best buy" for three phases of decontamination and cleanup contract is in doubt 548

Life cycle costing
Benchmark-based evaluation

Since record suggests agency's benchmark-based life-cycle cost approach might not have been sufficiently accurate to support selection of awardee's rather than protester's equipment, and since agency's needs appear to have changed, GAO recommends that agency conduct market survey to determine, before further contract options are exercised, if reliance on awardee's equipment is justified 640

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Technically unequal offers

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Request for second round of best and final offers was proper where offeror was not advised of deficiency in proposal which rendered offeror ineligible for award. Also, accepted engineering change proposal was provided to all offerors to equalize competition 298

Requests for proposals
Specification requirements
Information
Specificity

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CONTRACTS—Continued
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Unbalanced proposal submission
Commingling of sole-source and competitive items Page

Procurement for expansion of computer system, wherein two of five items are sole source, and request for proposals, while prohibiting all or none offers, permits multiple-award discounts without any prohibition against unbalanced offers, is improper and recommendation is made that contract awarded be terminated and sole-source items be negotiated and competitive items be recompeted. This decision is modified by 59 Comp. Gen. 658 438

While agency contends other firms could have offered computer system, independent investigation reveals firms only could furnish hardware, not required software. Therefore, prior decision concerning sole-source nature of item is affirmed. 59 Comp. Gen. 438, modified 658

Requests for quotations
Testing market against option purpose

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

Responsiveness
Concept not applicable to negotiated procurements

Initial proposal which does not comply with Government-furnished equipment requirement in request for proposals and which incorporates engineering change proposal offering flat rather than spherical-ended tritium beads on rifle sight may not be rejected as nonresponsive. The rigid rules of bid responsiveness in advertised procurements do not apply to negotiated procurements 298

Protest alleging that awardee's proposal for leasing contract is "nonresponsive" in several respects is denied since procurement was negotiated and, therefore, these deficiencies were merely factors to be taken into account by contracting agency in evaluation of proposal 474

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

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Parts, etc.
Competition availability

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

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Where protester in step one of two-step procurement does not respond timely to amendment having little impact on overall technical acceptability of proposal, but later states its compliance with amendment requirement when negotiations are reopened by subsequent amendment, agency's determination to exclude protester's step-two bid from consideration is unreasonable. Agency relied inappropriately on concept of responsiveness in determination which is inapposite to nature of step one—the qualification of as many proposals as possible under negotiation. B–190051, Jan. 5, 1978, modified in part 588

Offer and acceptance
Offer status
Death of partner-offeror

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

What constitutes acceptance

Since Government agency did not mail acceptance of bid to contractor prior to expiration of period of availability for obligation of fiscal year 1979 appropriation, no "binding agreement" within meaning of 31 U.S.C. 200(a) (1976) arose in fiscal year 1979 which would provide basis for recording obligation against fiscal year 1979 appropriation and, therefore, fiscal year 1980 funds must be used 431

Options
Advantage to Government

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

Not to be exercised
Erroneous award

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

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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 informal advertising, competitive pricing is not exposed and contractor did not otherwise have opportunity to meet competition of market test..... 68
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Adjustment
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Fact that price adjustment percentages to be used in economic price adjustment clauses are to be based on domestic indexes, instead of French economy where some costs will be incurred, is determined to be irrelevant. 158

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Protests

Abeyance pending court action

Not all issues pending

"Claim preclusion" principle Page

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

Administrative actions

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What constitutes

Issuance of new solicitation after firm protest to agency cancellation of prior solicitation is not adverse agency action on protest where protester may reasonably believe protest is still under active consideration 349

Allegations

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On protester

Protester has not met burden of affirmatively proving its case that Determination & Findings exempting foreign materials from Buy American Act do not apply to instant procurement when Determination & Findings by their terms apply to all items of defense equipment other than those specifically excluded and protester has provided no evidence to support bare allegation that equipment is excluded from coverage 678

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Protest alleges unwritten Department of Defense/Department of Army policy to set aside procurements for exclusive small business participation whenever two or more small businesses are expected to compete without considering responsibility of anticipated small business bidders. Protest is denied because record does not support allegation 533

Contention—that awardee was not eligible for award because it did not satisfy solicitation's zoning requirement—is without merit where awardee had proper zoning on adequate portion of property to perform on contract 686

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Where protester's contentions—that agency took advantage of protester's proposal in preparing in-house cost estimate regarding reduced staffing from the current level of 329 to 259 and other matters—and agency's directly conflicting explanation constitute only evidence, protester has not met burden of proving its case by clear and convincing evidence 263

Speculative

GAO will not interpose legal objection where protester merely alleges agency will increase prospective awardee's award fee; GAO will not substitute its judgment for that of agency where protester merely speculates that successful offeror's proposed staffing will promote labor unrest or strife and adversely affect minority enterprises 316

CONTRACTS—Continued
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Authority to consider
Appeal before Contract Appeals Board
Protestor's default under predecessor contract Page

Where agency rejects bid from defaulted contractor on reprocurement contract because bid price exceeds defaulted contract price, subsequent finding by General Accounting Office that initial contract was not binding on contractor because of contracting officer's failure to seek verification of bid price does not render improper rejection of reprocurement bid since at time of rejection agency had reasonable basis for its action 195

Executive branch policy determinations

General Accounting Office (GAO) will not normally review agency compliance with Executive Branch policies under Bid Protest Procedures but will consider protest which contends such policies are contrary to applicable procurement statutes and regulations 409

Grant procurements

Request to reinstate General Accounting Office (GAO) review of grant related procurement complaint is denied where complainant voluntarily did not first seek resolution of its complaint through established Environmental Protection Agency (EPA) protest process which is part of EPA grant administration function. Intent of GAO in conducting review of complaints under Federal grants is not to interfere with grantor agencies's grant administration function 243

Cooperative agreements

General Accounting Office will consider complaint by bidder on solicitation issued by recipient of Federal financial assistance through cooperative agreement 758

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

Award approved
Prior to resolution of protest

Awards made pending resolution of protests before GAO were properly made where awards were approved at appropriate level above contracting officer and GAO was notified of intention to make awards 533

Contract administration
Not for resolution by GAO

Where successful bidder takes no exception to invitation's Davis-Bacon provisions, question of whether successful bidder will comply with Davis-Bacon Act is matter of contract administration and not for consideration under General Accounting Office's Bid Protest Procedures 422

Court action
No court request for GAO opinion

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

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Bidder found to be nonresponsible is not "interested" party under Bid Protest Procedures to protest against two bidders it contends submitted nonresponsive bids where other apparently responsive, responsible bidder exists and finding two bids to be nonresponsive would not lead to cancellation of invitation with possibility that protesting bidder could submit another bid under resolicitation ---- 255
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Procedures
Bid protest procedures
Applicability
Inapplicability to grant complaints
GAO Bid Protest Procedures are not applicable to review of grant complaints; consequently, GAO will consider complaint notwithstanding possible failure to comply with timeliness standards of Bid Protest Procedures ---- 73

CONTRACTS—Continued
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Procedures—Continued
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Reconsideration
Agency *v.* contractor requests Page

Where interested party and procuring agency, in request for reconsideration, come forward with facts which they contend require overturning prior decision, and such facts were in their possession during development of protest, evidence of interested party will not be considered. In future, procuring agency's late submission will be treated similarly but will be considered in instant matter. 59 Comp. Gen. 438, modified 658

Time for filing
"Court interest" exception

Although General Accounting Office (GAO) suspended action on protest when protester filed suit in United States District Court raising substantially same issues, protest will be considered where court by endorsement has expressed interest in GAO decision 298

Date basis of protest made known to protester

Protesters' objection to normalization of certain costs is untimely since protest was not filed within 10 days of knowledge of basis. *See* 4 C.F.R. 20.2(b)(2)(1979) 316

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

Protest allegations not filed until more than 10 working days after basis for allegations was known or should have been known are untimely and ineligible for consideration under Bid Protest Procedures 522

Initial adverse agency action date

Once agency denies protest, fact that protester believes agency will reconsider protest does not toll time for filing a protest to General Accounting Office (GAO) since GAO Bid Protest Procedures require protest to be filed within 10 working days of when protester learns of initial adverse agency action 640

Significant procurement issue exception

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

Significant procurement issue exception—applicability

Significant issue exception to GAO's Bid Protest Procedures is not applicable where protester admits wording of contract clause in question permits protested action 717

CONTRACTS—Continued
Protests—Continued
Sustained
Evaluation of proposals
Deviation from stated criteria Page

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

Timeliness
Adverse action basis determination
Resolicitation of protested procurement
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Issuance of new solicitation after firm protests to agency cancellation of prior solicitation is not adverse agency action on protest where protester may reasonably believe protest is still under active consideration--- 349

Basis of protest
Date made known to protester
Information not for official disclosure

Protest against application of late proposal provision to competitor's proposal and alleged "sham" permitted by consideration of late proposal is untimely because protest was not filed with GAO until more than 10 days after protester knew of facts giving rise to bases of protest, even though facts were not for official disclosure---- 717

Freedom of Information Act request involvement

Based on information obtained pursuant to Freedom of Information Act, basis of protest—filed within 10 days of such receipt—against the adequacy of IFB's estimated quantities is timely under 4 C.F.R. 20.2(b)(2) (1979) and will be considered on merits---- 338

Grant-funded procurements

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

Significant issue exception

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

Minimum needs overstated

Objection to allegedly excessive solicitation requirements raised for the first time after bid opening, while untimely, is significant issue and warants consideration under General Accounting Office Bid Protest Procedures, 4 C.F.R. 20.2(c)---- 378

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Significant issue exception—Continued
Prior GAO consideration of same issue effect Page

Untimely protest against alleged improper Service Contract Act wage determination does not present significant issue within meaning of 4 C.F.R. 20.2(c) (1979) because in previous decisions General Accounting Office (GAO) has considered issue and matter has been subject of detailed review and consideration by courts, Executive Branch, and Congress..... 338

Solicitation improprieties
Apparent prior to bid opening

Post-bid-opening bases of protest—(1) that bid based on excessive prompt-payment discount, where such possibility was expressly permitted in solicitation, should not be considered, and (2) that all bids should be rejected because of ambiguous solicitation provision—are untimely under 4 C.F.R. 20.2(b)(1) (1979) to the extent that they concern apparent alleged solicitation improprieties. Such protests must be filed prior to bid opening to be timely under GAO Bid Protest Procedures..... 338

Apparent prior to closing date for receipt of proposals

Contention—that request for proposals should not have contained provision assessing contractor $750,000 for new equipment associated with contracting out—first raised after closing date for receipt of initial proposals is untimely under GAO Bid Protest Procedures, 4 C.F.R. 20.2(b)(1) (1979), and will not be considered on merits..... 263

Protest based upon alleged impropriety in solicitation (failure to define central business district and preference to be accorded to location therein) which was apparent prior to date set for receipt of initial proposals is untimely since not filed in General Accounting Office (GAO) prior to closing date for receipt of initial proposals and will not be considered on merits. Section 20.2(b)(1) of GAO Bid Protest Procedures, 4 C.F.R. part 20 (1980)..... 474

Protest against inclusion of alternate late proposal provision in request for proposals is untimely because it was not filed with GAO until more than 10 days after date set for receipt of initial proposals..... 717

Benchmarking
Proposed procedure, etc.

Protest of methods used to compute costs from benchmark results is untimely where methods used were defined in request for proposals but protest was not lodged before benchmarking was completed..... 640

Proposed structure *v.* results

Results of benchmark do not provide proper basis for reconsideration of prior decision dealing with proposed benchmark procedure since benchmark results do not constitute evidence which should have been considered..... 640

Request for quotations

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

CONTRACTS—Continued
Protests—Continued
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Solicitation improprieties—Continued
Wage determinations Page

Protester contends that basis of protest against invitation for bids' (IFB) improper wage determination did not arise until award of contract even though alleged impropriety should have been apparent from solicitation. Contention is without merit and basis of protest is untimely under 4 C.F.R. 20.2(b)(1) (1979), since alleged solicitation impropriety should have been apparent and protest should have been filed prior to bid opening 338

To delay award
Benefit to protester
Evidence

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

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Requests for quotations
Competition
Equality of competition

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

Service Contract Act. (*See* **CONTRACTS, Labor stipulations, Service Contract Act of 1965**)
Small purchases. (*See* **PURCHASES, Small**)
Specifications
Amendments
Acknowledgement
Timeliness
Two-step procurement

Where protester in step one of two-step procurement does not respond timely to amendment having little impact on overall technical acceptability of proposal, but later states its compliance with amendment requirement when negotiations are reopened by subsequent amendment, agency's determination to exclude protester's step-two bid from consideration is unreasonable. Agency relied inappropriately on concept of responsiveness in determination which is inapposite to nature of step one—the qualification of as many proposals as possible under negotiation. B-190051, Jan. 5, 1978, modified in part 588

Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)
Conformability of equipment, etc. offered
Descriptive data
Clarification in bid

No legal requirement exists which prohibits bidder from clarifying printed descriptive literature with letter accompanying bid, and where low bidder offers equipment which meets specification requirements plus features which are not required, bid is acceptable 269

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Specifications—Continued
Defective
Effect not prejudicial to bidders, etc. Page
To extent that protest is against agency's determination not to reject all bids due to alleged noncompliance with IFB requirement labeled "(A) & (B)" but intended to read "(C) & (D)", it is without merit because intent was obvious and all bidders, including protester, recognized obvious intent and bid on that basis 338
Estimated quantities
Single price requested
Basic formal advertising principle that award must be made on basis of bids as submitted contemplates that material elements of contract obligation be set at bid opening so that bidder cannot elect whether to accept or reject award after bids have been exposed 754
Deviations
Acceptance not prejudicial to other bidders
Bid which offers larger quantity than specified in invitation is responsive where bid does not limit Government's right to make award consistent with needs at price below other bids received 296
Descriptive literature
Conforming clarification in letter accompaning bid
Bid responsive
No legal requirement exists which prohibits bidder from clarifying printed descriptive literature with letter accompanying bid, and where low bidder offers equipment which meets specification requirements plus features which are not required, bid is acceptable 269
Preprinted terms, etc.
"Waiver of Preprinted Information" clause effect
Low bid containing bidder's preprinted standard commercial terms and conditions, which are at variance with requirements of invitation for bids (IFB), may be considered for award in view of inclusion in IFB of "Waiver of Preprinted Information" clause which permits disregarding of preprinted information under conditions applicable here. However, General Accounting Office recommends clause not be utilized in future as it constitutes arbitrary convention which permits ignoring clear language of bid 347
Failure to furnish something required
Information
Small business concerns
Subcontracting plan requirement
Neither pertinent stature not solicitation clause implementing statue indicates that failure to submit small business subcontracting plan will result in rejection of bid as nonresponsive. Article and statute only require bidder selected for award to submit plan. Therefore, matter relates to responsibility, not responsiveness, despite other solicitaiton statement that plan must be submitted with bid 614
Licensing-type requirement
Recipient of Federal financial assistance through cooperative agreement property rejected bid submitted by firm that at bid opening lacked certificate of responsibility required at bid opening by recipient's solicitation and state law 758

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Specifications—Continued
Failure to furnish something required—Continued
Small business data Page
Bid received on total small business set-aside wherein sole bidder indicated that it, as regular dealer, would not supply materials manufactured by small business concerns was determined properly to be nonresponsive due to failure to submit binding promise to meet set-aside requirement, even though allegedly small business firms were listed in "Place of Performance" clause ---- 140
Interpretation
Oral advice
Contention that protester was misled by agency personnel concerning need for QPL qualification of product is without merit since IFB provided that oral explanations were not binding and erroneous advice given by agency personnel cannot act to estop agency from rejecting nonresponsive bid as it is required to do so by law ---- 742
Minimum needs requirement
Administrative determination
Agency for International Development's concurrence in grantee's determination of minimum needs (exclusion of Douglas fir and requirement for only CCA and/or Penta preservatives at a 1.25 pounds (#) per cubic foot retention rate) was rationally founded ---- 73
Exceeded
Where solicitation requires bid and evaluation on basis of replacing fire hydrants by tapping existing water mains under pressure when agency actually will permit many "dry" replacements, stated requirements exceed Government's actual needs and restricted competition. GAO therefore recommends termination of existing contract and resolicitation and bid evaluation on basis of Government's best estimate of "wet" and "dry" replacements ---- 378
Qualified products
Acceptability
Evaluation propriety
Fundamental question which must be addressed when compliance with Qualified Products List (QPL) clause is at issue is whether essential needs of Government, as reflected in QPL, will be satisfied by offered product ---- 742
Costs
Repackaging restriction which either increases cost of delivered product to Government or eliminates some concerns from bidding absent separate QPL listing is seen, based on present record, to be inconsistent with statutory requirement for "full and free" competition. Therefore, GAO recommends corrective action under Legislative Reorganization Act of 1970 ---- 43
Dealer or distributor
GAO fails to see why GSA does not accept apparent Department of Defense (DOD) position which stresses responsibility of QPL manufacturer for integrity of QPL product when bid by distributor. DOD position seems to constitute adequate protection against defective repackaging by distributor of qualified product in that if QPL manufacturer tolerates defective repackaging QPL status would be jeopardized ---- 43

CONTRACTS—Continued
Specifications—Continued
Qualified products—Continued
Listing
Capability to deliver listed product Page
Contractor responsibility and/or contract administration matter
Mere fact that allegation of nonresponsibility is made after award does not change question of responsibility into one of contract administration 90
Packaging requirements
GSA's professed concern about quality of process involved in repackaging QPL product is contradicted by solicitation which requires packaging in accordance with "normal commercial practice" without reference to applicable Federal Specification against which product was tested under QPL procedures. To extent GSA reasonably finds that concern does not have capacity to effectively repackage qualified product in accordance with "normal commercial practice" or has prior history of unsatisfactory repackaging, finding would serve as basis for decision that concern is not responsible 43
Pressurized form of qualified bulk product
Status as qualified end item
Where product offered by protester had not been subjected to additional specialized QPL tests established for product in form offered by protester and called for by invitation for bids (IFB), protester was not offering to supply qualified end item as required, and agency acted reasonably in rejecting protester's bid as nonresponsive 742
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 43
Status
Repackaging effect
Essential needs of Government are for end item being procured rather than for containers holding end item so that QPL status of qualified product should not generally be regarded as being affected by nonmanufacturing step such as repackaging end item. That repackaging generally should not be considered "manufacturing" is seen from analysis of term "manufacturing" taken from case interpreting Buy American Act. Although care must be taken to avoid contamination of adhesives in repackaging process, GAO doubts whether care required would convert repackaging into manufacturing process so as to affect QPL status of adhesive brand being offered 43
What constitutes "repackaging"
Transferring product which is qualified in bulk form into pressurized containers is not simply "repackaging" since product in pressurized form is subject to specialized QPL tests additional to those established for product in bulk form 742

CONTRACTS—Continued
Specifications—Continued
Restrictive
Justification
Public policy considerations Page

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

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

Minimum needs requirement
Administrative determination
Reasonableness

Protester's objections—to five minor benchmark requirements on ground that they provide incumbent contractor undue advantage—are without merit, since (1) these items do not prohibit protester from competing, (2) there is no showing that requirements are in excess of agency's minimum needs or unreasonable, and (3) there is no showing that incumbent gained any advantage through unfair Government action or preference---- 444

Particular make
Foreign item

Use of foreign brand name supplies as basis for brand name or equal procurement does not violate Buy American Act since Act does not totally preclude purchase of foreign equipment and in any event, Act has been waived for equipment manufactured in foreign countries in question---- 678

Invitation sufficiency

Allegation that specifications in brand name or equal procurement lack sufficient detail to enable protester to submit bid is without merit where solicitation clearly sets forth salient characteristics of brand name equipment and protester has not identified any specific portions of such specifications which it considers lacking in detail---- 678

Tests
Aircraft
Proposed *v.* testing model

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

Benchmark
Adequacy
Life cycle cost evaluation

Since record suggests agency's benchmark-based life-cycle cost approach might not have been sufficiently accurate to support selection of awardee's rather than protester's equipment, and since agency's needs appear to have changed, GAO recommends that agency conduct market survey to determine, before further contract options are exercised, if reliance on awardee's equipment is justified---- 640

CONTRACTS—Continued
Specifications—Continued
Tests—Continued
Benchmark—Continued
Requirements
Status to protest Page

Agency and incumbent contractor argue that merits of protest regarding benchmark should not be considered since protester did not participate in benchmark and since at least one retrial would have been held if required. General Accounting Office will consider merits of protest because (1) neither regulatory guidance not express agency commitment guaranteed any participant a second benchmark attempt, (2) competition is not maximized by forcing vendor to attempt benchmark it cannot complete successfully, and (3) protester's participation in benchmark, which it believed to be defective, might have resulted in subsequent untimely protest 444

Structure
Propriety

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

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

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

Time for establishing eligibility

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

Stenographic reporting
Bid evaluation factors
Prices to public

Protester contends that (1) Federal Advisory Committee Act prohibits contractors from charging public more than actual cost of duplication for transcript copies, and (2) low bid proposed price in excess of that limitation. Contention is without merit because act does not apply to

CONTRACTS—Continued
Stenographic reporting—Continued
Big evaluation factors—Continued
Prices to public—Continued Page

contractors. Moreover, as practical matter, public can obtain copies from agency at $0.10 per page or contractor at $0.75 per page as it freely elects 338

Sucessors
Service Contract Act of 1965
"Wage busting"

Successful offeror is not guilty of "wage busting" (practice of lowering employee wages and fringe benefits by successor contractor to become low offeror where incumbent contractor's employees are retained to perform same jobs on successor contracts) since it agreed and agency's evaluation of proposal confirmed that compensation offers to incumbent employees would not be less than current wages and fringe benefits paid by incumbent contractor 316

Termination
Convenience of Government
Erroneous awards

Where contract is improperly awarded because of contracting officer's interpretation of contract specifications, agency should explore feasibility of such termination of contract for convenience of Government, as is consistent with fair and reasonable treatment of parties and in best interest of Government, i.e., at a reasonable cost and compatible with agency's need for equipment 269

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

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

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

Not in Government's best interest
Small business set-aside
Ineligible bidder/offeror award

Because any interference with awarded contract might impair agency's ability to perform all required tasks before 1981 White House Conference, and since protester does not appear to be immediately in line for award on termination of contract, General Accounting Office (GAO) will not recommend termination of contract even if awardee on small business set-aside contract is finally found to be other than small business 717

COURTS

Judgments, decrees, etc.

Interest

Delayed payment of judgment

Government appeal

Disposition not on the merits

The permanent indefinite appropriation for payment of judgments (31 U.S.C. 724a) is available to pay interest to a plaintiff whose judgment payment was delayed solely because the United States appealed and lost. *Vaillancourt* v. *United States* extended this principle to apply to situations in which the United States withdrew its appeal without a disposition of the case on its merits. Payment of interest will also be permitted when Government appeals denial of motion under Federal Rule of Civil Procedure (FRCP) 60(b) to reopen judgment on collateral issue and not on merits of the underlying judgment, since plaintiff's delay in receiving payment was caused by Government's unsuccessful appeal 259

Patent infringement suit

"Delay compensation"

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

Res judicata

Correction of military records subsequent to judgment

Air Force member who successfully sues in Federal District Court for reinstatement to active duty and damages may not recover on an administrative claim for backpay in excess of $10,000 jurisdictional limitation of district court under 28 U.S.C. 1346(a)(2). Since claim filed concerns same parties and issues, including amount of damages, as decided by district court, doctrine of *res judicata* precludes consideration of this claim 624

Judgment based on stipulation

Subsequent claim

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

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 51

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

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

CUSTOMS
Employees
Overtime services
Reimbursement
Customs Service inspector employees
"1931 Act overtime"
Immigration inspector entitled to overtime pay under 8 U.S.C. 1353a for 3.25 hours worked on Sunday morning and 3 hours worked Sunday night outside his 8-hour Sunday shift was properly paid 1½ days' pay for time on duty of 6.25 hours, computed as an aggregate of the two periods of overtime work. Attorney General did not exceed his broad authority to determine what constitutes overtime services under 8 U.S.C. 1353a in prescribing a midnight-to-midnight cutoff for Sundays and holidays. Also, computation of overtime on second Sunday under similar circumstances was proper 110
Services in foreign airports
Recovery of costs
Treasury Enforcement Communications System
Where Customs Service receives no advantage from conducting passenger preclearance activity on foreign soil *vis a vis* conducting passenger clearance activities within the United States and preclearance activity was initiated at airlines request, results in substantial cost savings to airlines and permits airlines to better use their resources, record supports determination that airlines are primary beneficiaries of preclearance service. Therefore, under authority of 31 U.S.C. 483a, Customs may continue to assess user charge against airlines and recover that portion of its costs (including Treasury Enforcement Communications System) that are increased by its conducting passenger preclearance on foreign soil. 48 Comp. Gen. 24, modified (clarified) 389

CUSTOMS—Continued

Services to the public

Reimbursement. (*See* **FEES, Services to public**)

DEBT COLLECTIONS

Erroneous payments to bank, etc. accounts

Electronic funds transfer program

Death/incapacity of intended recipient

Limitation on bank's etc., liability by regulation Page

Treasury Department regulations 31 CFR Part 210 governing recurring payments made through the electronic funds transfer program directly to recipients' bank accounts, generally limits liability of financial organization to Government for payments by disbursing officer after entitlement ceased because of death or incapacity of recipient to amount of payments within 45 days after death or incapacity. Government and disbursing officer are adequately protected inasmuch as agency can recover remainder of erroneous payments from person who withdrew funds from the account. Where recovery is unsuccessful, disbursing officer can seek relief of liability from this Office under 31 U.S.C. 82a–2..... 597

Federal Claims Collection Act of 1966. (*See* **FEDERAL CLAIMS COLLECTION ACT OF 1966**)

Interest. (*See* **INTEREST, Debt owed United States**)

Set-off (*See* **SET-OFF**)

Waiver

Civilian employees

Compensation overpayments

Overtime

Nonexempt employee under Fair Labor Standards Act performed overtime during summer in exchange for compensatory time. Civil Service Commission made determination that employee is entitled to payment of overtime under FLSA; payment is proper with offset of the value of compensatory time granted. Since supervisor did not have authority to order or approve overtime, there is no entitlement to compensatory time under title 5, United States Code. Erroneous payments of compensatory time not used as offset may be considered for waiver under 5 U.S.C. 5584..... 246

Leave payments

Lump-sum leave payment

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

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 appiontee to manpower shortage position. Employee must repay amounts erroneously paid since overpayments of travel and relocation expenses may not be waived under 5 U.S.C. 5584; there is no basis for compromise or termination of collection action under Federal Claims Collection Act; and Government is not estopped from repudiating erroneous advice or authorization of its agents..... 28

DEFENSE ACQUISITION REGULATION
Small business concerns
Set-asides
Eligibility
Notice to unsuccessful bidders, etc. requirements Page

Contracting officer's unilateral referral to Small Business Administration of low offeror's eligibility for small business set-aside obviated need for notifying unsuccessful offerors of apparently successful offeror's for notifying unsuccessful offerors of apparently successful offeror's identity and deadline for filing size protest 405

DEPARTMENTS AND ESTABLISHMENTS
Adjudicative proceedings
Public intervenors
Financial assistance

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

Commercial activities
Private *v.* Government procurement
Cost comparison

Contention—that cost comparison was incorrect because agency assessed protester $2,139,290 representing personnel relocation-related expenses associated with contracting out—is without merit where agency's explanation for assessment is reasonably based 263

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

Expired agency, etc.
Post-expiration claims
Certification for payment
General Services Administration's authority. (*See* **GENERAL SERVICES ADMINISTRATION, Services for other agencies, etc., Expired agencies**)

Services between
Appropriation obligation
Strip stamp services

Regardless of whether Bureau of Alcohol, Tobacco and Firearms (ATF) places order for strip stamps with Bureau of Engraving pursuant to either 31 U.S.C. 686 or 26 U.S.C. 6801, it may obligate annual appropriations at the end of the fiscal year only to the extent stamps are printed, in process or a contract has been entered into by the Bureau with a third party to provide the stamps to ATF. 31 U.S.C. 681–1, 34 Comp. Gen. 708 (1955). However, we would not object to ATF's automatically obligating its next fiscal year's appropriation to cover the remainder of the order based on information provided by the Bureau on the extent to which it has filled the particular order as of the close of the fiscal year 602

DEPARTMENTS AND ESTABLISHMENTS—Continued
Services between—Continued
Certifying officers acting for two agencies. (*See* **CERTIFYING OFFICERS, Responsibility, Interagency services**)
Debt collection
Referral to General Accounting Office Page
In dispute between General Services Administration (GSA) and Air Force over Air Force claim for reimbursement, Air Force withheld Standard Level User Charge payment owed to GSA in order to collect unrelated debt. Inter-agency claims are not to be collected by offset but should be submitted to General Accounting Office for adjudication--- 505
Overseas services
State Department authority. (*See* **STATE DEPARTMENT, Authority, Services for other agencies overseas**)
Reimbursement
Appropriation availability
Department of State is authorized by 22 U.S.C. 846 to administer housing pool on behalf of agencies which have leased or wish to lease housing to be used by employees of various agencies involved in pool and may pay rent on behalf of agencies involved directly from its own appropriations to be reimbursed by agency users on the basis of their share of total costs of State's operation of housing pool (including any operating, maintenance and utility costs paid by State)---------- 403
Costs
Loan *v.* transfer
Equipment, supplies, etc.
Loans of supplies, equipment and materials may be made on a nonreimbursed basis if for a temporary period and the borrowing agency agrees to assume costs incurred by reason of the loan. However, as further stated in 38 Comp. Gen. 558 (1959) , transfers which are or may become permanent must be made on a reimbursable basis in order to comply with section 601 of the Economy Act of 1932---------- 366
Damages
In the absence of specific statutory authority, the Department of Army may not reimburse the Department of Agriculture for cost of restoration of real property damaged by Army training exercises in De Soto National Forest. Generally, one executive department may not be reimbursed for real property damaged by another executive department. 44 Comp. Gen. 693 (1965)---------- 93
Debt collection by General Accounting Office. (*See* **DEPARTMENTS AND ESTABLISHMENTS, Services between, Debt collection, Referral to General Accounting Office**)
Federal Highway Administration/Forest Service agreements
Forest highway construction. (*See* **TRANSPORTATION DEPARTMENT, Federal Highway Administration, Cooperative agreements**)
Maintenance, etc. costs
Excess real property
General Services Administration (GSA) regulations make GSA responsible for cost to agencies of maintaining excess real property, beginning one year after it becomes excess. FPMR 101–47.402–2(b). Air Force spent $197,546 to maintain property. GSA says it is liable to reimburse only $56,000 because it offered to pay only that amount and

DEPARTMENTS AND ESTABLISHMENTS—Continued
Services between—Continued
Reimbursement—Continued
Maintenance, etc. costs—Continued
Excess real property—Continued Page

because it lacked funds to pay more. GSA is liable for full amount but we will not require GSA to seek deficiency appropriation for intragovernmental payment. GSA should budget for these expenses or change its regulation---------- 505

Merit Systems Protection Board services
Travel expenses of hearing officers

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

Written agreement requirement
Loan of personnel

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

DETAILS
Compensation
Higher grade duties assignment
Excessive period
Prior Office of Personnel Management approval
Special agency agreements

By special agreement Civil Service Commission authorized Department of Energy to detail some employees for up to 1 year during organization of the Department, subject to certain specified conditions. Agreement does not apply to employee's detail to higher-grade position because Department of Energy did not comply with conditions of agreement---- 662

Transferred position
Reclassification by new agency

Federal Power Commission (FPC) employee was transferred with her position to Department of Energy (DOE) where she continued to perform same duties until detailed to a transferred higher-grade position. During detail the higher-grade position was reevaluated and reclassified without significant change as DOE position. The employee is entitled to a retroactive temporary promotion and backpay for period of detail beyond 120 days. Detail was not one to unclassified duties merely because former FPC position had not been reclassified as DOE position and was not interrupted by reclassification. but was a continuous detail to same position---------- 662

DETAILS—Continued

Extensions

Approval

National Guard Technicians Act applicability Page

National Guard technicians, whose positions as Aircraft Mechanics, WG–10, were prevailing rate positions in excepted service, filed claims for retroactive temporary promotion and backpay under *Turner-Caldwell* line of decisions alleging improperly extended details to positions as Aircraft Mechanics (Crew Chief), WG–12. Although the positions in question are beyond the scope of coverage set forth in section 8–2, subchapter 8, chapter 300, Federal Personnel Manual, claims may be independently evaluated and adjudicated where nondiscretionary agency regulation extends coverage of FPM detail provisions to National Guard technicians in hourly wage pay plan positions 200

Office of Personnel Management approval

Delegation of authority

By FPM Bulletin 300–48, effective February 15, 1979, Office of Personnel Management (OPM) delegated authority to agencies to detail employees to higher-grade positions without prior OPM approval (1) for up to 1 year during major reorganizations as determined by the agencies; and (2) for up to 240 days in other situations. Where detail exceeded 120 days and right to backpay vested under *Turner-Caldwell* decisions prior to effective date of bulletin, employee is entitled to backpay up to effective date of bulletin. On and after effective date, however, entitlement to backpay is governed by bulletin's provisions. 662

Terminations

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

DISBURSING OFFICERS

Accounts

False, etc. claims

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

Liability

Electronic funds transfer program

Erroneous payments to bank, etc. accounts

Recovery

Limitation on bank's etc. liability

Treasury Department regulations 31 CFR Part 210 governing recurring payments made through the electronic funds transfer program directly to recipients' bank accounts, generally limits liability of financial organization to Government for payments by disbursing officer after entitlement ceased because of death or incapacity of recipient to amount of payments within 45 days after death or incapacity. Government and disbursing officer are adequately protected inasmuch as agency can recover remainder of erroneous payments from person who withdrew funds from the account. Where recovery is unsuccessful, disbursing officer can seek relief of liability from this Office under 31 U.S.C. 82a-2 ... 597

EDUCATION

Children of overseas employees Page

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

EMPLOYMENT

Ceilings

Part-time, etc. employees

Computation basis

Part-time employees, irrespective of nature of employment, currently may be counted against full-time permanent and total employment ceilings of agency. Effective October 1, 1980, under 5 U.S.C. 3404, part-time employees will be counted fractionally based upon number of hours worked 237

ENERGY

Department of Energy

Employees

Downgrading

Saved compensation

Entitlement criteria

Employee who held GS–13 position with Department of Energy (DOE) exercised statutory rights he had with former agency to reemployment in the GS–12 position he held with that agency prior to appointment with DOE, rather than undergo a transfer of function within DOE. He is not entitled to grade and pay retention under 5 U.S.C. 5361 *et seq.* since he was not placed in a lower grade position as a result of declining to transfer with his function. He chose to exercise his statutory rights of reemployment independent of any rights he may have had in connection with the transfer of function 311

Energy Research and Development Administration

Employees

Agency excepted from competitive service and General Schedule

Effect

Extended details

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

ENVIRONMENTAL PROTECTION AGENCY
Generally. (*See* **ENVIRONMENTAL PROTECTION AND IMPROVEMENT, Environmental Protection Agency**)
ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Environmental Protection Agency
Appropriations
Availability
Contracts
Cost overruns Page

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

Public intervenors

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

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

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

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 ---------- 1

ENVIRONMENTAL PROTECTION AND IMPROVEMENT—Continued
Environmental Protection Agency—Continued
Hazardous substances
Disposals, etc. control
Surplus sales
Page

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

EQUAL EMPLOYMENT OPPORTUNITY
Commission
Administrative proceedings
Attorney fees
Proposed regulations

Equal Employment Opportunity Commission (EEOC) may provide in its regulations for administrative payment of attorneys fees to prevailing party in Federal employee complaints filed under Rehabilitation Act of 1973, as amended, since scope of regulatory and judicial authority is same as granted under Title VII of Civil Rights Act of 1964, as amended 728

EEOC may provide in its regulations for administrative payment of attorneys fees to prevailing party in Federal employee complaints filed under Age Discrimination in Employment Act (ADEA) of 1967, as amended. Scope of authority granted to EEOC to regulate is virtually the same as granted in Title VII of Civil Rights Act of 1964, as amended and legislative history of 1978 amendments to ADEA shows no intent to deprive prevailing Federal employees of right available to non-Federal employees to receive attorneys fees awards 728

EQUIPMENT
Automatic Data Processing Systems
Acquisition, etc.

Procurement for expansion of computer system, wherein two of five items are sole source, and request for proposals, while prohibiting all or none offers, permits multiple-award discounts without any prohibition against unbalanced offers, is improper and recommendation is made that contract awarded by terminated and sole-source items be negotiated and competitive items be recompeted. This decision is modified by 59 Comp. Gen. 658 438

Recommendation in prior decision (59. Comp. Gen. 438) that contract be terminated and requirement resolicited is modified in view of agency contention that such action would disrupt critical computer services and current contract may continue during resolicitation effort and then be terminated if incumbent is not successful offeror under new solicitation 658

Lease-purchase agreements
Acquisition of equipment
Option evaluation
Market testing

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

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Leases
Renewal
Justification
Not established Page

No meaningful relief can be provided in best interest of Government because of inadequately justified fiscal year 1980 sole source lease where only abbreviated lease period is available for possible competitive procurement. Recommendation is made that agency plan fiscal year 1981 needs sufficiently in advance to allow competition for needed ADPE---- 283

EXECUTIVE ORDERS
Authority
Basis

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

Effect

An amendment to Executive Order 11157 by Executive Order 12094 redefined sea duty for basic allowance for quarters (BAQ) purposes; however, the amendment did not affect the Secretaries of the armed services' authority to issue supplemental regulations not inconsistent with the Executive orders. A Coast Guard member contends that he is entitled to receive BAQ in light of the new definition, while on sea duty for over 3 months, during which he spent a few days on shore. Since the claimant would not be entitled to receive BAQ under the supplemental regulations issued by the Coast Guard and since those regulations rationally effectuate 37 U.S.C. 403(c), which prohibits payment of BAQ to member without dependents who is on sea duty for 3 months or more, and the Executive orders, the claim is denied---- 192

EXPERTS AND CONSULTANTS
Fees
Witness fees

Compensation of expert witnesses, appointed by the Court under Rule 706, Federal Rules of Evidence (Public Law 93-595), in criminal proceedings is payable from Justice Department appropriations as a litigation expense. 39 Comp. Gen. 133, overruled in part---- 313

FAIR LABOR STANDARDS ACT
Overtime
Fair Labor Standards Act *v.* other pay laws

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

FAIR LABOR STANDARDS ACT—Continued
Overtime—Continued
Fair Labor Standards Act *v.* other pay laws—Continued Page

Commission made determination that employee is entitled to payment tion. Contention is without merit because act does not apply to contractors. Moreover, as practical matter, public can obtain copies from agency

Nonexempt employee under Fair Labor Standards Act performed overtime during summer in exchange for compensatory time. Civil Service Commission made determination that employee is entitled to payment of overtime under FLSA; payment is proper with offset of the value of compensatory time granted. Since supervisor did not have authority to order or approve overtime, there is no entitlement to compensatory time under title 5, United States Code. Erroneous payments of compensatory time not used as offset may be considered for waiver under 5 U.S.C. 5584 246

FEDERAL ADVISORY COMMITTEE ACT
Applicability
Reporting services
Agency proceedings
Duplication charges to public
Agency *v.* contractor status

Protester contends that (1) Federal Advisory Committee Act prohibits contractors from charging public more than actual cost of duplication for transcript copies, and (2) low bid proposed price in excess of that limitation. Contention is without merit because act does not apply to contractors. Moreover, as practical matter, public can obtain copies from agency at $0.10 per page or contractor at $0.75 per page as it freely elects 338

FEDERAL CLAIMS COLLECTION ACT OF 1966
Procedure
Standards
Agency implementation
Interest collection

Federal Claims Collection Standards do not mandate procedural requirements to be followed by agenceis in charging interest on delinquent debts. Therefore VA is free to adopt such procedural refinements as it deems appropriate. For example, where debtor could demonstrate that original debt notification was never received, imposition of interest for time between original notification and later set-off against other amounts due debtor by Government would appear to be inequitable. Consequently, it might be desirable to provide by regulation for a second notification 359

FEDERAL EMPLOYEES INTERNATIONAL ORGANIZATION SERVICE ACT
Transfer of Federal employees, etc. (*See* **INTERNATIONAL ORGANIZATIONS, Transfer of Federal employees, etc.**)

FEDERAL EMPLOYEES PART-TIME CAREER EMPLOYMENT ACT
Military leave
Entitlement

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

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977

Compliance

Cooperative agreements Page

General Accounting Office will consider complaint by bidder on solicitation issued by recipient of Federal financial assistance through cooperative agreement 758

Grant, etc, agreements *v.* procurement contract

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

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT

Procurement policies

President's authority

Space needs

Urban areas

Central business district preference

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

FEDERAL PROPERTY MANAGEMENT REGULATIONS

Excess real property

Maintenance

Cost liability

To holding agency

General Services Administration

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

FEDERAL PROPERTY MANAGEMENT REGULATIONS—Continued

Proposed revision, etc.

Definition of "urban area"

Purpose

Urban development preference policy Page

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

FEDERAL WATER POLLUTION CONTROL ACT

Grants-in-aid

Limitations

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---------- 1

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Attorneys

Grievance proceedings

Employee entitlement to fees

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

Inspection

Mobile homes

Section 620 of National Mobile Home Construction and Safety Standards Act of 1974, as amended by Housing and Community Development Act of 1979, constitutes permanent indefinite appropriation of mobile home inspection fees collected by Secretary of Housing and Urban Development. Funds will be available to pay costs of inspection program without any further action by Congress. B–114808, August 7, 1979, distinguished---------- 215

FEES—Continued

Services to public

Charges

Duplication

Agency proceedings' records Page

Protester contends that (1) Federal Advisory Committee Act prohibits contractors from charging public more than actual cost of duplication for transcript copies, and (2) low bid proposed price in excess of that limitation. Contention is without merit because act does not apply to contractors. Moreover, as practical matter, public can obtain copies from agency at $0.10 per page or contractor at $0.75 per page as it freely elects..... 338

Inspectional services

Customs' services in foreign airports

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

Regular, scheduled

Customs services in U.S. airports

Additional personnel hiring and reimbursement propriety

While there are delays in clearing Customs at Miami International Airport, there is no authority for Customs Service to accept funds from airport, airlines, or Dade County, Florida, to hire and compensate additional personnel for inspectional services during regular business hours. In absence of clear congressional mandate to contrary, monies for administering regular Customs services must come from Customs appropriations..... 294

Reimbursement from outside sources for services on behalf of general public would constitute augmentation of Customs appropriations..... 294

Witnesses

Payment

Appropriation chargeable

Compensation of expert witnesses, appointed by the Court under Rule 706, Federal Rules of Evidence (Public Law 93-595), in criminal proceedings is payable from Justice Department appropriations as a litigation expense. 39 Comp. Gen. 133, overruled in part..... 313

FLY AMERICA ACT

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

FOREIGN AID PROGRAMS
Contracts
Agency for International Development (AID) grants
Procurement procedures
Control by AID reserved
Review by GAO Page

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

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES
Education for dependents
Maximum rate
Administrative discretion
Trust Territory of the Pacific Islands

Under chapter 270 and section 912.1 of the Standardized Regulations, the High Commissioner of the Trust Territory of the Pacific Islands has the discretionary authority to establish the rate of the overseas educational allowance, 5 U.S.C. 5924(4)(A), received by Department of the Interior employees assigned to the government of the Trust Territory of the Pacific Islands below the maximum rate established by the Department of State Standardized Regulations, section 920, for the geographical areas of the Trust Territory. His exercise of this discretion based on budgetary constraints is not improper 713

New appointee

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

Territorial cost-of-living allowances
Back Pay Act applicability

Civilian employee of Air Force stationed in Japan upon involuntary dismissal returned to United States. She contested dismissal and was reinstated to the position with backpay under 5 U.S.C. 5596. The backpay award includes allowances for housing and cost of living which are paid employees working in high cost areas overseas even though the employee is not present in that area during period of wrongful dismissal. 261

FOREIGN GOVERNMENTS
Agreements
Cooperative
Indemnification provisions
Authority to settle claims

Page

General statutory authority to carry out international programs does not necessarily carry with it authority to agree to settle foreign claims against the United States 369

Insurance premium payments by United States
Limitations on liability

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

FOREIGN SERVICE
Home leave
Entitlement
Panama Canal Zone
Status as home residence

Department of State Foreign Service employee requests home leave in Panama Canal Zone. Home leave may not be authorized in Canal Zone since home leave may only be granted in continental United States or its territories and possessions and Panama Canal Treaty of 1977, effective October 1, 1979, provides that Republic of Panama has full sovereignty over Canal Zone. Since home leave for purposes of "re-Americanization" is compulsory under 22 U.S.C. 1148, employee should designate an appropriate location for this purpose 671

FOREST SERVICE
Other than timber sales. (*See* **AGRICULTURE DEPARTMENT, Forest Service**)

FRAUD
False claims
Forfeiture
Rule
Applicability
Military personnel

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

Related, etc. claim effect
Item and date separability
Fraudulent claim for lodgings effect
Actual expenses *v.* per diem

A fraudulent claim for lodgings taints the entire claim for per diem under the lodgings-plus system for days for which fraudulent information is submitted, and per diem payments will not be made to an individual for these days. 37 Comp. Gen. 664, amplified 99

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

FREEDOM OF INFORMATION ACT

Disclosure requests

Contract protester Page

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

FUNDS

Appropriated. (*See* **APPROPRIATIONS**)

Federal grants, etc. to other than States

Audit

"Audit by exception"

Request to reinstate General Accounting Office (GAO) review of grant related procurement complaint is denied where complainant voluntarily did not first seek resolution of its complaint through established Environmental Protection Agency (EPA) protest process which is part of EPA grant administration function. Intent of GAO in conducting review of complaints under Federal grants is not to interfere with grantor agencies' grant administration function 243

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

Miscellaneous receipts. (*See* **MISCELLANEOUS RECEIPTS**)

GENERAL ACCOUNTING OFFICE

Decisions

Abeyance

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

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

Overruled or modified

Prospective application

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

GENERAL ACCOUNTING OFFICE—Continued
Decisions—Continued
Reconsideration
Additional information submitted
Available but not previously provided to GAO
Agency justification for award Page

Where interested party and procuring agency, in request for reconsideration, come forward with facts which they contend require overturning prior decision, and such facts were in their possession during development of protest, evidence of interested party will not be considered. In future, procuring agency's late submission will be treated similarly but will be considered in instant matter. 59 Comp. Gen. 438, modified 658

Jurisdiction
Antitrust matters

Debarment of bidders which pled guilty to anti-trust violations involving the submission of bids is within the discretion of procuring agency and not for initial decision by General Accounting Office 761

Claims
Settlements
Authority
"Contract Disputes Act of 1978" effect

Executive agencies should continue to refer demands for payment arising under informal commitments to General Accounting Office for settlement. Contract Disputes Act of 1978 does not conflict with statutory authority of GAO to pass upon propriety of expenditures of public funds 232

Conflict of interest statutes

Although General Accounting Office does not review questions concerning agency decision denying grant award unless there is allegation that agency used grant award process to avoid competitive requirements of Federal procurement, where it appears that process of selecting grantee might have been influenced by conflict of interest, GAO will undertake review to determine whether process was tainted by favoritism or fraud. 273

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

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

Disputes
"Contract Disputes Act of 1978"

GAO will not decide whether cancellation or termination for convenience was proper method to terminate contract improperly awarded to protester. Appropriate forum for deciding issue is agency board of contract appeals since the facts are in dispute 746

Grants-in-aid

Request to reinstate General Accounting Office (GAO) review of grant related procurement complaint is denied where complainant voluntarily did not first seek resolution of its complaint through established Environmental Protection Agency (EPA) protest process which is part of EPA grant administration function. Intent of GAO in conducting review of complaints under Federal grants is not to interfere with grantor agencies' grant administration function 243

GENERAL ACCOUNTING OFFICE—Continued
Jurisdiction—Continued
Contracts—Continued
Grants-in-aid—Continued
Cooperative agreements Page

General Accounting Office will consider complaint by bidder on solicitation issued by recipient of Federal financial assistance through cooperative agreement ---- 758

In-house performance *v.* contracting out
Cost comparison
Adequacy

General Accounting Office will consider protest from bidder alleging arbitrary rejection of bid when contracting agency utilizes procurement system to aid in determination of whether to contract out by spelling out in solicitation circumstances under which contractor will or will not be awarded contract ---- 263

Exhaustion of administrative remedies

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

Small business matters
Nonresponsibility determination
Scope of GAO review

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

Procurement under 8(a) program

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

Scope of review

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

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

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

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

Protests against grant awards
No authority to consider
Exceptions

Although General Accounting Office does not review questions concerning agency decision denying grant award unless there is allegation that agency used grant award process to avoid competitive requirements of Federal procurement, where it appears that process of selecting grantee might have been influenced by conflict of interest, GAO will undertake review to determine whether process was tainted by favoritism or fraud 273

Patent infringement
Delayed payment of judgment

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

Policy determinations

General Accounting Office (GAO) will not normally review agency compliance with Executive Branch policies under Bid Protest Procedures but will consider protest which contends such policies are contrary to applicable procurement statutes and regulations 409

Recommendations
Contracts
Prior recommendations
Modified
Termination action postponement

Recommendation in prior decision (59 Comp. Gen. 438) that contract be terminated and requirement resolicited is modified in view of agency contention that such action would disrupt critical computer services and current contract may continue during resolicitation effort and then be terminated if incumbent is not successful offeror under new solicitation.. 658

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Contracts—Continued
Procurement deficiencies
Correction Page

Given closeness of scoring and inadequate negotiating approach, offeror having "best buy" for three phases of decontamination and cleanup contract is in doubt ---- 559

Resolicitation under revised specifications
Termination of awarded contract, etc.

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

Procurement for expansion of computer system, wherein two of five items are sole source, and request for proposals, while prohibiting all or none offers, permits multiple-award discounts without any prohibition against unbalanced offers, is improper and recommendation is made that contract awarded be terminated and sole-source items be negotiated and competitive items be recompeted. This decision is modified by 59 Comp. Gen. 658 ---- 438

Specifications
"Waiver of Preprinted Information" clause elimination

Low bid containing bidder's preprinted standard commercial terms and condition, which are at variance with requirements of invitation for bids (IFB), may be considered for award in view of inclusion in IFB of "Waiver of Preprinted Information" clause which permits disregarding of preprinted information under conditions applicable here. However, General Accounting Office recommends clause not be utilized in future as it constitutes arbitrary convention which permits ignoring clear lanuagge of bid ---- 347

Two-step procurement

Where protester in step one of two-step procurement does not respond timely to amendment having little impact on overall technical acceptability of proposal, but later states its compliance with amendment requirement when negotiations are reopened by subsequent amendment, agency's determination to exlcude protester's step-two bid from consideration is unreasonable. Agency relied inappropriately on concept of responsiveness in determination which is inapposite to nature of step one—the qualification of as many proposals as possible under negotiation. B–190051, Jan. 5, 1978, modified in part ---- 588

Reporting to Congress

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

GENERAL SERVICES ADMINISTRATION

Authority

Procurement of goods and services

Public utility services

Indemnification clauses in tariff/contract

Acceptance propriety Page

General Service Administration (GSA) may procure power under tariff or contract requiring customer to indemnify utility against liability arising from delivery of power. GSA has authority to procure power for Government under tariffs. Where no other practical source exists, tariff requirement is applied uniformly to purchases, without singling out Government, and risk of loss is remote, GAO will interpose no objection to existing practice of agreeing to tariff, with indemnity requirement, nor to proposed contract with similar indemnity provision. However, GSA should report situation to Congress 705

Motor pool vehicles

Liability for damages

Requisitioning agency *v.* GSA

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

Services for other agencies, etc.

Excess real property

Maintenance costs

Liability to holding agencies

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

Expired agencies

Post-expiration claims

Certification for payment authority

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

GENERAL SERVICES ADMINISTRATION—Continued
Services for other agencies, etc.—Continued
Space assignment
Including leasing
Lease validity Page

Solicitation provided that award would be based on rental price per square foot (not overall annual price) and other disclosed award factors. Where agency reports that its evaluation of disclosed factors showed protester's and awardee's proposals were equal and protester's price per square foot was lower than awardee's, agency's award determination based on undisclosed award factors (including lowest overall life-cycle cost) was improper because principles of negotiated procurement require agency to advise offerors when disclosed basis of award is changed------ 686

Urban location restriction
Central district preference

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

Legality

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

Rental
Liability of GSA damages to agency property

Government Printing Office (GPO) may not reduce Standard Level User Charge (SLUC) payments to General Services Administration (GSA) by amount of loss suffered by GPO when its supplies were damaged by water leaking through roof while stored at a GSA Stores Depot. In authorizing SLUC payments Congress intended to generate revenue and not to create a landlord-tenant relationship with all the attendant legal rights and duties---------- 515

GENERAL SERVICES ADMINISTRATION—Continued
Services for other agencies, etc.—Continued
Teleprocessing Services Program (TSP)
Multiple Award Schedule Contracts (MASC)
Minimum needs requirement
User agency determination Page

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

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

HEALTH, EDUCATION AND WELFARE DEPARTMENT
Programs
Medicare, Medicaid, etc. (*See* **SOCIAL SECURITY, Medicare, Medicaid, etc.**)

HIGHWAYS
Forest
State, etc. roads in
National Forests
Cooperative agreements
Provisions for cost, etc. reimbursement
Absence effect

No basis is seen to conclude that one Government agency is liable to second agency for cost of latter's disputes clause claim settlement with contractor, even where first agency's error was basis for settlement, since record does not disclose any agreement or mutual understanding between agencies covering situation 207

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Housing and Community Development Act
Mobile home inspection program

Section 620 of National Mobile Home Construction and Safety Standards Act of 1974, as amended by Housing and Community Development Act of 1979, constitutes permanent indefinite appropriation of mobile home inspection fees collected by Secretary of Housing and Urban Development. Funds will be available to pay costs of inspection program without any further action by Congress. B–114808, August 7, 1979, distinguished 215

HUSBAND AND WIFE
Annulments
Widow's entitlement to annuity elected by military member
Annulment of widow's remarriage. (*See* **PAY, Retired, Survivor Benefit Plan, Spouse, Annulment of widow's remarriage**)

HUSBAND AND WIFE—Continued

Divorce

Children

Divided (alternating) custody Page

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

INDEMNIFICATION

Public utilities

Services to Government. (*See* **PUBLIC UTILITIES, Government use, Damage, loss, etc. claims, Government indemnification**)

INDIAN AFFAIRS

Contracts

Bureau of Indian Affairs

Indian Self-Determination Act

Compliance determination

Indian Self-Determination Act requires Federal agency to include in prime contract for benefit of Indians provision requiring prime contractor to afford preference to Indian-owned firms in award of subcontracts to greatest extent feasible, and requirement is not satisfied by compliance with Buy-Indian Act 739

INTEREST

Debts owed United States

General rule

Contractual *v.* noncontractual debts

Distinction between contractual debts and those arising from overpayments of noncontractual benefits is not relevant in determining whether it is proper to charge interest on debts due the Government, pursuant to Federal Claims Collection Standards. Thus, absent a statute or other rule to the contrary, Veterans Administration (VA) has authority to charge interest on equitable theory that creditor is entitled to compensation for detention of his money without regard to manner in which obligation arose 359

Federal grants, etc. to States and their subdivisions

Retention of interest earned

Non-governmental subgrantee's entitlement

Non-governmental subgrantees of Federal grants to States are entitled to keep interest earned on advances from the States. Section 203 of the Intergovernmental Cooperation Act, 42 U.S.C. 4213, which exempts State grantees from accounting to the Federal Government for interest earned on grant advances, serves to exempt subgrantees as well 218

Judgments. (*See* **COURTS, Judgments, decrees, etc., Interest**)

INTERGOVERNMENTAL PERSONNEL ACT

Transportation of household goods

Return expense reimbursement

New location Page

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

INTERNATIONAL ORGANIZATIONS

Transfer of Federal employees, etc.

Federal Employees International Organization Service Act

Transfer entitlements

Limitations

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

Reemployment guarantees

Equalization allowance

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

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

JUSTICE DEPARTMENT

Appropriations. (*See* **APPROPRIATIONS, Justice Department**)

Litigation expenses

Appropriation availability. (*See* **APPROPRIATIONS. Justice Department, Litigation expenses**)

LEASES
Damages
Lessee's liability
Government lessee
General Services Administration services for other Government agencies Page

Government Printing Office (GPO) may not reduce Standard Level User Charge (SLUC) payments to General Services Administration (GSA) by amount of loss suffered by GPO when its supplies were damaged by water leaking through roof while stored at a GSA Stores Depot. In authorizing SLUC payments Congress intended to generate revenue and not to create a landlord-tenant relationship with all the attendant legal rights and duties---------- 515

Negotiation
Evaluation of offers
Undisclosed factors

Solicitation provided that award would be based on rental price per square foot (not overall annual price) and other disclosed award factors. Where agency reports that its evaluation of disclosed factors showed protester's and awardee's proposals were equal and protester's price per square foot was lower than awardee's, agency's award determination based on undisclosed award factors (including lowest overall life-cycle cost) was improper because principles of negotiated procurement require agency to advise offerors when disclosed basis of award is changed------- 686

Renewals
Competition availability
Failure to consider

Decision to lease automatic data processing equipment (ADPE) is not justified where agency has not demonstrated reasonable basis for sole-source decision after receipt of affirmative responses to Commerce Business Daily notice of intention to procure, published pursuant to Federal Procurement Regulations Temporary Regulation No. 46, notwithstanding agency's prior expectation that no alternate sources were available---------- 283

Justification
Inadequate
Corrective action recommended

No meaningful relief can be provided in best interest of Government because of inadequately justified fiscal year 1980 sole source lease where only abbreviated lease period is available for possible competitive procurement. Recommendation is made that agency plan fiscal year 1981 needs sufficiently in advance to allow competition for needed ADPE----- 283

Rent
Limitation
Fair market value determination

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

LEASES—Continued

Repairs and improvements

Limitations

Economy Act

Applicability determination

Direct *v.* indirect Government payments Page

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

Specifications

Administrative determination

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

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

LEAVES OF ABSENCE

Annual

Accrual

Maximum limitation

Establishment

Reemployment under lower leave ceiling

An employee who had a 45-day annual leave ceiling left the Federal service and received a lump sum payment. Upon re-entry into Federal service, 3 years later, the employee's annual leave ceiling is established at 30 days since he had used all of his previous 45 days of annual leave 352

Lump-sum payments. (*See* **LEAVES OF ABSENCE, Lump-sum payments**)

Recredit on restoration after unjustified removal

Current accrued leave over maximum

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

LEAVES OF ABSENCE—Continued

Annual and Sick Leave Act

Coverage

Temporary commission employees Page

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

Civilians on military duty

Entitlement

Part-time, intermittent and temporary employees

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

Compensatory time

Overtime adjustment

Fair Labor Standards Act

Nonexempt employees

Nonexempt employee under Fair Labor Standards Act performed overtime during summer in exchange for compensatory time. Civil Service Commission made determination that employee is entitled to payment of overtime under FLSA; payment is proper with offset of the value of compensatory time granted. Since supervisor did not have authority to order or approve overtime, there is no entitlement to compensatory time under title 5, United States Code. Erroneous payments of compensatory time not used as offset may be considered for waiver under 5 U.S.C. 5584 246

Set-off

Against excess annual leave taken

Administrative error

Question arising from labor-management negotiations asks whether an employee may use compensatory time to refund excess annual leave taken because it had been credited to his account through administrative error, if such compensatory time would have been available for use at time that excess annual leave was taken. While payment for excess annual leave generally must be recovered under 5 U.S.C. 6302(f), alternatively, the employee's available compensatory time balance may be charged for the excess annual leave taken through administrative error as proposed in the submission. 58 Comp. Gen. 571 (1979), modified; 45 Comp. Gen. 243 (1965), distinguished 253

Travel on nonworkday

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

LEAVES OF ABSENCE—Continued

Court

Entitlement

Complaints under Civil Rights Act

Discrimination alleged Page

Although not entitled to court leave authorized by 5 U.S.C. 6322 which is limited to jurors and certain summoned witnesses, prevailing plaintiff in civil action in U.S. District Court against employing Federal agency based on sex discrimination under the Civil Rights Act of 1964, as amended, is entitled to official time for attendance at trial and should not be charged annual leave or leave without pay 290

Home leave travel of overseas employees

Foreign service personnel. (*See* **FOREIGN SERVICE, Home leave**)

Lump-sum payments

Rate at which payable

Increases

Prevailing rate employees

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

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

Standby premium pay

Entitlement status

Extended sick leave pending disability retirement effect

Federal Aviation Administration employee is not entitled to premium pay for standby duty while on extended sick leave pending disability retirement because there is no reasonable expectancy that he will perform standby service in the future. Moreover, since he is not entitled to such pay at date of separation and he would not have received it had he remained in the service, such pay may not be included in his lump-sum annual leave payment 683

Refunds on reemployment

Installment payments

Excess leave forfeiture

Reemployment on day after separation

Since 5 U.S.C. 5551(a) authorizing lump-sum leave payment contemplates an actual separation from Government service and does not apply to a transfer such as resignation from an agency and reemployment in another agency the following day, lump-sum payment to employee separated by United States Information Agency and appointed by Air Force the next day was erroneous, and refund requirement of 5 U.S.C. 6306(a) is not applicable. In accordance with 5 C.F.R. 630.501(a), leave should have been recredited at time of reemployment and leave forfeited as result of failure to recredit leave account until lump-sum had been repaid may be restored under 5 U.S.C. 6304(d)(1)(A) 335

LEAVES OF ABSENCE—Continued
Lump-sum payments—Continued
Removal, suspension, etc. of employee
Refund on reinstatement Page

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

Status
Period of payment not service

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

Military
Civilians on military duty. (*See* **LEAVES OF ABSENCE, Civilians, on military duty**)
Military personnel
Payments for unused leave on discharge, etc.
Adjustment on basis of record correction
Rate payable for unused leave

A service member's enlistment expired after he was confined as a result of a court-martial conviction. Thereafter, he was placed in a parole status in lieu of remaining confinement time, which status was terminated on date confinement would have ended. He was then placed in an excess leave status pending appellate review of his conviction. Upon review the conviction and sentence were set aside and all rights restored includiig leave accrual. He is entitled to leave accrual through the last day of parole, not to exceed 60 days. While pay and allowances accrued only through last day of parole (59 Comp. Gen. 12) payment of lump-sum leave is to be based on rates of basic pay in effect on the date of the member's discharge, even though he was not returned to a duty status. 59 Comp. Gen. 12, modified (amplified) ---------- 595

Separations, transfers, reemployment, etc.
Annual leave ceiling establishment
After break in service

An employee who had a 45-day annual leave ceiling left the Federal service and received a lump sum payment. Upon re-entry into Federal service, 3 years later, the employee's annual leave ceiling is established at 30 days since he had used all of his previous 45 days of annual leave ---- 352

Sick
Recredit of prior leave
Reemployment
After Congressional office position

Former General Accounting Office (GAO) employee worked more than 3 years in Congressional office before accepting position with National Aeronautics and Space Administration (NASA). Although employee could not earn or use accrued sick leave in Congresional position, such employment is Federal service and is not considered break in service. Sick leave accrued in GAO position should be credited for use by NASA in accordance with 5 C.F.R. 630.502(e) ---------- 704

LEGISLATION
Overcoming General Accounting Office decisions
Wage board employees
Entitlement to double overtime
Civil Service Reform Act, 1978, effect Page

In 1967, Corps of Engineers, North Pacific Division, and Columbia Power Trades Council, representing wage board employees at hydroelectric power plants negotiated a double overtime provision in their agreement. Double overtime was stopped by agency following our decision in 57 Comp. Gen. 259, February 3, 1978. In light of section 704 of Civil Service Reform Act which overruled our decision, and although wages are not negotiated, provision for double overtime is preserved by section 9(b) of Public Law 92-392. This decision is modified (extended by 60 Comp. Gen. —— (B-180010.07, Nov. 7, 1980)..... 583

Statutory construction. (*See* **STATUTORY CONSTRUCTION**)

LICENSES
Import licensing authority
Nuclear Regulatory Commission
Exemption
State agreement effect

License requirements are matters of responsibility, at heart of which is question whether offeror can perform. We believe that requirement for license from Nuclear Regulatory Commission (NRC) in procurement involving nuclear by-products is satisfied by foreign offeror whose local representative has qualifying license from State of North Carolina, under State agreement with NRC, and which exempts representative from requirement for obtaining NRC-issued import license..... 298

Offeror qualifications

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Offers or Proposals, Qualifications of offerors**)

LOBBYING
Appropriation prohibition
Promoting public support or opposition

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

MEDICARE AND MEDICAID (*See* **SOCIAL SECURITY, Medicare, Medicaid, etc.**)

MERIT SYSTEMS PROTECTION BOARD
Appropriations
Reimbursement
Travel expenses of hearing officers. (*See* **DEPARTMENTS AND ESTABLISHMENTS, Services between, Reimbursement, Merit Systems Protection Board services**)
Special Counsel
Authority under Civil Service Reform Act of 1978
Corrective action
Recommendations
Attorney fees Page

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

MILEAGE
Carpool arrangement
Effect
Temporary duty near headquarters
Travel expense reimbursement
Cost comparison basis

Employee who frequently performs temporary duty near his headquarters claims mileage for travel between residence and temporary duty station. Agency regulations require deduction of normal commuting expenses from such mileage claims, but regulations do not provide guidance on computing expenses incurred in use of carpool. In absence of agency regulations, employee's normal commuting expenses should be determined on weekly basis and be divided by five to determine daily expense.. 605

Military personnel
Travel by privately owned automobile
Advantageous to Government
Temporary duty

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

Between residence and temporary duty station

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

MILEAGE—Continued
Military personnel—Continued
Travel by privately owned automobile—Continued
Interstation travel *v.* travel within limits of duty station Page
Member of the Marine Corps travelled by privately owned vehicle from his home in Springfield, Virginia, to Quantico, Virginia, in order to perform temporary duty. Member's travel is interstation travel and therefore payment of his travel allowance is governed by 37 U.S.C. 404 (1976), and the implementing regulations 397
Proration formula
Air transportation in violation of "Fly America Act"
Where carrier submits evidence of air freight charges paid, part of which were improperly diverted from American-flag air carrier contrary to the Fly America Act, its bill for through door-to-door transportation charges, less air freight charges improperly diverted as determined by the mileage proration formula in 56 Comp. Gen. 209 (1977), may be certified for payment. B–188227, May 8, 1978, modified 124
Travel by privately owned automobile
Between residence and headquarters
Travel between headquarters and temporary duty points
Expense reimbursement
Cost comparison—carpool-travel-to-headquarters' effect
Employee who frequently performs temporary duty near his headquarters claims mileage for travel between residence and temporary duty station. Agency regulations require deduction of normal commuting expenses from such mileage claims, but regulations do not provide guidance on computing expenses incurred in use of carpool. In absence of agency regulations, employee's normal commuting expenses should be determined on weekly basis and be divided by five to determine daily expense 605
Taxicab fare cost limitation
Federal mine inspectors drive their privately owned vehicles to their duty station and then use a Government vehicle to travel to various inspection sites which take them away from the duty station and their residences for one or more nights. Authorization for payment of mileage in such circumstances from home to work and work to home is contingent upon payment of taxi fares in similar circumstances and within the agency's discretion to authorize or deny 333

MILITARY PERSONNEL
Allowances
Basic allowance for quarters (BAQ). (*See* **QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ)**)
Dislocation. (*See* **MILITARY PERSONNEL, Dislocation allowance**)
Annuity elections for dependents
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Civilian service employment
Incompatibility with active military service
The rules governing parole of a service member confined by military authorities as a result of a court-martial sentence require as a prerequisite to that parole that the parolee will have gainful employment. Therefore, in the absence of a statute so authorizing, it would be improper to set off civilian earnings against military pay due for a parole period which becomes a period of entitlement to pay and allowances, unless the earnings are from Federal civilian employment which is considered incompatible with military service Modified (amplified) by 59 Comp. Gen. 595 12

MILITARY PERSONNEL—Continued

Claims

Fraudulent

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

Dependents

Certificates of dependency

Filing requirements Page

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

Education

Procedure to obtain

Employee of Department of Army stationed in Korea who entered into a private arrangement with a private school for education of his daughter may not be reimbursed for the costs he incurred prior to Department of Defense's (DOD) contractual arrangement with the school. Authority for DOD providing for the schooling of dependents of employees stationed overseas, provisions in annual DOD appropriation acts, expressly provides that appropriations therefor are for expenditure in accordance with 10 U.S.C. 7204. That provision contemplates that needed arrangements for schooling are to be made by the Department concerned and that a parent has no authority to obligate the Government by a private agreement 581

Dislocation allowance

Members with dependents. (*See* **TRANSPORTATION, Dependents, Military personnel, Dislocation allowance**)

Members without dependents

Unable to occupy assigned quarters

A dislocation allowance may be paid to members without dependents of both the on-ship and off-ship crews of nuclear submarines incident to a change of home port of the submarine, when they initially occupy permanent non-Government quarters at the new home port although the submarine is the permanent station for both crews. This is based on the view that Congress did not intend to preclude payment of the allowance when a member is not able to occupy quarters assigned to him and does incur the expense of moving into non-Government quarters. 57 Comp. Gen. 178 modified (extended) 221

Home port change

Expense reimbursement in lieu of allownace

A naval officer without dependents is not entitled to a dislocation allowance when he is required to obtain non-Government quarters because his ship is declared uninhabitable due to overhaul and repair upon the ship's arrival at a new home port. However, an officer in this situation is entitled to reimbursement under the provisions of 10 U.S.C. 7572(b) for expenses incurred incident to obtaining private quarters 708

What constitutes

Regulation change approved by GAO

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

MILITARY PERSONNEL—Continued

Household effects

Storage. (*See* **STORAGE, Household effects, Military personnel**)

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

Leaves of absence. (*See* **LEAVES OF ABSENCE, Military personnel**)

Mileage. (*See* **MILEAGE, Military personnel**)

Missing, interned, etc. persons

Promotions while in missing-in-action status Page

Survivor Benefit Plan annuity for the surviving spouse of member who dies while on active duty when otherwise eligible to retire, is computed on grade and years of service as though member retired on the day he died. Computation includes limitations on grade for retirement purposes such as the 6-month in grade requirement. However, where a member who who was missing in action is determined to have been killed in action, the 6-month in grade requirement does not apply since promotions received while in a missing status are "fully effective for all purposes," under 37 U.S.C. 552(a) 276

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

Retired. (*See* **PAY, Retired**)

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

Record correction

Payment basis

Leave accrual

A service member's enlistment expired after he was confined as a result of a court-martial conviction. Thereafter, he was placed in a parole status in lieu of remaining confinement time, which status was terminated on date confinement would have ended. He was then placed in an excess leave status pending appellate review of his conviction. Upon review the conviction and sentence were set aside and all rights restored including leave accrual. He is entitled to leave accrual through the last day of parole, not to exceed 60 days. While pay and allowances accrued only through last day of parole (59 Comp. Gen. 12) payment of lump-sum leave is to be based on rates of basic pay in effect on the date of the member's discharge, even though he was not returned to a duty status. 59 Comp. Gen. 12, modified (amplified) 595

Release of Government from additional claims

Court judgment

Air Force member who successfully sues in Federal District Court for reinstatement to active duty and damages may not recover on an administrative claim for backpay in excess of $10,000 jurisdictional limitation of district court under 28 U.S.C. 1346(a)(2). Since claim filed concerns same parties and issues, including amount of damages, as decided by district court, doctrine of *res judicata* precludes consideration of this claim 624

Retired pay. (*See* **PAY, Retired**)

Station allowances, (*See* **STATION ALLOWANCES, Military personnel**)

Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

Survivorship annuities. (*See* **PAY, Retired, Survivor Benefit Plan**)

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

MILITARY PERSONNEL—Continued
Training duty station
Involuntary extension at same station
Change of local residence
Transportation allowances Page

Neither 37 U.S.C. 406(e) nor any other provision of statutory law contains authority which would permit the amendment of Volume 1, Joint Travel Regulations, to allow the drayage of a service member's household goods to a new residence when his duty assignment at a given location is extended, and he then elects solely as a matter of personal preference to move to new living quarters 626

Transportation
Household effects. (*See* **TRANSPORTATION, Household effects, Military personnel**)
Travel allowances. (*See* **TRAVEL ALLOWANCES, Military personnel**)
Travel expenses. (*See* **TRAVEL EXPENSES, Military personnel**)

MISCELLANEOUS RECEIPTS
Special account *v.* Miscellaneous Receipts
Collections
Rent payments
Government-furnished quarters

Forest Service Certifying Officer may use amounts remaining in appropriations as a result of payroll deduction for use of Government quarters, for maintenance and operation expenses of such quarters. 5 U.S.C. 5911(c) allows such deductions to remain in applicable appropriation and Forest Service's appropriations from which salaries are paid are available for such expenses 235

Telephone commissions

Commissions received by the Bureau of Prisons, based on collections from pay telephones provided for the exclusive use of inmates and penal and correctional institutions of the Bureau must be deposited into the general fund of the Treasury as miscellaneous receipts. No substantial outlays from Bureau appropriations is made for installation and provisions of pay telephone service. Therefore, 18 U.S.C. 4011, providing an exception to 31 U.S.C. 484, is not applicable 213

NATIONAL ENDOWMENT FOR THE ARTS
Appropriation availability
Promoting public support or opposition. (*See* **APPROPRIATIONS, Availability, Promoting Public support or opposition**)

NATIONAL GUARD
Civilian employees
Technicians
Extended details
Retroactive promotion

National Guard technicians, whose positions as Aircraft Mechanics, WG-10, were prevailing rate positions in excepted service, filed claims for retroactive temporary promotion and backpay under *Turner-Caldwell* line of decisions alleging improperly extended details to positions as Aircraft Mechanics (Crew Chief), WG-12. Although the positions in question are beyond the scope of coverage set forth in secton 8-2, subchapter 8, chapter 300, Federal Personnel Manual, claims may be independently evaluated and adjudicated where nondiscretionary agency regulation extends coverage of FPM detail provisions to National Guard technicians in hourly wage pay plan positions 200

NONDISCRIMINATION
Discrimination alleged
Federal employees
Court leave. (*See* **LEAVES OF ABSENCE, Court, Entitlement, Complaints under Civil Rights Act**)

NUCLEAR REGULATORY COMMISSION
Adjudicative proceedings
Public intervenors
Financial assistance Page

Nuclear Regulatory Commission may use appropriated funds to provide financial assistance to intervenors in its proceedings if it determines that participation of party can reasonably be expected to contribute substantially to a full and fair determination of the issues before it, and if intervenor is indigent or otherwise unable to finance its own participation 228

OFFICE OF MANAGEMENT AND BUDGET
Circulars
No. A-76
Revision
Effective date
Cost comparison

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

No. A-102
Attachment O
State and local grantee procurements
Brooks Bill—nonapplicability

Grantee's solicitation requiring all responding architectural and engineering (A/E) professional services firms to furnish cost and pricing data, to be considered along with statement of qualifications in selection of A/E firm, is not shown to be contrary to terms of OMB Circular A-102, Attachment O, or Ohio law. A/E procurement procedures in 40 U.S.C. 541 (Brooks Bill), mandatory for Federal procurements for A/E services, are not *per se* applicable to grantee procurements 251

OFFICE OF PERSONNEL MANAGEMENT
Jurisdiction
Fair Labor Standards Act

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

OFFICE OF PERSONNEL MANAGEMENT—Continued

Regulations

Details to higher grade

Excessive period

Approval requirement

Delegation of authority Page

By FPM Bulletin 300–48, effective February 15, 1979, Office of Personnel Management (OPM) delegated authority to agencies to detail employees to higher-grade positions without prior OPM approval (1) for up to 1 year during major reorganizations as determined by the agencies; and (2) for up to 240 days in other situations. Where detail exceeded 120 days and right to backpay vested under *Turner-Caldwell* decisions prior to effective date of bulletin, employee is entitled to backpay up to effective date of bulletin. On and after effective date, however, entitlement to backpay is governed by bulletin's provisions 662

OFFICERS AND EMPLOYEES

Appointments. (*See* **APPOINTMENTS**)

Back Pay Act

Applicability

Allowances

Overseas employees

Civilian employee of Air Force stationed in Japan upon involuntary dismissal returned to United States. She contested dismissal and was reinstated to the position with backpay under 5 U.S.C. 5596. The backpay award includes allowances for housing and cost of living which are paid employees working in high cost areas overseas even though the employee is not present in that area during period of wrongful dismissal 261

Compensation. (*See* **COMPENSATION**)

Conflict of interest statutes

Parties seeking Government employment

Conflict status

Record does not indicate agency acted improperly in making grant award to firm whose President had applied for agency's Regional Director position where evaluation and grant selection were performed at agency's centralized administrative office rather than by relevant regional office 273

Details. (*See* **DETAILS**)

Handicapped

Attendants

Subsistence

Per diem. (*See* **SUBSISTENCE, Per diem, Attendants, Handicapped employees**)

Travel expenses. (*See* **TRAVEL EXPENSES, Private parties, Attendents, Handicapped employees**)

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

Lump-sum payments. (*See* **LEAVES OF ABSENCE, Lump-sum payments**)

Mileage. (*See* **MILEAGE**)

OFFICERS AND EMPLOYEES—Continued

Overseas
Dependents
Education
Procedure to obtain
Department of Defense employees Page

Employee of Department of Army stationed in Korea who entered into a private arrangement with a private school for education of his daughter may not be reimbursed for the costs he incurred prior to Department of Defense's (DOD) contractual arrangement with the school. Authority for DOD providing for the schooling of dependents of employees stationed overseas, provisions in annual DOD appropriation acts, expressly provides that appropriations therefor are for expenditure in accordance with 10 U.S.C. 7204. That provision contemplates that needed arrangements for schooling are to be made by the Department concerned and that a parent has no authority to obligate the Government by a private agreement 581

Travel expenses

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

Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)

Home leave
Residence determination
Panama Canal Zone status

Department of State Foreign Service employee requests home leave in Panama Canal Zone. Home leave may not be authorized in Canal Zone since home leave may only be granted in continental United States or its territories and possessions and Panama Canal Treaty of 1977, effective October 1, 1979, provides that Republic of Panama has full sovereignty over Canal Zone. Since home leave for purposes of "re-Americanization" is compulsory under 22 U.S.C. 1148, employee should designate an appropriate location for this purpose 671

Personnel ceilings. (*See* **EMPLOYMENT, Ceilings**)

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

Promotions
Compensation (*See* **COMPENSATION, Promotions**)
Temporary
Detailed employees

By special agreement Civil Service Commission authorized Department of Energy to detail some employees for up to 1 year during organization of the Department, subject to certain specified conditions. Agreement does not apply to employee's detail to higher-grade position because Department of Energy did not comply with conditions of agreement 662

OFFICERS AND EMPLOYEES—Continued
Promotions—Continued
Temporary—Continued
Detailed employees—Continued
Agency excepted from competitive service and General Schedule effect Page

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

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 employees 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 51

After higher grade appointment to energy agency
Higher grade and pay retention
Non-entitlement

Employee who held GS–13 position with Department of Energy (DOE) exercised statutory rights he had with former agency to reemployment in the GS–12 position he held with that agency prior to appointment with DOE, rather than undergo a transfer of function within DOE. He is not entitled to grade and pay retention under 5 U.S.C. 5361 *et seq.* since he was not placed in a lower grade position as a result of declining to transfer with his function. He chose to exercise his statutory rights of reemployment independent of any rights he may have had in connection with the transfer of function 311

Salary retention. (*See* **COMPENSATION, Downgrading, Saved compensation**)
Relocation expenses
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Service agreements
Transfers. (*See* **OFFICERS AND EMPLOYEES, Transfers, Service agreements**)
Suits against
Attorneys' fees. (*See* **ATTORNEYS, Fees**)

OFFICERS AND EMPLOYEES—Continued

Training

Transportation and/or per diem

Cost comparison requirement Page

Where agency is sending employees on training assignments, before agency decides to pay for the transportation of employee's dependents and household goods, cost comparisons, on individual basis, are required by 5 U.S.C. 4109 and the applicable agency regulations. In this case since proper cost comparisons were not made prior to issuing orders authorizing payment for transportation of employee's dependents and household goods, such orders were not competent and may be retroactively modified to implement Grievance Examiner's recommendations to allow payment of per diem. In each of these cases a cost comparison showed that per diem would have been less costly, but apparently actual, as opposed to projected, transportation costs were less than per diem 619

Transfers

Government *v.* employee interest

Merit promotion transfers

Relocation expense reimbursement

Absence of agency regulations

Employee, who transferred from Department of the Interior, New Orleans, to Commission on Civil Rights, Washington, D.C., claims relocation expenses on basis that transfer was under merit promotion program. Agency denied claim because transfer was for convenience of employee and because of budget constraints. Employee may not be denied relocation expenses of transfer pursuant to selection under merit promotion plan on basis that the employee initiated the job request by replying to a vacancy announcement. Budget constraints do not justify denial of relocation expenses on transfer in interest of Government. *Fontanella*, B–184251, July 30, 1974, modified (amplified). This decision was later modified (extended) by B–201256, Apr. 27, 1981 699

Relocation expenses

House hunting. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Transportation for house hunting**)

Miscellaneous expenses

"Ham" radio equipment

Disconnection and reinstallation

Transferred employee claims miscellaneous expenses for taking down and reinstalling "ham" radio antenna and hooking up icemaker and dishwasher. Employee is entitled to be reimbursed these expenses under para. 2–3.1b(1) of the Federal Travel Regulations which specifies reimbursement of fees for disconnecting and connecting appliances and equipment. Employee may not be reimbursed for replacing certain incidental parts needed to reinstall antenna. Modified in part by 60 Comp. Gen. (B–191662, Mar. 3, 1981) 600

New appointees

Manpower shortage category

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

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Real estate expenses
Retransfer of employee
To former station Page

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

Transportation for house hunting
Handicapped employees

Blind employee of Internal Revenue Service who was transferred from Jackson, Mississippi, to Atlanta, Georgia, claims travel expenses of attendant who accompanied him and his wife, who is also blind, on househunting trip and on permanent change of station travel. Travel expenses of attendant may be paid as necessary expenses of employee's travel since such payment is consistent with explicit congressional intent to employ the handicapped and prohibit discrimination based on physical handicap. *H. W. Schulz*, B-187492, May 26, 1977; *John F. Collins*, 56 Comp. Gen. 661 (1977)---- 675

What constitutes "permanent change of station"
Temporary position description
Not controlling for reimbursement purpose

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

Service agreements
Failure to fulfill
Absence 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 creditable service for purpose of service agreement---- 25

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

OFFICERS AND EMPLOYEES—Continued
Traveltime
Hours of travel
Regular *v.* nonduty hours
Where airline overbooked the Thursday night flight on which employee had reservations for return travel and rebooked him on the next available flight, employee is not entitled to overtime compensation or compensatory time off for his travel time under 5 U.S.C. 5542(b)(2)(B). Although agency did not have control over airline's actions which delayed employee's travel, the event that necessitated his travel—return to his permanent duty station—was subject to administrative control. Employee's presence at his duty station the following workday was not an administratively uncontrollable event 95
Overtime. (*See* **COMPENSATION, Overtime, Traveltime**)
Unions
Membership
Allotment for dues. (*See* **UNIONS, Federal service, Dues, Allotment for**)
Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)

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

PANAMA CANAL ZONE
Status. (*See* **CANAL ZONE, Status**)

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

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

PAY

After expiration of enlistment

Confinement, etc., periods

Release

Prior to setting aside of conviction

Rate payable for unused leave lump payment

A service member's enlistment expired after he was confined as a result of a court-martial conviction. Thereafter, he was placed in a parole status in lieu of remaining confinement time, which status was terminated on date confinement would have ended. He was then placed in an excess leave status pending appellate review of his conviction. Upon review the conviction and sentence were set aside and all rights restored including leave accrual. He is entitled to leave accrual through the last day of parole, not to exceed 60 days. While pay and allowances accrued only through last day of parole (59 Comp. Gen. 12) payment of lump-sum leave is to be based on rates of basic pay in effect on the date of the member's discharge, even though he was not returned to a duty status. 59 Comp. Gen. 12, modified (amplified) 595

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. Modified (amplified) by 59 Comp. Gen. 595 12

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

Missing, interned, etc. persons

Promotions

"Effective for all purposes"

Survivor Benefit Plan annuity for the surviving spouse of member who dies while on active duty when otherwise eligible to retire, is computed on grade and years of service as though member retired on the day he died. Computation includes limitations on grade for retirement purposes such as the 6-month in grade requirement. However, where a member who was missing in action is determined to have been killed in action, the 6-month in grade requirement does not apply since promotions received while in a missing status are "fully effective for all purposes," under 37 U.S.C. 552(a) 276

Record correction. (*See* **MILITARY PERSONNEL, Record correction**)

Retired

Advance payment

Retired pay is included within the definition of pay in 37 U.S.C. 101-(21). Therefore, authority in 37 U.S.C. 1006(h) to make payments up to 3 days in advance of a regular payday, of pay and allowances to individuals under the jurisdiction of the Secretaries of the military departments includes payments of retired pay 219

PAY—Continued
Retired—Continued
Alternate method
Public Law 94–106 effect Page

Military retired pay is adjusted to reflect changes in the Consumer Price Index rather than changes in active duty pay rates, and as a result a "retired pay inversion" problem arose: service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a (f), title 10, U.S. Code, was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement 691

Annuity elections for dependents
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Civilian employment
State law effect
Community property states

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

Computation
Uniform Retirement Date Act
Public Law 94–106 effect
Navy, Marine and Public Health Service officers

Since the Uniform Retirement Date Act, 5 U.S.C. 8301, generally provides for retirements to become effective on the first day of a month, language contained in certain provisions of law authorizing the voluntary retirement of Navy, Marine Corps, and Public Health Service officers also providing for retirement on the first day of a month may be regarded as a surplusage insofar as retired pay computations under 10 U.S.C. 1401a(f) are concerned. Hence, those officers may have their retired pay computed under 10 U.S.C. 1401a(f) in the same manner as other service members, i.e., on the basis of retirement eligibility on the date immediately preceding an active duty pay rate change 691

Effective date
Uniform Retirement Date Act
Public Law 94–106 effect

In computing retired pay under 10 U.S.C. 1401a(f), the date immediately preceding an active duty basic pay rate change should generally be used as the earlier date of voluntary retirement eligibility, since this will normally result in a computation most favorable to the service member concerned. Under the Uniform Retirement Date Act, 5 U.S.C. 8301, the hypothetical earlier retirement would have become effective on the first day of the following month, but retired pay could be computed on the basis of retirement eligibility on the date immediately preceding the active duty pay rate change 691

PAY—Continued
Retired—Continued
Grade, rank, etc. at retirement
Three and four star general officers
Time-in-grade restrictions
Public Law 94–106 effect Page

Where an Army or Air Force officer is retired in the grade of lieutenant general or general under 10 U.S.C. 3962 or 8962, the time-in-grade restrictions in 10 U.S.C. 3963 or 8963 do not apply in selecting an earlier hypothetical retirement date for retired pay computation pursuant to 10 U.S.C. 1401a(f) 691

Rate at time of retirement
Basis of computation
Alternate method

Military retired pay is adjusted to reflect changes in the Consumer Price Index rather than changes in active duty pay rates, and as a result a "retired pay inversion" problem arose: service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, U.S. Code, was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement 691

Survivor Benefit Plan
Beneficiary payments
Prohibition

Payments such as survivor annuities to dependents not included within the definitions of pay and allowances contained in title 37, United States Code, may not be made in advance under the authority of 37 U.S.C. 1006(h) 219

Coverage charges
Commencement date
Retirement on day other than first of month

Active duty service members are usually retired effective the first day of a month. If they participate in the SBP, the computed costs of coverage are assessed at the monthly rate for the whole retirement month. If an active duty member is placed in a retired or retainer pay status effective on a day other than the first of a month and participates in the SBP, charge for coverage begins the first day of the month beginning after retirement unless a regulation is issued pursuant to 10 U.S.C. 1455 providing for pro rata charge for part of a monthly coverage. 57 Comp. Gen. 847, modified 569

Coverage termination on first day of month
Proration authority

Where a retired member is participating in the Survivor Benefit Plan (SBP) and his elected spouse coverage is to be terminated because the eligible spouse beneficiary died on the first day of the month, so long as the eligible spouse beneficiary was in being at the first moment of the first day of the month full reduction of retired pay or retainer pay for spouse coverage is required for that month. Charges for that month may be made on a pro rata basis only if regulations providing for such a change are issued under 10 U.S.C. 1455. 57 Comp. Gen. 847 (1978), modified 569

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Missing persons
Computation of annuity
After date of death determination Page

Survivor Benefit Plan annuity for the surviving spouse of member who dies while on active duty when otherwise eligible to retire, is computed on grade and years of service as though member retired on the day he died. Computation includes limitations on grade for retirement purposes such as the 6-month in grade requirement. However, where a member who was missing in action is determined to have been killed in action, the 6-month in grade requirement does not apply since promotions received while in a missing status are "fully effective for all purposes," under 37 U.S.C. 552(a) ---- 276

Spouse
Annulment of widow's remarriage
Annuity reinstatement date

Where the beneficiary of Survivor Benefit Plan annuity payments remarried before the age of 60 causing her annuity payments to be terminated and the second marriage was subsequently annulled, beneficiary is entitled to have her annuity payments reinstated effective as of the first day of the month in which the decree annulling her remarriage was rendered. See 10 U.S.C. 1450(b) (1976) ---- 725

Social Security offset

Service members, upon whose death Survivor Benefit Plan (SBP) annuities became payable to surviving spouses, in some cases are fully insured for Social Security coverage based on lifetime employment, but do not achieve that status based solely on military service. For the purpose of the reduction in the SBP annuity required by 10 U.S.C. 1451(a), it is unnecessary that the member acquired a fully insured Social Security status based solely on military service. The setoff is to be based on that portion of the total Social Security payment attributable to the deceased member's military service. See 58 Comp. Gen. 795 (1979) ---- 586

Free wage credit inclusion

Service members upon whose death SBP annuities became payable to surviving spouses, receive free wage credits under 42 U.S.C. 429 for military service after 1956 for the purpose of computing total Social Security payments. Therefore, for the purpose of computing the setoff required by 10 U.S.C. 1451(a), since generally those credits tend to increase Social Security payments, they must be included in the computation ---- 586

Waiver for civilian retirement benefits
Survivor Benefit Plan coverage
Effect

A retired service member who elected survivor benefit plan (SBP) coverage and who later retires as a Civil Service employee may waive receipt of military retired pay in order to combine military with civilian service for purposes of computing his Civil Service annuity. It was held in B-192470, January 3, 1979, that an individual who waives military retired pay in those circumstances and accepts survivor coverage under Civil Service Retirement is not covered by SBP and upon his death no payment under SBP either to his widow or his surviving children may be allowed. This is true even where the individual had "child only" coverage under the SBP. On reconsideration that decision is sustained ---- 225

PAYMENTS

Advance

Pay and allowances

Authority Page

Retired pay is included within the definition of pay in 37 U.S.C. 101 (21). Therefore, authority in 37 U.S.C. 1006(h) to make payments up to 3 days in advance of a regular payday, of pay and allowances to individuals under the jurisdiction of the Secretaries of the military departments includes payments of retired pay ---------- 219

Prohibition

Exceptions

Grants

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

Survivor annuities

Prohibition

Payments such as survivor annuities to dependents not included within the definitions of pay and allowances contained in title 37, United States Code, may not be made in advance under the authority of 37 U.S.C. 1006(h) ---------- 219

PER DIEM (*See* **SUBSISTENCE, Per diem**)

POSTAL SERVICE, UNITED STATES

Mails

"Penalty" mail

Use

Court reporters

Federal courts. (*See* **COURTS, Reporters, Federal courts, "Penalty mail" use**)

PRINTING AND BINDING

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

PROCUREMENT

In-house *v.* commercial sources

General Accounting Office will consider protest from bidder alleging arbitrary rejection of bid when contracting agency utilizes procurement system to aid in determination of whether to contract out by spelling out in solicitation circumstances under which contractor will or will not be awarded contract ---------- 263

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

PROCUREMENT—Continued

Statutory changes

Implementation

Effective date of application

Perference to Indian concerns Page

Where almost 5 years elapses from time of enactment of statute before regulation is promulgated requiring Federal agency to include in prime contract for Indians' benefit subcontracting preference for Indian firms, agency may not be excused from implementing statutory requirements because regulation was published after bid opening ---------- 739

PROPERTY

Private

Damage, loss, etc.

Carrier's liability

Released valuation

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

Public

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

PROTESTS

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

PUBLIC LANDS

Interagency loans, transfers, etc.

Damages, restoration, etc.

Authority

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

PUBLIC UTILITIES

Government use

Damage, loss, etc. claims

Government indemnification

General Services Administration (GSA) may procure power under tariff or contract requiring customer to indemnify utility against liability arising from delivery of power. GSA has authority to procure power for Government under tariffs. Where no other practical source exists, tariff requirement is applied uniformly to purchases, without singling out Government, and risk of loss is remote, GAO will interpose no objection to existing practice of agreeing to tariff, with indemnity requirement, nor to proposed contract with similar indemnity provision. However, GSA should report situation to Congress ---------- 705

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

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

Small
Small business concerns
Certificate of Competency procedures under SBA
Applicability

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

Army contracting officer's failure to refer determination of nonresponsibility of small business to Small Business Administration, although consistent with applicable regulation, is contrary to Small Business Act. While contract award is not disturbed, General Accounting Office recommends that Defense Acquisition Regulation 1-705.4(c), covering Certificate of Competency procedures, be promptly revised to eliminate exception to referral requirement for proposed awards not exceeding $10,000, since amended Small Business Act provides for no such exception---------- 637

QUARTERS
Government furnished
Rent payments
Salary deduction *v.* direct payment
Special account reimbursement propriety

Forest Service Certifying Officer may use amounts remaining in appropriations as a result of payroll deduction for use of Government quarters, for maintenance and operation expenses of such quarters. 5 U.S.C. 5911(c) allows such deductions to remain in applicable appropriation and Forest Service's appropriations from which salaries are paid are available for such expenses---------- 235

Unable to occupy
Military members without dependents
Dislocation allowance

A dislocation allowance may be paid to members without dependents of both the on-ship and off-ship crews of nuclear submarines incident to a change of home port of the submarine, when they initially occupy permanent non-Government quarters at the new home port although the submarine is the permanent station for both crews. This is based on the view that Congress did not intend to preclude payment of the allowance when a member is not able to occupy quarters assigned to him and does incur the expense of moving into non-Government quarters. 57 Comp. Gen. 178 modified (extended)---------- 221

QUARTERS—Continued
Unable to occupy—Continued
Military members without dependents—Continued
Dislocation allowance—Continued
Page

A naval officer without dependents is not entitled to a dislocation allowance when he is required to obtain non-Government quarters because his ship is declared uninhabitable due to overhaul and repair upon the ship's arrival at a new home port. However, an officer in this situation is entitled to reimbursement under the provisions of 10 U.S.C. 7572(b) for expenses incurred incident to obtaining private quarters 708

Vacating
Military members without dependents
Return after extended temporary duty
Allowance entitlements

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

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Assigned to Government quarters
Member on sea duty
Regulation requirements
Coast Guard

An amendment to Executive Order 11157 by Executive Order 12094 redefined sea duty for basic allowance for quarters (BAQ) purposes; however, the amendment did not affect the Secretaries of the armed services' authority to issue supplemental regulations not inconsistent with the Executive orders. A Coast Guard member contends that he is entitled to receive BAQ in light of the new definition, while on sea duty for over 3 months, during which he spent a few days on shore. Since the claimant would not be entitled to receive BAQ under the supplemental regulations issued by the Coast Guard and since those regulations rationally effectuate 37 U.S.C. 403(c), which prohibits payment of BAQ to member without dependents who is on sea duty for 3 months or more, and the Executive orders, the claim is denied 192

Dependents
Certificates of dependency
Filing requirements
Annual recertification

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

QUARTERS ALLOWANCE—Continued
Basic allowance for quarters (BAQ)—Continued
Dependents—Continued
Husband and wife both members of armed services
Dependent children from prior marriage
Parent not occupying Government quarters Page

A military member married to a military member occupies Government quarters with their dependent child. Upon a permanent change of station of the male member, the female member remains in Government quarters with the dependent child. Male member is not provided Government quarters at new station and claims a basic allowance for quarters (BAQ) at the with-dependent rate since he is paying child support to a former non-military spouse not residing in Government quarters with dependent children. The male member is entitled to BAQ at the with-dependent rate since his BAQ entitlement is determined independent of his military spouse where they do not reside in the same household 681

Termination
Members without dependents
Sea or field duty for 3 months or more
Temporary or permanent

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

Dependents
Quarters occupancy prevented by "competent authority"
Allowance continuation period
After authorization and prior to occupancy

Member is transferred overseas with deferred travel of dependents due to unavailability of Government quarters. Upon arrival, member is assigned Government quarters available for himself and dependents due to administrative error. Under 37 U.S.C. 403(d), member is entitled to basic allowance for quarters (BAQ) at the with dependent rate as orders of competent authority prevent dependents from joining him and residing in Government quarters. Upon authorization of dependents' travel, member is entitled to continuation of BAQ until transportation is available for dependents' travel, and arrangements are made for household goods, plus normal travel time of dependents to member's station. See 25 Comp. Gen. 220 (1945) 291

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

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

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

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

RECORDS
Military personnel
Correction. (*See* **MILITARY PERSONNEL, Record correction**)

REGULATIONS
Amendment
Retroactive. (*See* **REGULATIONS, Retroactive**)
Effective date
Modification

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

Joint Travel. (*See* **REGULATIONS, Travel, Joint**)
Legality
Military personnel
Basic allowance for quarters (BAQ)
Sea duty

An amendment to Executive Order 11157 by Executive Order 12094 redefined sea duty for basic allowance for quarters (BAQ) purposes; however, the amendment did not affect the Secretaries of the armed services' authority to issue supplemental regulations not inconsistent with the Executive orders. A Coast Guard member contends that he is entitled to receive BAQ in light of the new definition, while on sea duty for over 3 months, during which he spent a few days on shore. Since the claimant would not be entitled to receive BAQ under the supplemental regulations issued by the Coast Guard and since those regulations rationally effectuate 37 U.S.C. 403(c), which prohibits payment of BAQ to member without dependents who is on sea duty for 3 months or more, and the Executive orders, the claim is denied ---- 192

Promulgation
Delay

Where almost 5 years elapses from time of enactment of statute before regulation is promulgated requiring Federal agency to include in prime contract for Indians' benefit subcontracting preference for Indian firms, agency may not be excused from implementing statutory requirements because regulations was published after bid opening ---- 739

REGULATIONS—Continued
Recommendations by GAO
Small business matters
Nonresponsibility determination referral to SBA
Conformance of FPR and DAR provisions Page

Army contracting officer's failure to refer determination of nonresponsibility of small business to Small Business Administration, although consistent with applicable regulation, is contrary to Small Business Act. While contract award is not disturbed, General Accounting Office recommends that Defense Acquisition Regulation 1-705.4(c), covering Certificate of Competency procedures, be promptly revised to eliminate exception to referral requirement for proposed awards not exceeding $10,000, since amended Small Business Act provides for no such exception 637

Retroactive
Amended regulations

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

Travel
Joint
Actual expense reimbursement
Retroactive designation of high rate areas
Prohibition

General designation of a high rate geographical area may not be made retroactively even though the existence of normal high costs sufficient to warrant such a designation was unknown to the Per Diem, Travel and Transportation Allowance Committee prior to the performance of travel in any individual case and such facts are thereafter made known. 32 Comp. Gen. 315 (1953) 560

Amendments
Military personnel
Travel within area of duty station reimbursement

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

REGULATIONS—Continued
Travel—Continued
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Change
Dislocation allowance
Members unaccompanied by dependents Page

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

Military personnel
Temporary lodgings allowance (TLA)
Entitlement guidelines

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

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

REHABILITATION ACT OF 1973
Discrimination complaints
Attorney fees. (*See* **ATTORNEYS, Fees, Agency authority to award, Discrimination complaints**)

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

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

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

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

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

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

SET-OFF
Authority
Common law right

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

Interagency claims

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

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. Modified (amplified) by 59 Comp. Gen. 595 ---- 12

SEWERS
Services charges
Increases
Agreement modification — Page

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

SMALL BUSINESS ADMINISTRATION
Authority
Investment companies. (*See* SMALL BUSINESS ADMINISTRATION, Investment companies, Authority to invest in)
Small business concerns
Allocation of 8(a) subcontracts

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

Contracts
Awards to small business concerns. (*See* CONTRACTS, Awards, Small business concerns)
Contracting with other Govt. agencies
Subcontracting under "8(a)" program
Administrative discretion
Evaluation of proposals by procuring agency

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

Architect-engineering services. (*See* CONTRACTS, Architect, engineering, etc., services, Contractor selection base)
Investment companies
Authority to invest in
Minority Enterprise Small Business Investment Companies (MESBICs)
Leveraging propriety
Non-private fund matching

The Small Business Administration (SBA) does not have authority to "leverage against" (partially match) funds invested by the Federal Railroad Administration in minority enterprise small business investment companies (MESBICs) because, generally, SBA may only leverage against investments made by private sources in MESBICs 635

SOCIAL SECURITY

Medicare, Medicaid, etc.

Reduction in Federal share Page

Department of Health, Education, and Welfare (HEW) is required to reduce Medicaid payments to State under section 1903(g) of Social Security Act, 42 U.S.C. 1396b(g) as amended, unless State makes satisfactory and valid showing that it has program of control over utilization of long term institutional services. In order to make valid showing, State must comply with criteria listed in statute including physician certification of need and plan for care in case of each long term patient. Fact that State may have satisfied most of requirements of statute does not permit HEW to find showing valid where any long term patients are found not to have certification of need of plan of care ---------- 286

Military personnel

Retired

Survivor Benefit Plan

Offset

Formula

Service members upon whose death Survivor Benefit Plan (SBP) annuities became payable to surviving spouses, in some cases are fully insured for Social Security coverage based on lifetime employment, but do not achieve that status based solely on military service. For the purpose of the reduction in the SBP annuity required by 10 U.S.C. 1451(a), it is unnecessary that the member acquired a fully iusured Social Security status based solely on military service. The setoff is to be based on that portion of the total Social Security payment attributable to the deceased member's military service. See 58 Comp. Gen. 795 (1979) ---------- 586

Free wage credits

Service members upon whose death SBP annuities became payable to surviving spouses, receive free wage credits under 42 U.S.C. 429 for military service after 1956 for the purpose of computing total Social Security payments. Therefore, for the purpose of computing the setoff required by 10 U.S.C. 1451(a), since generally those credits tend to increase Social Security payments, they must be included in the computation ---------- 586

SOCIAL SECURITY ADMINISTRATION

Employees

Overtime

Night differential

Entitlement

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

STATE DEPARTMENT
Appropriations. (*See* **APPROPRIATIONS, State Department**)
Authority
Services for other agencies overseas
Housing pool administration Page
Department of State is authorized by 22 U.S.C. 846 to administer housing pool on behalf of agencies which have leased or wish to lease housing to be used by employees of various agencies involved in pool and may pay rent on behalf of agencies involved directly from its own appropriations to be reimbursed by agency users on the basis of their share of total costs of State's operation of housing pool (including any operating, maintenance and utility costs paid by State)---------- 403
Standardized Regulations
Cost-of-living allowances
Education allowance
Overseas employees
Under chapter 270 and section 912.1 of the Standardized Regulations, the High Commissioner of the Trust Territory of the Pacific Islands has the discretionary authority to establish the rate of the overseas educational allowance, 5 U.S.C. 5924(4)(A), received by Department of the Interior employees assigned to the government of the Trust Territory of the Pacific Islands below the maximum rate established by the Department of State Standardized Regulations, section 920, for the geographical areas of the Trust Territory. His exercise of this discretion based on budgetary constraints is not improper---------- 713

STATES
Federal aid, grants, etc.
Federal statutory restrictions
State fund contributions
Local recipient of a grant under sections 305 and 306 of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*, may use community development block grant funds to pay the required local matching share even though section 318(c) of the Coastal Zone Management Act specifically prohibits use of Federal funds to meet local matching requirements. B-167694, May 22, 1978, modified---------- 668
Interest on Federal funds
Intergovernmental Cooperation Act of 1968 effect
Applicability to non-governmental subgrantees
Non-governmental subgrantees of Federal grants to States are entitled to keep interest earned on advances from the States. Section 203 of the Intergovernmental Cooperation Act, 42 U.S.C. 4213, which exempts State grantees from accounting to the Federal Government for interest earned on grant advances, serves to exempt subgrantees as well---------- 218
Percentage limitation
Environmental Protection Agency has no authority to exclude from eligibility for a construction grant a percentage of the total costs of an otherwise acceptable project to upgrade a wastewater treatment facility equal to the percentage of service the facility would be required to provide to a major Federal facility. Section 202(a)(1) of the Federal Water Pollution Control Act as amended requires payment of full 75 percent of approved costs of the total project. Although justified as "saving" grant funds, EPA may not artificially reduce the total costs of a project which otherwise meets its standard solely to stretch available grant funds to cover additional projects---------- 1

STATES—Continued

Federal-State conflict

Community property

Dual Compensation Act applicability Page

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

STATION ALLOWANCES

Military personnel

Members unaccompanied by dependents

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

Temporary lodgings

Concurrent payments 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 58

Dependents' relocation overseas

Member's change to restricted duty

Where a member of the uniformed services lives with his dependents in the vicinity of his duty station outside the United States and the duty station is reclassified from nonrestricted to restricted, thereby requiring the dependents to be relocated to a designated place outside the United States or in Hawaii or Alaska, the Joint Travel Regulations may be amended to provide the member a temporary lodging allowance for his dependents at the new designated location. To the extent this conflicts with 50 Comp. Gen. 83, that decision will no longer be followed. 353

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

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

STATUTES OF LIMITATION
Military service suspension
Active duty requirement

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

STATUTORY CONSTRUCTION
Legislative intent
Appropriation act *v.* committee report

Nuclear Regulatory Commission may use fiscal year 1980 funds to provide financial assistance to intervenors in its proceedings despite appropriation committee statement that no funds are being provided for this purpose. Limitations on spending contained in committee reports are not binding on agency unless expressly stated in appropriation act 228

STORAGE
Household effects
Military personnel
Nontemporary storage
Duty within United States
Involuntary extension of training assignment

Under the statutory authority of 37 U.S.C. 406(e) (1976), Volume 1 of the Joint Travel Regulations may be amended to allow a service member any necessary drayage and storage of household goods when he experiences an involuntary extension of assignment at a permanent duty station upon completing a training program there, and he is required for reasons beyond his control, such as the refusal of his landlord to renew a lease agreement, to change his residence on the local economy incident to that extension of his assignment 626

SUBSISTENCE

Actual expenses

Fractional months

Prepaid rent forfeiture

Reimbursement basis Page

Employees whose 40-day temporary duty assignments were unexpectedly cut short after 2 days by orders to return to their permanent duty station may be reimbursed for total amount of unrefundable prepaid rent if agency determines employees acted reasonably in securing lodging for the extended period. Unrefundable rent was incurred pursuant and prior to cancellation of travel orders. Reimbursement therefor is allowable as a travel expense to the same extent as it would have been allowed if the orders had not been cancelled. *Texas C. Ching*, B–188924, June 15, 1977, and similar cases will not longer be followed. This decision is modified (extended) by 60 Comp. Gen. 53 609

Preparatory travel costs

Travel canceled

Deposit forfeiture

Reimbursement

Employee of the Internal Revenue Service, who was scheduled for an extended temporary duty assignment, made a nonrefundable $150 deposit to lease an apartment. Subsequently the assignment was cancelled, and the deposit was forfeited through no fault of the employee. Employees may be reimbursed reasonable deposits made in anticipation of ordered travel when travel is cancelled and deposits are forfeited. Overrules B–194900, Sept. 14, 1979. This decision was later modified (amplified) by B–198699, Oct. 6, 1980 612

Per diem

Actual expenses

High rate areas

Undesignated

The Per Diem, Travel and Transportation Allowance Committee (for uniformed service personnel) and the General Services Administration (for civilian employees) may issue regulations permitting reimbursement to travelers on an actual expense basis based on unusual circumstances when due to the infrequency of travel to a given location consideration was not given to designating that locality as within a high cost geographical area. Authorization or approval of actual expense reimbursement should be predicated upon advice from the Committee or the Administration, as appropriate, that the locality was not considered for inclusion in the list due to lack of information with respect thereto and will be applicable only to the specific travel under consideration 560

Attendants

Handicapped employees

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

SUBSISTENCE—Continued
Per diem—Continued
Attendants—Continued
Handicapped employees—Continued

Page

Blind employee of Internal Revenue Service who was transferred from Jackson, Mississippi, to Atlanta, Georgia, claims travel expenses of attendant who accompaned hin and his wife, who is also blind, on house-hunting trip and on permanent change of station travel. Travel expenses of attendant may be paid as necessary expenses of employee's travel since such payment is consistent with explicit congressional intent to employ the handicapped and prohibit discrimination based on physical handicap. *H. W. Schulz*, B–187492, May 26, 1977; *John F. Collins*, 56 Comp. Gen. 661 (1977) 675

Fractional days
Absence from headquarters less than 24 hours
Travel time/distance comparison
Agency authority

Employee claims per diem for travel to nearby temporary duty station where travel time exceeds 10 hours. Social Security Administration (SSA) denied claims since SSA regulation precludes per diem except where travel exceeds employee's normal travel time or distance of normal commute to permanent duty station. SSA regulation falls within discretion set forth in Federal Travel Regulations and Health, Education, and Welfare travel regulations and is consistent with our decisions. See *Buker and Sandusky*, B–185195, May 28, 1976 605

Military personnel
Rates
Lodging costs
Double occupancy

A military member traveling on temporary duty shared a lodging accommodation with another person (his wife) who was not entitled to lodging at Government expense. In the absence of regulations providing otherwise, if he would have used the same accommdation at the single occupancy rate had he not been accompanied, he may be reimbursed on the basis of such single occupancy rate rather than at one-half of the double occupancy rate. If the hotel makes no distinction in rates between single and double occupancy, then the member may be reimbursed on the basis of the full room cost 245

Reduction
Quarters furnished
On board vessels
Department of Defense employees

Insofar as applicable to non-lodging portion of per diem, the "3 days in port" rule of 50 Comp. Gen. 388 (1970) was not affected by enactment of section 853 of Defense Appropriation Act, 1978, restricting use of appropriated funds to pay lodging cost when Government quarters are available. Since October 1, 1977, amendment to 2 JTR 4552–3b(6) to reflect appropriation restriction did not define per diem entitlement when meals were procured ashore, the "Government Quarters Available" rate of per diem prescribed by 2 JTR 4552–3d should be paid in the third day in port for period from Oct. 1, 1977, until Dec. 1, 1978 733

SUBSISTENCE—Continued
Per diem—Continued
Training periods
Cost comparison Page

Where agency is sending employees on training assignments, before agency decides to pay for the transportation of employee's dependents and household goods, cost comparisons, on individual basis, are required by 5 U.S.C. 4109 and the applicable agency regulations. In this case since proper cost comparisons were not made prior to issuing orders authorizing payment for transportation of employee's dependents and household goods, such orders were not competent and may be retroactively modified to implement Grievance Examiner's recommendations to allow payment of per diem. In each of these cases a cost comparison showed that per diem would have been less costly, but apparently actual, as opposed to projected, transportation costs were less than per diem---- 619

TELEPHONES
Coin boxes
Commissions

Commissions received by the Bureau of Prisons, based on collections from pay telephones provided for the exclusive use of inmates at penal and correctional institutions of the Bureau must be deposited into the general fund of the Treasury as miscellaneous receipts. No substantial outlay from Bureau appropriations is made for installation and provisions of pay telephone service. Therefore, 18 U.S.C. 4011, providing an exception to 31 U.S.C. 484, is not applicable---- 213

Private residences
Prohibition
Coast Guard services
Cuban refugee immigration into Florida

Although official duties of the District Commander of the Seventh Coast Guard District require that he be available 24 hours a day to respond to problems arising from the Cuban Refugee Freedom Flotilla, 31 U.S.C. 679 prohibits the District Commander from being reimbursed by the Government for the costs associated with installing and maintaining a telephone in his residence---- 723

TIMBER SALES
Contracts
Disputes
Settlement under disputes clause
Inter-agency cooperative agreements
Reimbursement propriety

No basis is seen to conclude that one Government agency is liable to second agency for cost of latter's disputes clause claim settlement with contractor, even where first agency's error was basis for settlement, since record does not disclose any agreement or mutual understanding between agencies covering situation---- 207

Quantity variances
Access road cost recovery

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

TRANSPORTATION

Air carriers

Foreign

American carrier availability

Absent Page

Employee was scheduled to travel on certificated U.S. air carrier and, upon arrival at airport, was informed by carrier that it could not accommodate him and carrier re-routed him on foreign air carrier. U.S. air carrier service is considered unavailable and traveler is not subject to penalty for use of noncertificated carrier. 56 Comp. Gen. 216 modified (amplified)---- 223

Penalty for use of foreign

Mileage proration formula. (*See* **MILEAGE, Proration formula, Air transportation in violation of "Fly America Act"**)

Reserve space denial

Carrier liability

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

Reserve space voluntarily released

Compensation

Acceptance by employee

Reduction by Government

Employee, while traveling on official business, received $150 from airline for voluntarily vacating his seat on overbooked flight and taking next scheduled flight. Airline payments to volunteers are distinguishable from denied boarding compensation which is due the Government. Employee may retain payment received as volunteer reduced by any additional expense incurred by Government. Clarified by B-199417, Oct. 10, 1980---- 203

Automobiles

Illness of employee

While on temporary duty

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

Bills

Payment

Agent, principal, etc.

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

TRANSPORTATION—Continued

Bills of lading
Notations
Carrier liability
Loss or damage of property Page

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

Cargo Preference Act
Nonapplicability
Cash transfer program for Israel

General Accounting Office disagrees with Maritime Administration view that Cargo Preference Act of 1954 applies to cash transfer program for Israel managed by Agency for International Development 279

Dependents
Military personnel
Dislocation allowance
Actual movement of dependents requirement
JTR proposed amendment effect

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

Overseas employees
Children
Attend colleges, schools, etc.

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

Parents divorced

Employee's transportation expenses for minor children whose custody has been divided between the employee and his former spouse are reimbursable pursuant to 5 U.S.C. 5722 when his children met definition of "immediate family" as set forth in para. 2-1.4d of Federal Travel Regulations, and became "members of employee's household" consistent with decisions of this Office. Length of time which children actually live with parent-employee and discernible intent which characterizes these periods are integral evidentiary facts which must be considered in determining entitlement to travel expenses. 52 Comp. Gen. 878, modified (amplified) . 450

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

TRANSPORTATION—Continued

Household effects

Entitlement

Intergovernmental Personnel Act assignment Page

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

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

Military personnel

Advance shipments

Orders canceled, etc.

Payment of return expenses

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

Prior to issuance of orders

Vessel overhaul scheduled

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

"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 .. 34

Emergency, etc. conditions

Training assignment extension

Change of local residence

Under the statutory authority of 37 U.S.C. 406(e) (1976), Volume 1 of the Joint Travel Regulations may be amended to allow a service member any necessary drayage and storage of household goods when he experiences an involuntary extension of assignment at a permanent duty station upon completing a training program there, and he is required for reasons beyond his control, such as the refusal of his landlord to renew a lease agreement, to change his residence on the local economy incident to that extension of his assignment 626

TRANSPORTATION—Continued
Household effects—Continued
Military personnel—Continued
Emergency, etc. conditions—Continued
Training assignment extension—Continued
Changes of local residence—Continued

Neither 37 U.S.C. 406(e) nor any other provision of statutory law contains authority which would permit the amendment of Volume 1, Joint Travel Regulations, to allow the drayage of a service member's household goods to a new residence when his duty assignment at a given location is extended, and he then elects solely as a matter of personal preference to move to new living quarters ..... Page 626

Requests
Issuance, use, etc.
Fraudulent use
Carrier's entitlement to payment

Common carrier, which, without negligence and in good faith, honors Government transportation request (GTR) regular on its face although fraudulent, is entitled to payment for services rendered 630

Traveler identification
"Due care" standard

Common carrier honoring GTR are required only to exercise due care to establish identity of traveler as party to whom GTR was issued 630

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

Employee of Department of Interior and traveler whose transportation is reimbursable by that Department, unaware of regulation precluding use of travel agents, purchased airline tickets from travel agencies with personal funds. Reimbursement is permissible in an amount not exceeding cost of transportation if transportation had been purchased directly from carrier. Modified (extended) by 60 Comp. Gen. ———— (B-201777, May 6, 1981) 433

Vessels
American
Cargo preference
Nonavailability
Cash transfer program for Israel

General Accounting Office disagrees with Maritime Administration view that Cargo Preference Act of 1954 applies to cash transfer program for Israel managed by Agency for International Development 279

TRANSPORTATION DEPARTMENT
Federal Highway Administration
Cooperative agreements
Forest highway construction
Claim settlement reimbursement

No basis is seen to conclude that one Government agency is liable to second agency for cost of latter's disputes clause claim settlement with contractor, even where first agency's error was basis for settlement, since record does not disclose any agreement or mutual understanding between agencies covering situation 207

TRAVEL AGENCIES (*See* **TRANSPORTATION, Travel agencies**)
TRAVEL ALLOWANCES
Military personnel
Junior enlisted service members
Increases
Effective date Page

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

TRAVEL EXPENSES
Actual expenses
High cost areas
Undesignated
Retroactive reimbursement

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

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

General designation of a high rate geographical area may not be made retroactively even though the existence of normal high costs sufficient to warrant such a designation was unknown to the Per Diem, Travel and Transportation Allowance Committee prior to the performance of travel in any individual case and such facts are thereafter made known. 32 Comp. Gen. 315 (1953) 560

Privately owned sailboat operation
Military personnel

A service member authorized reimbursement of the cost of transoceanic transportation used when performing travel upon PCS who traveled by privately owned sailboat may be reimbursed only necessary expenses directly connected with the operation of the vessel (fuel, oil and docking fees), provided they do not exceed the amount which would have been paid by the sponsoring service for available Government transportation 737

TRAVEL EXPENSES—Continued
Actual expenses—Continued
Reimbursement basis
Criteria
Unusual circumstances
Undesignated high cost areas Page

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

Lodging
Prepaid rent forfeiture
Temporary duty period shortened

Employees whose 40-day temporary duty assignments were unexpectedly cut short after 2 days by orders to return to their permanent duty station may be reimbursed for total amount of unrefundable prepaid rent if agency determines employees acted reasonably in securing lodging for the extended period. Unrefundable rent was incurred pursuant and prior to cancellation of travel orders. Reimbursement therefor is allowable as a travel expense to the same extent as it would have been allowed if the orders had not been cancelled. *Texas C. Ching*, B-188924, June 15, 1977, and similar cases will no longer be followed. This decision is modified (extended) by 60 Comp. Gen. 53---------- 609

Air travel
Fly America Act
Employees' liability
Travel by noncertificated air carriers
Involuntary re-routing

Employee was scheduled to travel on certificated U.S. air carrier and, upon arrival at airport, was informed by carrier that it could not accommodate him and carrier re-routed him on foreign air carrier. U.S. air carrier service is considered unavailable and traveler is not subject to penalty for use of noncertificated carrier. 56 Comp. Gen. 216 modified (ampified)---------- 223

Foreign air carriers
Prohibition
Availability of American carriers

A service member may execute a justification certificate regardlng "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---------- 35

TRAVEL EXPENSES—Continued
Air travel—Continued
Foreign air carriers—Continued
Prohibition—Continued
Availability of American carriers—Continued

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 ..... Page 66

Reservation penalties
Recovery

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

Reservation penalties *v.* voluntary space release
Compensation
Employee *v.* Government's entitlement

Employee, while traveling on official business, received $150 from airline for voluntarily vacating his seat on overbooked flight and taking next scheduled flight. Airline payments to volunteers are distinguishable from denied boarding compensation which is due the Government. Employee may retain payment received as volunteer reduced by any additional expense incurred by Government. Clarified by B-199417, Oct. 10, 1980 203

Dependents. (*See* **TRANSPORTATION, Dependents**)
Illness
Automobile return to headquarters

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

Mileage. (*See* **MILEAGE**)
Military personnel
Air travel. (*See* **TRAVEL EXPENSES, Air travel**)
Local travel
Criteria

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

TRAVEL EXPENSES—Continued
Military personnel—Continued
Mode of travel
Sailboat
Privately owned Page

A service member authorized reimbursement of the cost of trans-oceanic transportation used when performing travel upon PCS who traveled by privately owned sailboat may be reimbursed only necessary expenses directly connected with the operation of the vessel (fuel, oil and docking fees), provided they do not exceed the amount which would have been paid by the sponsoring service for available Government transportation 737

Subsistence. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Temporary duty
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel, Rates**)
Per diem. (*See* **SUBSISTENCE, Per diem**)
Permanent change of station
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Private parties
Attendants
Handicapped employees

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

Permanent change of station

Blind employee of Internal Revenue Service who was transferred from Jackson, Mississippi, to Atlanta, Georgia, claims travel expenses of attendant who accompanied him and his wife, who is also blind, on house hunting trip and on permanent change of station travel. Travel expenses of attendant may be paid as necessary expenses of employee's travel since such payment is consistent with explicit congressional intent to employ the handicapped and prohibit discrimination based on physical handicap. *H. W. Schulz*, B–187492, May 26, 1977; *John F. Collins*, 56 Comp. Gen. 661 (1977) 675

Reimbursement
Intergovernmental Personnel Act assignment

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

TRAVEL EXPENSES—Continued

Return to official station on nonworkdays

Reimbursement

Limitation Page

Customs Service employee who is on temporary duty assignment (TDY) and receiving actual subsistence returned home for weekend. During time away from TDY, he did not incur costs for 3 nights' lodging and 2½ days of meals. Under Federal Travel Regulations (FPMR 101–7) para. 1–8.4f (May 1973), employee may receive reimbursement for travel up to actual subsistence expenses which would have been allowable at TDY site. Since employee's weekend round-trip travel expense was less than the average subsistence expenses at TDY site, employee may be reimbursed his travel expenses 293

Temporary duty

Commuting expenses

Reimbursement limitations

Cost comparison with ordinary commuting expense

Carpool arrangement effect

Employee who frequently performs temporary duty near his headquarters claims mileage for travel between residence and temporary duty station. Agency regulations require deduction of normal commuting expenses from such mileage claims, but regulations do not provide guidance on computing expenses incurred in use of carpool. In absence of agency regulations, employee's normal commuting expenses should be determined on weekly basis and be divided by five to determine daily expense 605

Rental of apartment

Broker's fee to locate

Employees of Department of Housing and Urban Development's Chicago Regional Accounting Office assigned to temporary duty at New York Regional Office for 6 months for training purposes may be reimbursed under Federal Travel Regulations para. 1–9.1d for brokers' fees charged for locating rental housing if fees are necessary and sum of fees and rent s less than cost of hotel rooms for same period 622

Prepaid rent forfeiture

Reimbursement basis

Duty period officially shortened

Employees whose 40-day temporary duty assignments were unexpectedly cut short after 2 days by orders to return to their permanent duty station may be reimbursed for total amount of unrefundable prepaid rent if agency determines employees acted reasonably in securing lodging for the extended period. Unrefundable rent was incurred pursuant and prior to cancellation of travel orders. Reimbursement therefor is allowable as a travel expense to the same extent as it would have been allowed if the orders had not been cancelled. *Texas C. Ching*, B–188924, June 15, 1977, and similar cases will no longer be followed. This decision is modified (extended) by 60 Comp. Gen. 53 609

TRAVEL EXPENSES—Continued
Temporary duty—Continued
Rental of apartment—Continued
Security deposit forfeiture
Deposit reimbursement
Travel cancelled Page

Employee of the Internal Revenue Service, who was scheduled for an extended temporary duty assignment, made a nonrefundable $150 deposit to lease an apartment. Subsequently the assignment was cancelled, and the deposit was forfeited through no fault of the employee. Employees may be reimbursed reasonable deposits made in anticipation of ordered travel when travel is cancelled and deposits are forfeited. Overrules B–194900, Sept. 14, 1979. This decision was later modified (amplified) by B–198699, Oct. 6, 1980 612

Return to official station on nonworkdays. (*See* **TRAVEL EXPENSES, Return to official station on nonworkdays**)
Transfers
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Travel agencies. (*See* **TRANSPORTATION, Travel agencies**)
Vouchers and invoices. (*See* **VOUCHERS AND INVOICES, Travel**)

TREASURY DEPARTMENT
Bureau of Engraving and Printing
Prevailing rate employees
Pay increase ceiling applicability.

Bureau of Engraving and Printing trade and craft employees whose pay is set administratively under 5 U.S.C. 5349(a), "consistent with the public interest," were properly limited to 5.5 percent wage increase in fiscal year 1979. Although pay increase limitation in 1979 appropriation act did not apply to these Bureau employees, agency officials properly exercised discretion to limit pay increases in the public interest in accordance with the President's anti-inflation program. See court cases cited. The fact that similar employees of Government Printing Office received higher wage increases is not controlling since they were not covered by appropriation act limitation or President's determination ... 240

TRUST TERRITORY OF THE PACIFIC ISLANDS
High Commissioner
Authority
Overseas cost-of-living allowances
Educational allowance
Rate establishment

Under chapter 270 and section 912.1 of the Standardized Regulations, the High Commissioner of the Trust Territory of the Pacific Islands has the discretionary authority to establish the rate of the overseas educational allowance, 5 U.S.C. 5924(4)(A), received by Department of the Interior employees assigned to the government of the Trust Territory of the Pacific Islands below the maximum rate established by the Department of State Standardized Regulations, section 920, for the geographical areas of the Trust Territory. His exercise of this discretion based on budgetary constraints is not improper 713

UNIONS
Federal service
Dues
Allotment for
Agency failure to discontinue
Recoupment of payments
Benefit to employee consideration Page

Accounting and Finance Officer inquires whether Government is required to reimburse employees for union dues allotments which were continued after employees were no longer part of a bargaining unit. Reimbursement is not required even though not stopping the allotments in accordance with 5 C.F.R 550.322(c) was an agency error because employees have a responsibility to notify agency of improper allotment withholding and because agency action merely paid dues for employees who were union members and owed dues. Employees are not entitled to reimbursement for allotment payments which inure to their benefit. B-194692, July 24, 1979. For same reason there is no requirement to recoup allotment payments from union. 54 Comp. Gen. 921 (1975) and B-180095, Dec. 8, 1977, modified (amplified)---------- 710

"Excessive recognition" requirement
Revocability of authorization for allotment

The Department of the Army received from an employee a signed authorization to have union dues allotted directly to a union. The employee then requested that the authorization be returned to her before any dues had been allotted to the union and the agency agreed. The union filed a grievance and the agency settled the grievance in favor of the union and the dues were allotted to the union. Under the Civil Service Reform Act, 5 U.S.C. 7115(a), an agency must honor a written authorization for allotment of union dues when it is received and the employee may not have the union dues returned to her---------- 666

USER CHARGE
Statute
Applicability
Customs' services
Foreign airports

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

Inapplicability
Regular, scheduled services to public
Customs' personnel in U.S. airports. (*See* **FEES, Services to public, Regular, scheduled**)

UTILITIES
Public. (*See* **PUBLIC UTILITIES**)

VEHICLES

Automobiles

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

Government

Damages

Motor pool vehicles

Requisitioning agency liability Page

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

Privately owned

Mileage incident to automobile transportation

Federal mine inspectors drive their privately owned vehicles to their duty station and then use a Government vehicle to travel to various inspection sites which take them away from the duty station and their residences for one or more nights. Authorization for payment of mileage in such circumstances from home to work and work to home is contingent upon payment of taxi fares in similar circumstances and within the agency's discretion to authorize or deny 333

VESSELS

Cargo preference. (*See* **TRANSPORTATION, Vessels, American, Cargo preference**)

Crews

Two-crew nuclear-powered submarines

Dislocation allowance

Initial unavailability of assigned quarters

A dislocation allowance may be paid to members without dependents of both the on-ship and off-ship crews of nuclear submarines incident to a change of home port of the submarine, when they initially occupy permanent non-Government quarters at the new home port although the submarine is the permanent station for both crews. This is based on the view that Congress did not intend to preclude payment of the allowance when a member is not able to occupy quarters assigned to him and does incur the expense of moving into non-Government quarters. 57 Comp. Gen. 178 modified (extended) 221

VOUCHERS AND INVOICES

Certifications

False claims

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

VOUCHERS AND INVOICES—Continued

Transportation

Principal carrier billing requirement Page

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

Travel

False or fraudulent claims

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

WORDS AND PHRASES

"Accountable officer"

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

"Agency head" definition in Brooks Bill

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

"Arbitrary convention"

Low bid containing bidder's preprinted standard commercial terms and conditions, which are at variance with requirements of invitation for bids (IFB), may be considered for award in view of inclusion in IFB of "Waiver of Preprinted Information" clause which permits disregarding of preprinted information under conditions applicable here. However, General Accounting Office recommends clause not be utilized in future as it constitutes arbitrary convention which permits ignoring clear language of bid 347

"Audit by exception"

Request to reinstate General Accounting Office (GAO) review of grant related procurement complaint is denied where complainant voluntarily did not first seek resolution of its complaint through established Environmental Protection Agency (EPA) protest process which is part of EPA grant administration function. Intent of GAO in conducting review of complaints under Federal grants is not to interfere with grantor agencies' grant administration function 243

"Claim preclusion" principle

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

WORDS AND PHRASES—Continued

"Directly derived" Page

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

"Do-It-Yourself"

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

"Limited technical competition"

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

"Make or buy decisions"

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

"Military discharge"

A service member's enlistment expired after he was confined as a result of a court-martial conviction. Thereafter, he was placed in a parole status in lieu of remaining confinement time, which status was terminated on date confinement would have ended. He was then placed in an excess leave status pending appellate review of his conviction. Upon review the conviction and sentence were set aside and all rights restored including leave accrual. He is entitled to leave accrual through the last day of parole not to exceed 60 days. While pay and allowances accrued only through last day of parole (59 Comp. Gen. 12) payment of lump-sum leave is to be based on rates of basic pay in effect on the date of the member's discharge, even though he was not returned to a duty status. 59 Comp. Gen. 12, modified (amplified) ---------- 595

"Military Interdepartmental Procurement Requests (MIPRs)"

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

WORDS AND PHRASES—Continued

"Mission suitability score" Page

NASA's analysis of probable costs of doing business with offeror correctly included costs of additional employees determined by NASA to be necessary for offeror to adequately perform contract requirements. There is no requirement to increase mission suitability score to reflect additional employees 316

"Normal commercial practice" for packaging

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

"Part-time employee"

Part-time employees, irrespective of nature of employment, currently may be counted against full-time permanent and total employment ceilings of agency. Effective October 1, 1980, under 5 U.S.C. 3404, part-time employees will be counted fractionally based upon number of hours worked 237

"Permanent change of station"—change in home port of vessel or mobile unit

A dislocation allowance may be paid to members without dependents of both the on-ship and off-ship crews of nuclear submarines incident to a change of home port of the submarine, when they initially occupy permanent non-Government quarters at the new home port although the submarine is the permanent station for both crews. This is based on the view that Congress did not intend to preclude payment of the allowance when a member is not able to occupy quarters assigned to him and does incur the expense of moving into non-Government quarters. 57 Comp. Gen. 178 modified (extended) 221

"Re-Americanization"

Department of State Foreign Service employee requests home leave in Panama Canal Zone. Home leave may not be authorized in Canal Zone since home leave may only be granted in continental United States or its territories and possessions and Panama Canal Treaty of 1977, effective October 1, 1979, provides that Republic of Panama has full sovereignty over Canal Zone. Since home leave for purposes of "re-Americanization" is compulsory under 22 U.S.C. 1148, employee should designate an appropriate location for this purpose 671

"Regularly scheduled work"

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

WORDS AND PHRASES—Continued

"Rollback time" for Customs employees Page

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

"Rounding up" and "rounding down"

General Accounting Office has no legal objection to proposal of Director, Office of Personnel Management, to provide by regulation, under its authority in sections 5504, 5548, and 6101 of title 5, United States Code, that an agency may institute the practice of "rounding up" and "rounding down" to nearest quarter hour (or fractions less than a quarter of hour) for crediting irregular, unscheduled overtime work under sections 5542, 5544, and 5550 of title 5, United States Code ---------- 578

"Rural area"

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

"School away from post"

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

"Sea duty" as defined in E.O. 12094 for BAQ purposes

An amendment to Executive Order 11157 by Executive Order 12094 redefined sea duty for basic allowance for quarters (BAQ) purposes; however, the amendment did not affect the Secretaries of the armed services' authority to issue supplemental regulations not inconsistent with the Executive orders. A Coast Guard member contends that he is entitled to receive BAQ in light of the new definition, while on sea duty for over 3 months, during which he spent a few days on shore. Since the claimant would not be entitled to receive BAQ under the supplemental regulations issued by the Coast Guard and since those regulations rationally effectuate 37 U.S.C. 403(c), which prohibits payment of BAQ to member without dependents who is on sea duty for 3 months or more, and the Executive orders, the claim is denied ---------- 192

WORDS AND PHRASES—Continued

Storage and movement of household goods

Unusual circumstances Page

Under the statutory authority of 37 U.S.C. 406(e) (1976), Volume 1 of the Joint Travel Regulations may be amended to allow a service member any necessary drayage and storage of household goods when he experiences an involuntary extension of assignment at a premanent duty station upon completing a training program there, and he is required for reasons beyond his control, such as the refusal of his landlord to renew a lease agreement, to change his residence on the local economy incident to that extension of his assignment 626

Neither 37 U.S.C. 406(e) nor any other provision of statutory law contains authority which would permit the amendment of Volume 1, Joint Travel Regulations, to allow the drayage of a service member's household goods to a new residence when his duty assignment at a given location is extended, and he then elects solely as a matter of personal preference to move to new living quarters 626

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

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

"Subsistence expenses" *v.* per diem allowance

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

"Technician Personnel Manual"

National Guard technicians, whose positions as Aircraft Mechanics, WG-10, were prevailing rate positions in excepted service, filed claims for retroactive temporary promotion and backpay under *Turner-Caldwell* line of decisions alleging improperly extended details to positions as Aircraft Mechanics (Crew Chief), WG-12. Although the positions in question are beyond the scope of coverage set forth in section 8-2, subchapter 8, chapter 300, Federal Personnel Manual, claims may be independently evaluated and adjudicated where nondiscretionary agency regulation extends coverage of FPM detail provisions to National Guard technicians in hourly wage pay plan positions 200

"Urban area"

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

WORDS AND PHRASES—Continued

"Wages or compensation" Page

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

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