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Contracts—Protests—Court-Solicited Aid—Scope of GAO Revi

Where material issues of protest are before court of competent jurisdiction which has issued preliminary injunction and which has asked for General Accounting Office (AGO) opinion, GAO will consider findings of fact and conclusions of law made by court, but will conduct independent review of matter.

Contracts—Protests—Court-Solicited Aid—Scope of GAO Review—Timeliness of Protest Determination

GAO will consider untimely protests on merits where material issues of protest are before court and court has asked for GAO decision. GAO will also provide court with opinion as to timeliness of issue. Here, protest that signer of Determination and Findings (D&F) had no authority to make D&F was timely, since filed within 10 working days of knowledge of signing of D&F.

General Accounting Office—Jurisdiction—Contracts—National Defense Needs—Negotiation Authority—Delegation

Authority of Under Secretary of Defense for Research and Engineering, or his Principal Deputy, to sign D&F authorizing negotiation of contract under 10 U.S.C. 2304(a)(16) is not matter of executive policy which GAO should not review, but is matter of statutory law clearly within GAO jurisdiction.

Contracts—Negotiation—Administrative Determination—"Determination and Findings" by Agency Head—Department of Defense—Delegation of Authority

Even though 10 U.S.C. 2302(1) does not list Secretary, Under Secretaries, or Assistant Secretaries of Defense as officials authorized to make D&F's justifying negotiation under 10 U.S.C. 2304(a)(16), statutes creating and reorganizing Department of Defense and expanding power of the Secretary of Defense, and legislative history of those statutes, make it clear that those officials may make such D&F's.

Contracts—Negotiation—Justification

D&F justifying negotiation under 10 U.S.C. 2304(a)(16) was signed initially by Principal Deputy to Under Secretary of Defense for Research and Engineering, an official not authorized to make such D&F. D&F was reexecuted later by Under Secretary, an authorized official. Protester argues that Under Secretary did not make D&F, but merely "rubber stamped" it. Where, as here, there is written record of reasons for decision, GAO will not probe mental processes of decisionmaker to ascertain degree of his personal involvement in decision. Therefore, we find that Under Secretary made decision.

Contracts—Negotiation—National Emergency Authority—Sole Source Negotiation—Maintenance of Industrial Mobilization Base

Our review of determinations to negotiate under 10 U.S.C. 2304(a)(16) is limited to review of whether determination is reasonable given findings. We will not review findings, since they are made final by statute. Where findings show that mobilization base is best served by having two separate sources for item, protester has previously been sole supplier, and there is only one other qualified producer, then sole-source award to that producer is reasonable.

Contracts—Negotiation—Determination and Findings—Propriety of Determination

Contrary to protester's arguments, facts show that D&F and supporting documents contained all required information. Protester argues that an economic

analysis was not performed to establish cost benefit of expanding productive capacity rather than stockpiling items. Record shows that it was performed. Degree to which Under Secretary considered analysis in his decision will not be reviewed.

Contracts—Negotiation—Sole-Source Basis—Authority—Awards in Interest of National Defense

Argument that letter contract is improper here because there is no real urgency will not be considered, since we have found that sole-source award was proper. Therefore, form of contract could not prejudice protester.

Matter of: Norton Company, Safety Products Division, April 1, 1981:

The Norton Company, Safety Products Division (Norton), protests the proposed award of a letter contract on a sole-source basis to the Brunswick Corporation (Brunswick) by the Defense Personnel Support Center of the Defense Logistics Agency (DLA). The contract is for chemical protective butyl gloves.

The procurement is based on the authority contained in 10 U.S.C. § 2304(a)(16) (1976), a provision of the Armed Services Procurement Act of 1947, as amended, permitting negotiation when an agency head determines that it would be in the interest of national defense to have a manufacturer available in case of a national emergency, or that the interest of industrial mobilization in case of such an emergency would otherwise be served. A Determination and Findings (D&F), justifying the use of such authority, was made by authority of the Under Secretary of Defense for Research and Engineering. The D&F was signed on December 8, 1980, by the Principal Deputy to the Under Secretary. The Under Secretary then signed the document on December 24, 1980. Under the D&F contracts are to be awarded to Norton and Brunswick, by dividing the total requirement.

Norton argues that the D&F is void *ab initio* because neither the Principal Deputy nor the Under Secretary is statutorily authorized to make such D&F's, and the D&F does not contain all of the information which it is required to contain. Norton also contends that even if the D&F was properly executed, it does not adequately justify a sole-source award and, therefore, the procurement should be formally advertised or at least competitively negotiated. Additionally, Norton argues that the (a)(16) authority may not be used to create a new supplier of goods by weakening the present sole supplier. Finally, Norton contends that there is no authority for the use of a letter contract in these circumstances.

Norton filed suit in the United States District Court for the District of South Carolina (Civil Action No. 80-2518-1), asking for injuctive and declaratory relief. On January 20, 1981, the court issued an order granting a preliminary injunction, enjoining award of the con-

tract to Brunswick. The court made findings of fact and conclusions of law. The court also expressed an interest in the General Accounting Office's decision on the merits of the protest. A few days prior to the issuance of this decision we learned that the federal defendants appealed to the United States Court of Appeals for the Fourth Circuit from the order granting the injunction.

It is our view that the proteest is without merit.

Preliminary Matters

When the material issues of a protest are also before a court of competent jurisdiction, our Office will not consider the protest on the merits, unless, as here, the court expresses an interest in a decision by our Office. *Allis-Chalmers Corporation*, B-195311, December 7, 1979, 79-2 CPD 397.

Norton urges our Office to give great weight to the findings and conclusions of the court stated in the order of January 20 and cites *Optimum Systems*, 56 Comp. Gen. 934 (1977), 77-2 CPD 165, in support of that proposition. DLA argues that in *Optimum Systems* GAO conducted an independent review of the matters at issue, and should do the same here. DLA also points out that in *Optimum Systems* GAO had the same record before it as the court had, while in this case the court did not have the benefit of the administrative report and rebuttal comments filed with our Office by DLA and the comments filed by Brunswick. Therefore, DLA contends GAO should not feel bound by the court's findings and conclusions.

We will, of course, consider the findings and conclusions of the court in our decision. However, we assume that the court would not have expressed an interest in our decision if it did not want our independent review of the record, even if our conclusions might differ.

DLA argues that Norton's protest regarding the statutory authority of the Under Secretary to execute the (a)(16) D&F is untimely. On August 21, 1980, DLA sent Norton a copy of a proposed D&F requesting authority from the Under Secretary to negotiate contracts with Norton and Brunswick under the (a)(16) authority. DLA contends that Norton knew at that time that the D&F would be executed by the Under Secretary, and to be timely should have protested the alleged lack of authority within 10 working days of receipt of that draft D&F. Then, DLA asserts, the issue could have been developed properly and resolved without the disruption to the procurement process that has occurred as a result of Norton's delayed filing. DLA understands that GAO will decide untimely issues on the merits when a court has expressed an interest in our decision, but asks that we provide the court with our views concerning the timeliness of Norton's protest.

DLA is correct in stating that GAO will consider an untimely protest if the issues are before a court of competent jurisdiction and that court requests our opinion. *Dr. Edward Weiner*, B-190730, September 26, 1978, 78-2 CPD 230. Also, we have provided courts with our views concerning timeliness, *id.*, and we will do so here.

Norton points out that while the draft D&F was submitted to the Under Secretary by memorandum from DLA requesting authority to negotiate under (a)(16), nothing indicated that it would be signed by the Under Secretary. Also, Norton argues that the draft D&F statement "which I hereby make as Agency Head" is an obvious reference to the definition of head of an agency at 10 U.S.C. § 2302 (1976), which does not include the Under Secretary. That statement would lead one to conclude that the D&F would not be signed by the Under Secretary, but rather by a statutorily authorized official. Therefore, Norton claims, it could not know that the Under Secretary or his delegated agent would sign the D&F until that actually occurred on December 8, 1980.

We agree that Norton could not have known, without doubt, that the D&F would be signed by the Under Secretary or his delegated agent until December 8 and consequently the protest is not untimely. A protester is not required to anticipate that a contracting agency will take an action that the protester feels is improper. We believe that if Norton had protested at that time, the protest would have been dismissed as premature. *Aero Corporation*, B-194495.2, October 17, 1979, 79-2 CPD 262.

DLA also urges us to conclude that the issue of the Under Secretary's authority to execute an (a)(16) D&F is a matter of executive policy which we would not review, but for the court's interest. We disagree. The question of the (a)(16) authority is a matter of statutory law, not executive policy, and clearly comes within our bid protest jurisdiction.

Authority to Execute D&F's Justifying Negotiation under 10 U.S.C. § 2304(a)(16)

Norton argues that neither the Principal Deputy, who signed the D&F on December 8, 1980, nor the Under Secretary, who signed it on December 24, 1980, have the authority to make such a D&F, and that the D&F is, therefore, void *ab initio*. According to Norton, the statute clearly limits the authority to make (a)(16) D&F's to the head of an agency. 10 U.S.C. § 2304(a)(16) provides that negotiation may be used when:

> (16) he [the head of an agency] determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in

case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved;

The term "head of an agency" is defined in 10 U.S.C. § 2302(1) (1976), which provides:

(1) "Head of an agency" means the Secretary, the Under Secretary, or any Assistant Secretary of the Army, Navy, or Air Force; the Secretary of the Treasury; or the Administrator of the National Aeronautics and Space Administration.

10 U.S.C. § 2311 (1976) provides that the power to make D&F's may be delegated only as follows:

The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter except the power to make determinations and decisions (1) under clauses (11)–(16) of section 2304(a) of this title.

Norton contends that the plain language of the quoted statutes prohibits anyone other than the officials listed in § 2302(1) from making an (a)(16) D&F. This includes the Principal Deputy, the Under Secretary and even the Secretary of Defense. The protester argues that since there is no ambiguity in the statute, it is impermissible to resort to legislative history or other statutes to arrive at the meaning of the statute, and cites *United States* v. *Missouri Pacific Railroad Company*, 278 U.S. 269, 277 (1929), for support. Even if the legislative history of the Armed Services Procurement Act is consulted, asserts Norton, the meaning of the plain language of the statute is confirmed. In that regard, Norton quotes the following exchange from the Congressional Hearings:

Sen. Baldwin * * * under the unification bill [unifying military departments under predecessor to DOD], if that bill is passed, would the final decision for letting a contract under the proviso of Section 16 [sic] be up to the Secretary of the Armed Services, or would it be up to the Secretary of the particular military department?

Gen. Vandenberg. I think it would be up to the Secretary of the Air Force.

* * * * * * *

Mr. Kenney. [The unification] bill preserves the existence of the departments, and so the agency head in that case would be the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force.

We note that there is an error in Norton's quotation of this portion of the legislative history. Senator Baldwin actually asked about the proviso of section 15 of the bill, not section 16 as indicated by Norton. Section 15 provided for the use of negotiation in procuring supplies of a specialized nature requiring a substantial initial investment or an extended preparation for manufacture, where the agency head determines that formal advertising would result in additional cost and/or delay to the Government as a result of duplication of investment and/or preparation time. The exchange quoted by Norton took place during a statement by General Vandenberg, on behalf of the Army Air Force, which was essentially a plea for passage of proviso

15. General Vandenberg argued that without proviso 15 the Air Force would experience great difficulty in procuring airplanes. We think that General Vandenberg's statement that the Secretary of the Air Force would make the agency head determination under proviso 15 must be viewed in the context of the special importance of that proviso to the Air Force.

The court, in its order of January 20, 1981, granting a preliminary injunction, agreed with Norton on this issue in Conclusions of Law 6, 7, and 8. While we feel that this position is supportable based on the plain language of the statute, we feel that the better view is that the Secretary of Defense has the authority to execute (a)(16) D&F's. As we will show, this view is supported by the statutes establishing and reorganizing the Department of Defense, and then expanding the power of the Secretary of Defense over the Department, and by the legislative history of those statutes. We note that on this issue, the court did not have before it the arguments of DLA and Brunswick that are part of our record.

While we recognize the rule of statutory construction cited by Norton, there is an equally important countervailing rule of construction applicable here. If the plain language of a statute would lead to an unintended result, one may look beyond the plain language in order to ascertain the meaning of the statute. *United States* v. *American Trucking Ass'ns*, 310 U.S. 534 (1939); *United States* v. *Mendoza*, 565 F.2d 1285 (5th Cir. 1978). The exclusion of the Secretary of Defense from the group of officials designated to make (a)(16) and other D&F's may have been intended, and may not have been unreasonable in the late 1940's when his authority and role were unclear, but later legislation changing DOD and expanding and clarifying the role of the Secretary of Defense makes such a conclusion unreasonable in the present.

The National Security Act of 1947, Pub. L. 80-253, July 26, 1947, 61 Stat. 495 (50 U.S.C. 401 note), established the predecessor to the Department of Defense, the National Military Establishment, and the office of Secretary of Defense. Section 202(a) of the act provided that the Secretary's duties were to:

> (1) Establish general policies and programs for the National Military Establishment and for all of the departments and agencies therein;
> (2) Exercise general direction, authority, and control over such departments and agencies;
> (3) Take appropriate steps to eliminate unnecessary duplication or overlapping in the fields of procurement, supply, transportation, storage, health, and research;

The same section contains the following proviso limiting the Secretary's authority.

> And provided further, that the Department of the Army, the Department of the Navy, and the Department of the Air Force shall be administered as indi-

vidual executive departments by their respective Secretaries and all powers and duties relating to such departments not specifically conferred upon the Secretary of Defense by this Act shall be retained by each of their respective Secretaries.

This was the "unification bill" referred to in the Armed Services Procurement Act hearings quoted by Norton. Given the rather general statement of supervisory control of the Secretary of Defense over the military departments, and the retention of their status as executive departments, it is not surprising that the Secretary was not included as an agency head in 10 U.S.C. § 2302 for the purposes of making specific procurement decisions. Also, the nature and extent of unification was controversial and unclear. If the relationship between the Secretary of Defense and the individual military departments had remained the same, it would not be unreasonable to conclude that the Secretary was unauthorized to execute D&F's under 10 U.S.C. § 2304. However, the authority of the Secretary of Defense has been broadened and definitized over the years in such a manner as to preclude that result.

The National Security Act Amendments of 1949, Pub. L. 81-216, 63 Stat. 578, made several relevant changes. The National Military Establishment was changed to the Department of Defense and was made an executive Department with cabinet-level status, while the Departments of the Navy, Army, and Air Force were downgraded from executive departments to military departments, thus, losing cabinet-level status. Also, the statement of the duties of the Secretary of Defense was changed from the previous "Exercise *general* direction, authority and control" over the military departments, to "shall have direction, authority and control." During the debate on the reported bill, S. 1843, Chairman Vinson of the House Armed Services Committee, one of the primary architects of the bill, made the following comments on that provision:

This sentence giving the Secretary direction, authority and control is the heart of this legislation. * * * In order that there can be no doubt as to what direction, authority and control mean, I want to give you their meaning.

"Direction means the act of governing, management, superintends [sic].

"Authority means legal power; a right to command: the right and power of a public officer to require obedience to his order lawfully issued in the scope of his public duties.

"Control means power or authority to manage, to direct, superintend, regulate, direct, govern, administer, or oversee.

"So under this law the Secretary of Defense is to have clearcut authority to run the Department of Defense."

The 1949 amendments also provided specific authority for the Secretary of Defense to transfer, abolish or consolidate various functions within the Department, subject to two restrictions. Section 202(c)(1) prohibited the Secretary from transferring "combatant functions," and section 202(c)(5) required the Secretary to report to Congressional oversight committees before transferring those functions which

were statutorily authorized. All other functions could be transferred, abolished, or consolidated without restriction.

Problems in DOD organization was the subject of a 1953 report by the Rockefeller Committee on Department of Defense Organization. That report included a memorandum of law concerning the authority of the Secretary of Defense, under the National Security Act, as amended. While the report is obviously not part of the legislative history of the act, many of its recommendations were adopted by the Congress in Reorganization Plan No. 6, H. Doc. 136, 83d Cong., 1st sess., 67 Stat. 638, and it was incorporated in the House Committee on Armed Services print of the act. It is reasonable to conclude that Congress was aware of and approved of the report's findings and conclusions. In a statement particularly relevant to this case, the memorandum of law in the report concluded that:

> * * * [t]he power and authority of the Secretary of Defense is complete and supreme. It blankets all agencies and all organizations within the Department; it is superior to the power of all officers thereof * * *. The fact that statutes have been passed subsequent to the 1949 amendments to the National Security Act which statutes confer specific authorities on a Secretary of a particular military department or other subordinate officer of the Department does not detract from the supreme authority of the Secretary of Defense. Once supreme authority is established it need not be repeatedly mentioned. On the contrary, it would require a most specific and emphatic statement to restrict or detract from the supreme authority conferred on the Secretary of Defense * * *. National Security Act of 1947, Rept. No. 93-21 of House Comm. on Armed Services (1973), pp. 55-56.

Certainly, this logic is even more applicable to such statutes passed before the 1949 amendments, since the legislators responsible for those statutes obviously could not have foreseen the scope of authority granted the Secretary by the amendments. Essentially, the 1949 amendments changed those statutes by implication.

The Department of Defense Reorganization Act of 1958, Pub. L. 85-599, 72 Stat. 514, 50 U.S.C. 401, further clarified the authority of the Secretary of Defense generally, and specifically, as it relates to the integration of supply and service functions. Section 2 changed the phrase "to provide three military departments, separately administered" to:

> * * * provide that each military department shall be separately organized under its own Secretary and shall function under the direction, auhority, and control of the Secretary of Defense.

This makes the subordination of the military departments and their Secretaries to the Secretary of Defense even more clear.

Most importantly, the act clarified the authority of the Secretary to transfer and consolidate most procurement functions without restriction. The so-called McCormack amendment, § 202(c)(6) of the National Security Act of 1947, as amended, provides that:

> Whenever he Secretary of Defense determines it will be advantageous to the Government in terms of effectiveness, economy, or efficiency, he shall pro-

vide for the carrying out of any supply or service activity common to more than one military department by a single agency or such other organizational entities as he deems appropriate. For the purposes of this paragraph, any supply or service activity common to more than one military department shall not be considered a "major combatant function" within the meaning of paragraph (1) hereof.

The final sentence refers to restrictions discussed earlier placed on the transfer, abolition or consolidation of major combatant functions.

We think that these statutes make it clear that the Secretary of Defense has been given direct control and authority over all of the officers of the military departments, and that the Secretary of Defense must have all of the authority granted to those officers, subject to the restrictions contained in the statutes. The McCormack amendment, in particular, made it clear that the Secretary has complete discretion to consolidate or transfer common procurement functions. In that context, it seems unreasonable to conclude that the Secretary is not an agency head for purposes of making D&F's under the Armed Services Procurement Act for procurements falling within the scope of his authority under the McCormack amendment. While Congress could have amended the Armed Services Procurement Act to reflect the Secretary's authority, that was not really necessary since it had already implicitly granted the authority in the statutes discussed above.

Norton argues that even if we determine that the Secretary of Defense is an agency head under 10 U.S.C. § 2302, 10 U.S.C. § 2311 prohibits the delegation of the authority to any other DOD official. We disagree. Section 2302 includes as agency heads, in addition to the Secretaries of the Army, Navy, or Air Force, the Under Secretary or any Assistant Secretary of those departments. If one agrees with the line of reasoning that we have followed to conclude that the Secretary of Defense is an agency head, then logic dictates that his subordinates in the Defense Department that are greater or equal in rank to the Secretaries, Under Secretaries or Assistant Secretaries of the military departments are also agency heads for the purposes of the statute. Therefore, the Under Secretary for Research and Engineering is a head of an agency for the purposes of the statute.

The conclusions reached above concerning the Secretary of Defense and the Under Secretary, are further supported by Congress' knowledge of and acquiescence in the Secretary's formation of the Defense Supply Agency (now DLA). The Secretary of Defense created DSA in November 1961. DOD Directive 5105.22 (Nov. 6, 1961). The stated purpose of DSA was to "[provide] the most effective and economical support of common supplies and services to the military departments and other DOD components." The Administrator of DSA was given the following authority:

To meet the needs of the military services and other authorized customers, conduct, direct, supervise and control all procurement activities with respect

to property, supplies and services assigned for procurement to DSA in accordance with applicable laws, the Armed Services Procurement Regulations, and other DOD regulations. To the extent that any law or executive order specifically limits the exercise of such authority to persons at the Secretarial level of a military department, such authority shall be exercised by the ASD (I & L) [Assistant Secretary of Defense--Installation and Logistics].

On May 10, 11, and 14, 1962, the Military Operations Subcommittee on the House Committee on Government Operations held hearings concerning the creation of DSA, including discussion of the above Directive, Congress did not disapprove of the creation of DSA, or the authority granted to the ASD (I & L). The authority granted the ASD (I & L) above, was transferred to the Under Secretary for Research and Engineering on April 20, 1977, by the Secretary of Defense. Where Congress has had before it an agency's view of a statutory scheme and does not disapprove of that view, it must be entitled great weight. *Constanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932).

Additionally, in a letter to the Chairman of the Special Subcommittee on Defense Agencies, House Committee on Armed Services, GAO concluded that the DSA had the authority to contract for common items under the procedures set forth at 10 U.S.C. § 2301, *et seq.*, B-140389, July 10, 1962.

While the arguments of DLA and Brunswick seem to imply that the Secretary of Defense, by virtue of his general supervisory powers, could delegate his authority to make (a)(16) D&F's to any DOD official that he selected, we think that the intent and purpose of 10 U.S.C. § 2311 would be violated by permitting anyone other than an Under Secretary or Assistant Secretary to make such D&F's. Therefore, we think that the Principal Deputy was not authorized to make the D&F in question. Consequently, we must resolve the issue of whether the Under Secretary's signing of the D&F on December 24, 1980, constituted "making" the D&F.

Effect of the Under Secretary's Signing of the (a)(16) D&F

Norton contends that the Under Secretary, in reissuing the December 8 D&F, did no more than rubber stamp the work of the Principal Deputy. The protester claims that the Under Secretary did not generate any written documents of his own, did not verify the data in the D&F, and did not perform any independent analyses. This argument is based on the Under Secretary's deposition taken in connection with the civil suit filed by Norton. Norton also relies on the Under Secretary's statement, in the deposition, that he spent "more than a few minutes and less than an hour" in reviewing the D&F and supporting documents, as evidence of the Secretary's cursory review.

Therefore, Norton argues, the D&F is void because the Under Secretary did not "make" the D&F as required by 10 U.S.C. § 2310(b) (1976) which states that:

> Each determination or decision under clauses (11)-(16) of section 2304(a) * * * shall be based on a written finding by the person making the determination or decision.

The court, in its order of January 20, 1980, found that the Under Secretary had not:

> * * * exercised the careful, independent, high level decisionmaking process envisioned by 10 U.S.C. § 2304(a)(16), and section 2310 and 2311. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F. 2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

We must respectfully disagree with the court's preliminary findings. In *Overton Park*, *supra*, the leading Supreme Court case permitting a decisionmaker's mental processes to be probed to determine the reasons for an administrative decision, the court stated that inquiry into the mental processes of decisionmakers is usually to be avoided. In a case where there are no written findings it is appropirate to examine mental processes because there may be no other effective way to review the decision. Where there are administrative findings supporting the decision, there must be a strong showing of bad faith or improper behavior before a court may inquire into the mental processes of the decisionmaker. Here, there are written findings explaining the determination, and no showing of bad faith or improper behavior has been made. Therefore, we will not examine the mental processes of the Under Secretary to determine the extent of his personal involvement in making the D&F.

Propriety of Sole-Source Award to Create a New Supplier

Norton argues that the 10 U.S.C. § 2304(g) mandate that formal advertising be used whenever "feasible and practicable" will be violated in this case. Norton contends that the D&F and other information do not support the determination to not formally advertise the procurement. Assuming *arguendo* that negotiation is justified, Norton contends that the negotiation must be competitive, not sole source.

For the following reasons, we find that not only is negotiation justified, but sole-source negotiation is proper. We have previously found that sole-source awards may properly be made under (a)(16). *National Presto Industries, Inc.*, B-195679, December 19, 1979, 79-2 CPD 418; *Braswell Shipyards, Inc.*, B-188286, June 24, 1977, 77-1 CPD 454; *Etamco Industries*, B-187532, February 25, 1977, 77-1 CPD 141. In reviewing the propriety of a determination to negotiate, whether sole source or competitively, under (a)(16) our Office will not disturb the findings justifying the determination, since they are

final. 10 U.S.C. § 2310(b), *National Presto Industries, Inc., supra.* We will, however, review whether the findings of fact legally support the determination to negotiate. *Id.*

The decision to negotiate solely with Brunswick is grounded on the following findings of fact in the D&F. Norton has been the sole supplier of butyl gloves to the Government, and its two plants do not possess the maximum capacity needed to meet mobilization requirements in the event of an emergency. The use of two separate sources rather than an expansion of the previous sole source, to increase the capacity, is needed to protect DOD from disruptions in deliveries attributable either to labor disputes or management decisions of a single manufacturer which are beyond the Government's control. Only two sources are currently qualified as planned producers, Norton and Brunswick. Planned producers are firms which, after being examined by DLA for technical expertise, capability and other such factors, are invited to participate in the DOD Industrial Preparedness program and which make a commitment to maintain their production capability for items vital to national defense. According to DLA, eight firms were surveyed, three were invited to participate, and Norton and Brunswick made the required commitments. Based on these findings, the D&F concluded that formal advertising or competitive negotiation might result in award to a firm that is not a planned producer, and the mobilization base would not be strengthened.

Norton has attacked a number of the facts claiming that they are inaccurate or merely state conclusions. However, as we stated above, such factual findings are final, and will not be disturbed by our Office. Given the validity of those findings we think that a sole-source award is not unreasonable. As we stated in *National Presto, supra:*

> In a procurement negotiated under 10 U.S.C. § 2304(a)(16) (1976), the normal concern with insuring maximum competition is secondary to the needs of industrial mobilization. The award of a contract for current needs becomes not only an end in itself, but a means to another goal—the creation and/or maintenance of mobilization capacity. Contracts are awarded to particular plants or producers to create or maintain their readiness to produce essential military supplies in the future.

In a related argument, Norton contends that (a)(16) may not be used to create a new source, especially if to do so will weaken an existing source. Norton, however, fails to support this assertion with any citation to statutes, regulations, or cases. On the other hand, language in two of the examples of situations when the use of (a)(16) should be considered, listed at DAR § 3-216.2, can reasonably be read as contemplating creation of new suppliers. Section 3-216.2(i) states that (a)(16) is appropriate to use when negotiation is necessary to "make available" vital suppliers of facilities. Section 3-216.2(ii) states that

(a)(16) may be used when it is necessary to train selected suppliers. Certainly, none of the examples precludes creation of a new supplier. Additionally, dicta in several of our decisions refer to using (a)(16) to create a new supplier. For example, in the above quotation from *National Presto*, we mentioned using (a)(16) to award contracts to particular producers to "create or maintain" their production capacity. Also, in *Etamco*, we stated that:

> * * * it is well established that where the setting up of an additional producer is in the interest of national defense, a contract may be negotiated under 10 U.S.C. § 2304(a)(16).

In the absence of a specific prohibition, we see no reason why (a)(16) may not be used to create a new supplier in order to expand the industrial mobilization base.

Norton argues that in this case the mobilization base will be weakened not strengthened because it will be forced to lay-off one-third of its employees, and perhaps close one of its plants. We note that under the questioned D&F, the total current glove requirements are to be divided between Norton and Brunswick. Based on information supplied by Norton, DLA has determined the proportion of the requirement that Norton needs in order to keep its plants open, and plans to award that amount to Norton. Even assuming that DLA's estimates are incorrect and Norton's productive capacity may be weakened, the finding by the Under Secretary that the mobilization base will be better served by having two separate sources encompasses such potential occurrences and is not reviewable by us.

Other issues

Norton contends that the D&F is void *ab initio* because it does not contain a statement of the hazards of relying on present sources, and the time required for a new source to achieve the production capacity necessary to meet mobilization requirements, as required by DAR Appendix J-200(f)(ix)(C).

The D&F clearly states the hazards of relying on only the present source, as was discussed above, and the Justification for Authority to Negotiate includes the other information mentioned by Norton. Therefore, this argument is not supported by the facts.

Norton also argues that an economic analysis, comparing the alternatives of stockpiling gloves or increasing production capacity, was not performed as required by DOD Directive 4005.1. However, an affidavit by a DLA procurement analyst, indicates that while an economic analysis was considered to be futile due to constraints on stock buildups imposed on DLA, one was prepared anyway. The Under

Secretary, in his deposition, could not recall whether he had seen such an analysis.

DOD Directive 4005.1 states that such an analysis should be done "as applicable." Here, it appears that the analysis may not have been applicable due to the constraints on stockpiling. In any event, it was prepared. Whether or not the Under Secretary in fact considered the analysis, is not for us to review, since that would involve probing his mental processes, which we have decided is inappropriate.

Finally, Norton argues that it is impermissible to award a letter contract to Brunswick. Since we have concluded that a sole-source award to Brunswick is proper in these circumstances, we fail to see how Norton can be prejudiced by the award of a letter contract. Therefore, we see no reason to consider this argument.

The protest is denied.

[B-199474]

Office of Personnel Management—Jurisdiction—Fair Labor Standards Act—Compliance Determination—Review by GAO—Burden of Proof

Employee filed Fair Labor Standards Act (FLSA) complaint and Office of Personnel Management (OPM) issued a compliance order requiring agency to pay 30 hours overtime compensation per year retroactive to May 1, 1974. Agency states that its records do not support award of 30 hours per year. General Accounting Office will not disturb OPM's findings unless clearly erroneous and the burden of proof lies with the party challenging the findings. Here, agency statement that it cannot find travel vouchers to support OPM award does not satisfy burden of proof. Under FLSA, each agency is responsible for keeping adequate records of wages and hours. Once employee has provided sufficient evidence of hours worked, burden shifts to employing agency to come forward with evidence to contrary.

Compensation—Overtime—Fair Labor Standards Act—Statute of Limitations

This Office has previously held that 6-year limitations period contained in 31 U.S.C. 71a and 237 applies to claims arising under section 204(f) of the FLSA, 29 U.S.C. 201, 204(f) (1976). Thus, where agency appeals OPM/FLSA compliance order to this Office, the 6-year limitations period continues to run until claim is received in this Office. Therefore, any portion of award under OPM compliance order which accrued more than 6 years prior to filing of claim in this Office may not be paid.

Matter of: Paul Spurr—Overtime compensation under the Fair Labor Standards Act—6-year Limitation Period, April 2, 1981:

The Office of the Comptroller of the Army requests that we issue an advance decision concerning the claim of Mr. Paul Spurr for overtime pay under the Fair Labor Standards Act (FLSA).

Mr. Spurr was employed by the Army Armament Research and Development Command, Dover, New Jersey. On September 4, 1979, a complaint on behalf of Mr. Spurr was submitted to the Office of

Personnel Management for overtime under the FLSA for travel performed outside his normal tour of duty for the period beginning May 1, 1974. As a result of this complaint, the Director, Eastern Region, OPM, after investigation, issued a compliance order under 29 U.S.C. § 204(f) (1976) awarding Mr. Spurr 30 hours of FLSA overtime compensation per year for the period from May 1, 1974, through August 6, 1978. The 30-hours-per-year figure was derived from evidence submitted by Mr. Spurr, substantiated by his supervisor, and confirmed by OPM during its investigation.

It appears that OPM issued the compliance order on the basis of the agency's failure to rebut certain evidence provided by the complainant, citing the responsibility imposed by the FLSA that employers maintain and preserve records pertaining to FLSA entitlements. The agency's assertion that the complainant was not entitled to compensation unless he provided documentation in the form of copies of his travel orders was specifically denied. Thus, on the basis of estimates submitted by the complainant and substantiated by the supervisor who assigned him the travel duties, OPM found that Mr. Spurr was entitled to 30 hours of overtime compensation per year. Although it does not dispute that Mr. Spurr performed travel for which he is entitled to overtime compensation under the FLSA, the agency contends that it has paid overtime for all periods of travel that can be substantiated by travel vouchers turned up by a search of its records. This amounts to 51 hours, or $618.54. However, it requests an advance decision as to the " * * * legality of payment of overtime compensation based upon a supervisor's informal memo for record estimate as directed in the OPM compliance order * * *."

In effect, we are requested to modify the compliance order issued by OPM. For the reasons stated below we will not disturb the compliance order in this case.

Section 204(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, 204(f) (1976), authorizes the Civil Service Commission (now the Office of Personnel Management) to administer the provisions of the Act with respect to most Federal employees. In fulfilling this responsibility, OPM has issued regulations providing for an FLSA compliance and complaint system. See Federal Personnel Manual (FPM) Letter 551-9, March 30, 1976. Paragraph 5 of that FPM Letter sets forth a procedure for processing complaints that includes an initial investigation on the basis of written presentations from all parties and also provides for onsite investigations, if necessary. The onsite investigations may include a review of time and attendance records, payroll records, and all other pertinent documents. Upon completion of the investigation, a compliance order is issued by OPM where violations are found to have occurred.

Thus, OPM's regulations provide for a formal system of gathering facts and issuing a decision in responding to complaints about possible FLSA violations. This system provides OPM with the means of obtaining all possible information upon which to base their decision. For this reason, we will not disturb OPM's factual findings unless they are clearly erroneous. See *Department of Agriculture Meat Graders*, B-163450.12, September 20, 1978.

Once a covered ("non-exempt") employee has established the fact that he performed work for which he was improperly compensated under the FLSA, he must produce sufficient evidence to show the amount and extent of that work as a matter of reasonable inference. The burden then shifts to the employer to come forward either with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. See *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Munsower* v. *Callicott*, 526 F. 2d 1187 (8th Cir. 1975).

In the present case, the Army has submitted no evidence to us that would compel a finding that OPM's determination was clearly erroneous. Its only contention is that it is unable to produce travel vouchers to support OPM's award of 30 hours of overtime compensation per year.

Local 225 of the American Federation of Government Employees (AFGE), on behalf of Mr. Spurr, alleges that the agency's inability to retrieve vouchers to support the award of 30 hours of overtime compensation per year lies in the agency's inadequate management recordkeeping system. AFGE states that:

> OPM found the same situation [i.e., poor recordkeeping] in the case of Mr. Spurr and therefore accepted evidence other than copies of the actual vouchers. We would point out that this evidence, which Mr. McCullough refers to in paragraph 5 of Inclosure 1 as a "supervisor's informal memo for record," was a signed statement by Mr. Spurr's supervisor (during the period of travel in question) which was submitted to and investigated by OPM. It is interesting to point out that management at no point questioned the supervisor or attempted to discredit his statement.

We do not believe that the Army has satisfied its burden of proving that OPM's factual findings were clearly erroneous. We are particularly persuaded by the fact that the Army did not attempt to refute the supervisor's estimate of Mr. Spurr's entitlements during OPM's processing of the complaint. Clearly, the proper forum for rebutting that evidence is during OPM's investigation of the complaint. Accordingly, we will not overturn the compliance order of OPM in this case.

However, we must impose the 6-year limitations period of 31 U.S.C. § 71a on a portion of Mr. Spurr's claim, even though the issue was not raised by either party. In *Transportation Systems Center*, 57 Comp. Gen. 441 (1978), we held that the 6-year statute of limitations con-

tained in 31 U.S.C. §§ 71a and 237 (1976) applied to claims for overtime under the FLSA. We also stated that:

> In order to protect the interests of employees, claims which have accrued more than 4 years ago and cannot promptly be approved and paid in full amount claimed should be forwarded to the Claims Division [of the General Accounting Office] for recording.

Since Mr. Spurr's claim accured at the time that the overtime was performed and it was not received in this Office until July 3, 1980, any portion that can be shown to have accrued prior to July 3, 1974, may not be paid. See *Unexcelled Chemical Corp.* v. *United States* 345 U.S. 59 (1953).

Accordingly, with the above modification, Mr. Spurr is entitled to payment of overtime compensation under the FLSA pursuant to the compliance order issued by the Office of Personnel Management on May 20, 1980.

[B-200642]

Fraud—False Claims—Effect of Acquittal, etc. of Criminal Charges on Civil Liability

Since acquittal on criminal charges may merely involve a finding of lack of requisite intent or failure to meet the higher standard of proof beyond reasonable doubt, doctrine of *res judicata* does not bar the Government from claiming in later civil or administrative proceeding that certain items on employee's voucher were fraudulent.

General Accounting Office—Decisions—Effective Date—Retroactive—False Claims—Severability Rule

In 57 Comp. Gen. 664 (1978) we held, for purposes of reimbursement where fraud is involved, that each day of subsistence expenses is a separate item of pay and allowances. That rule is applicable to present claim which has not been finally decided on merits and is pending on appeal. Due to discrepancies in record, we remand claim to Air Force for calculation of amount of per diem allowable under that rule.

Matter of: Civilian Employee of the Department of the Air Force—Per Diem Claim, April 7, 1981:

Does a jury verdict of not guilty on criminal fraud charges against an employee preclude the Government from recovering funds paid to the employee on the basis of an allegedly fraudulent travel voucher? Secondly, does the rule of 57 Comp. Gen. 664 (1978) that, for purposes of reimbursement where fraud is involved, each day of subsistence expenses is a separate item of pay and allowances apply to an appeal of a claim based on a travel voucher submitted before that decision was announced? These are the principal issues involved in this case.

This decision is in response to an appeal by a civilian employee of the Department of the Air Force ("Employee") at McClellan Air Force

Base, California, from our Claims Division's action of November 15, 1979, Z–2815083, which denied his claim for per diem.

From our examination of the present state of the record, the following facts emerge. Since 1969 Employee has been a sheet metal worker. From approximately May 28, 1974, to September 30, 1974, he was on temporary duty (TDY) at Jacksonville, Florida, and from approximately October 1, 1974, to March 10, 1975, he was on TDY at Otis AFB, Massachusetts. He returned to McClellan AFB, and on March 19, 1975, submitted travel voucher No. T–23115, in which he claimed total lodging costs of $3,465 for the entire period of temporary duty. Employees had been advanced $7,350, and the voucher indicated a total amount of expenses of $7,185.75 which included $597.75 for transportation and $6,588 for per diem. The per diem expenses included $3,123 for meals and incidental expenses and $3,465 for lodging. The then maximum per diem rate was $25, consisting of $11.80 for meals and miscellaneous, and $13.20 for lodging. The difference between the advancement and his actual TDY expenses allowed amounted to $164.25 which was apparently paid back to the United States.

At some later date, a suspicion arose that Employee's claim for lodging was false in part. The Air Force Office of Special Investigations (AFOSI) and the FBI concluded that he had defrauded the Government by approximately $1,000. On April 12, 1978, he was indicted by a Federal Grand Jury for filing a fraudulent claim for lodging for the period May 28, 1974, to March 10, 1975, and for making a false statement under oath about his lodging expenses while he was on temporary duty in Florida. After a jury trial in the U.S. District Court for the Eastern District of California in August 1978, he was found not guilty of the charges.

In the meantime, on June 30, 1978, the Air Force Accounting and Finance Officer (AFO) determined the travel claims to be false, and administratively initiated a recoupment action for $6,588, the entire per diem portion of the voucher. Since that date $25 per pay period has been and is being deducted from Employee's check. He has appealed that determination to the GAO.

Our Claims Division, on November 15, 1979, decided to deny Employee's claim for per diem on the ground that it was of doubtful validity and could not be paid. He filed an appeal of the denial on September 19, 1980.

In its present state, the record in this case presents several legal and factual disputes. Focusing our attention first on the legal issues, we are presented with the argument that Employee's acquittal is *res judicata* as to any disputed factual matters, and, therefore, that the

Government is now estopped from contending in any civil or administrative proceeding that he submitted a false claim for lodging.

It is clear that, as to matters in issue or points controverted upon which a finding or verdict was rendered, the findings in a prior criminal proceeding may estop a party, even the United States, in a subsequent civil action. *Kennedy* v. *Mendoza – Martinez*, 372 U.S. 144, 157 (1963). An acquittal on a criminal charge, however, may merely involve a finding that an act was not done with the requisite criminal intent. *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232, 234–235 (1972). Furthermore, the acquittal on criminal charges may have only represented "an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Id.* at 235, *quoting Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938). Thus, as to the issues raised, an acquittal on a criminal indictment does not constitute an adjudication on the lesser standard of evidence applicable in civil proceedings. For the applicable civil standard adopted by the Comptroller General, *see* 57 Comp. Gen. 664, 668 (1978) which states that fraud must be proved by evidence sufficient to overcome the presumption in favor of honesty and fair dealing.

Since an acquittal may merely involve a finding of lack of requisite intent or a failure to meet the higher standard of proof beyond a reasonable doubt, it follows that the doctrine of *res judicata* is not applicable in Employee's case, and the Government is not estopped from finding that certain lodging items on his voucher were fraudulent.

The second issue involves what effect, if any, our decision at 57 Comp. Gen. 664 (1978) has on the instant case. We held there that, where an employee submits a voucher for subsistence expenses, each day's subsistence expenses constitute a separate item for this purpose and that fraud for any subsistence item taints the entire per diem or actual expense claim for that day. However, claims for subsistence expenses on other days which are not based on fraud may be paid. In so ruling, we modified B–172915, September 27, 1971, where we had held that a claim for per diem on a voucher was an indivisible item of pay and allowances. In 59 Comp. Gen. 99, B–189072, November 27, 1979, we held the severability rule applicable also to military members and non-Government employees traveling pursuant to invitational travel orders.

The Air Force contends that, while 57 Comp. Gen. 664, decided August 11, 1978, is the current law, it should be given prospective application only. Thus, it would not affect the instant case where the agency seeks to recoup the entire per diem of $6,588 for the full period covered by Employee's travel voucher submitted on March 19, 1975.

While several previous decisions have held that a change in construction of the law need not be given retroactive application, 54

Comp. Gen. 890 (1975) and 56 Comp. Gen. 561 (1977), the question of retroactivity must be analyzed in light of the particular circumstances of each case and the potential impact on Federal agencies and employees. Here, the basic rule involved was established in 1961 in 41 Comp. Gen. 285 (1961), namely that each separate item of pay and allowances is to be viewed as a separate claim even though several such items are included in a single voucher. The 1978 decision merely modified our 1971 ruling as to what constitutes a separate item of subsistence expenses for this purpose. As such we do not believe it requires "prospective only" treatment. Instead we shall apply the rule followed by the courts where a case has not been finally decided on the merits, and is still on appeal, namely that "a court is to apply the law in effect at the time it renders its decisions, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Cort* v. *Ash*, 422 U.S. 66, 76–77 (1975), quoting *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). The Supreme Court thus reaffirmed the principle first announced by Chief Justice Marshall in *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

Moreover, the courts have long recognized that procedural rules apply to pending actions, absent any showing of hardships or injustice in particular cases. *United Wall Paper Factories, Inc.* v. *Hodges*, 70 F.2d 243, 244 (2d Cir. 1934). The severability rule announced in 57 Comp. Gen. 664 is in the nature of a procedural rule since it concerns the method of disposing of vouchers involving fraudulent claims.

Hence, the severability principles announced in 57 Comp. Gen. 664 (1978), and now in effect, are applicable to the present case. See *Ben L. Zane*, B–194159, October 30, 1979, where we applied the rule of 57 Comp. Gen. 664 to a case involving an employee of the Department of Health, Education and Welfare whose travel voucher had been submitted on August 18, 1976.

At this juncture, having ascertained the applicable principles of law, we would usually apply them to the facts of the instant case. We are hindered in this effort by the fact that the record submitted by the Air Force contains three different estimates of the amount of fraud varying between $823 and $1,000, and merely states conclusions as to the various items allowed or disallowed without sufficiently explaining the reasons therefor. We also note further unexplained discrepancies, e.g., it is not clear whether the Air Force considered certain rent receipts from June 1974 through August 1974 in the amounts of $346.40 as fraudulent or valid, or whether it considered utilities expenses during Employee's TDY at Jacksonville. We note there is no

indication in the record of any fraud in connection with his TDY in Massachusetts from October 1974 to March 1975.

In light of the above state of the record, Employee's per diem claim is remanded to the Air Force for a recalculation of the amount of the suspected fraud and a determination of the number of days for which fraudulent information was submitted. In performing this task it should be borne in mind that the regulations at the time these events occurred did not require lodging receipts. Then, in accordance with this opinion he should be allowed per diem for the days for which no fraud is involved.

[B-198464]

Contracts—Solicitation—What Constitutes—Essential Information Requirements

Procuring agency's letter to protester requesting "budgetary cost quote" did not amount to formal solicitation or request for quotations where letter did not advise protester of such essential Government requirements as time for delivery of procured items or cut-off date for submission of proposals and letter itself stated twice that it was merely request for "budgetary proposal" or "budgetary cost quote."

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

Failure of procuring agency to institute formal qualification procedure for known potential supplier, or to act in conjunction with Air Force in its qualification process of same supplier for similar parts for Air Force, contravened Defense Acquisition Regulation 3-101(d), which requires contracting officers to take action to avoid noncompetitive procurements.

Matter of: Algonquin Parts, Inc., April 9, 1981:

Algonquin Parts, Inc. (Algonquin), protests the procurement procedures used by the Department of the Navy, Naval Air Systems Command (NAVAIR), in awarding an order for certain parts for the F-4 aircraft, to the McDonnell Douglas Corporation (McDonnell), under Basic Ordering Agreement (BOA) No. N00019-78-G-0471.

The BOA with McDonnell was negotiated under the authority of 10 U.S.C. § 2304(a)(10) (1976) and the Determination and Findings of the Navy, dated July 20, 1979, wherein the Navy concluded that only certain designers, developers and sole manufacturers of various aircraft possessed the requisite knowledge of the design, production and assembly to perform the necessary work on the aircraft within the requisite timeframe. Accordingly, it was concluded that orders for certain parts, including aircraft retrofit change kits, could be placed with only specified contractors and without formal advertising since competition was impracticable. The Determination and Findings further provided that McDonnell was the approved supplier for the F-4 aircraft.

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Algonquin contends that it is capable of producing part IV of the retrofit change kits and, therefore, protests the Navy's sole-source procurement of part IV for 91 AFC No. 598 retrofit change kits for the F–4 aircraft. Algonquin states that the Navy solicited a bid from it and then refused to award it the order even though it submitted the low-responsive offer. Algonquin argues further that the Navy was fully aware at the time it placed its order that Algonquin was capable of producing part IV for the retrofit change kits but nevertheless improperly disqualified Algonquin as a supplier on the ground that Algonquin had not successfully produced part IV on a continuous basis. Algonquin argues in essence that the Navy's determination not to consider Algonquin a qualified supplier constituted a prequalification of Algonquin which was unduly restrictive of competition and violative of our decision in *Tymshare Inc.*, 57 Comp. Gen. 434 (1978), 78-1 CPD 322; and Defense Acquisition Regulations (DAR) §§ 3–210(i) and 3–410.2 (c)(2)(i) (1976 ed.).

By way of background, the record indicates that in March of 1979, NAVAIR received a proposal from Algonquin, indicating that Algonquin was a potential supplier of part IV of the F–4 No. 598 retrofit change kits. NAVAIR's supplier of these kits in the past had been McDonnell. In June 1979, NAVAIR requested a budgetary pricing proposal from McDonnell for procurement of the F–4 retrofit change kits. In November of 1979, McDonnell responded to NAVAIR's request, offering to supply 54 kits for a price of $2,430,000, and offering to deliver part IV of the kit in 19 months. Apparently, due to the long lead time for delivery of the retrofit change kits, NAVAIR began to take steps to consider Algonquin as a potential supplier. In December of 1979, Navy officials inspected Algonquin's production facilities and were informed by Algonquin that the Air Force had conducted a preaward survey on Algonquin which qualified Algonquin to produce a part substantially similar to part IV of the AFC No. 598 retrofit change kits the Navy required. By letter dated January 21, 1980, the Navy asked Algonquin to submit a budgetary proposal for production and delivery of part IV of the retrofit change kits, which Algonquin submitted by letter dated January 25, 1980, followed up by a letter dated February 4, 1980, stating that the budgetary proposal was an estimate which would be finalized at the time the Navy was prepared to process an order. Thereafter, Algonquin informed the Navy that it had received an Air Force contract to produce a part almost identical to the one Algonquin proposed to supply to the Navy. The Navy, however, on March 20, 1980, placed a sole-source order with McDonnell for the procurement of 91 F–4 AFC No. 598 retrofit change kits, including part IV.

The order was placed with McDonnell for delivery in 12 months notwithstanding the fact that the Navy had been previously advised that McDonnell was unable to meet the Navy's specified delivery schedule.

The Navy states that its determination to place the order with McDonnell was predicated on the fact that, at the time it placed its order for the retrofit change kits, it was still unsure of Algonquin's ability to produce a technically acceptable part for the F–4 aircraft. The Navy indicates that if Algonquin had been successfully producing these parts for the Air Force on a continuous basis at the time this order was placed, this would have sufficiently demonstrated Algonquin's capability, and if time permitted, a solicitation would have been issued. The Navy states, however, that it was unable to wait until Algonquin commenced production of the parts due to the need for the retrofit change kits.

Algonquin protests the Navy's use of the BOA to place its order with McDonnell alleging initially that the Navy, by letter dated January 21, 1980, solicited a bid from Algonquin which Algonquin responded to with the low-responsive offer. Algonquin argues that the Navy's letter contained sufficient information to inform it of the Government's needs and to allow Algonquin to compete on an equal basis with others and, therefore, it amounted to a formal solicitation. See, *e.g.*, *Servrite International, Ltd.*, B–187197, October 8, 1976, 76–2 CPD 325; *American Chain and Cable Company, Inc.*, B–188749, August 19, 1977, 77–2 CPD 129. Furthermore, Algonquin asserts that the letter contained far more information than required by DAR § 16–102.1/DD Form 1707 and, therefore, the letter amounted to a request for quotation (RFQ). Accordingly, Algonquin concludes that its letter of January 25, 1980, was a responsive offer which bound the Navy to place the order with Algonquin. Algonquin further contends that the F–4 weapons system manager who issued the letter had the requisite authority to issue a solicitation.

The Navy argues on the other hand that its letter was issued to Algonquin merely for budgetary planning purposes in the event that Algonquin was awarded the order after a properly conducted competition. The Navy contends that the letter contained insufficient information to enable it to be characterized as a solicitation.

A fundamental precept of Federal procurement law is the requirement that a written solicitation contain sufficient information with respect to the procurement to assure that all offerors are fully informed of the Government's needs so that they are able to compete on an equal basis. This requirement exists for the protection of both the offerors and the Government. *Tymshare, Inc.*, *supra*. With regard

to an RFQ, DAR § 3–501(b)(2) states that these requests should be prepared on Standard Form 18 (see DAR § 16–102.1), or on forms prescribed by departmental regulations. DAR § 16–102.1(a) provides that DD Form 1707 is authorized for obtaining price, cost, delivery, and related information from suppliers. The body of DD Form 1707 sets out such detailed information as the solicitation number, whether the procurement is a negotiated or an advertised one, and the date and local time for bid opening or receipt of proposals.

When viewed against these standards, we conclude that the Navy's letter of January 21, 1980, did not amount to either a solicitation for a bid or an RFQ as Algonquin suggests. Because the Navy's letter did not advise Algonquin of such essential Government requirements as the time for the delivery of the procured parts or the cut-off date for the submission of proposals, it was inadequate as a formal solicitation. See *Complete Irrigation, Inc.*, B–187423, November 21, 1977, 77–2 CPD 387; DAR § 1–305.2(a). Furthermore, the letter was not an RFQ or a request for price/delivery information since DAR § 16–201.1 specifically states that such requests will be made using either Standard Form 18 or DD Form 1707, and neither form was utilized in this instance. Additionally, the letter was not the informational equivalent of an RFQ as Algonquin contends since DD Form 1707 sets out, among other things, whether the procurement is a negotiated or advertised one, and the solicitation number for the procurement. The Navy's letter, on the other hand, contained none of this information and in no manner indicated that it was a solicitation or a request for an offer. To the contrary, the Navy's letter specifically stated in paragraph one and two that it was merely a request for a "budgetary cost quote" or "budgetary proposal." In our opinion, the phrase "budgetary proposal" in the letter was adequate to place Algonquin on notice that the Government did not intend to award a contract to it based solely upon this request. It appears that Algonquin understood this to be the case as Algonquin stated in its follow-up letter of February 4, 1980, that its budgetary proposal was an estimate which would be finalized at the time the Navy was prepared to process an order. In view of our conclusion that the Navy's request for a budgetary proposal was not a solicitation, we find it unnecessary to address the question of the F–4 Weapon System Manager's authority to issue a solicitation.

The procurement statutes and regulations require agencies to obtain maximum competition consistent with the nature and extent of the services or items being procured. *Department of Agriculture's use of master agreements*, 56 Comp. Gen. 78, 80 (1976), 76–2 CPD 390; *Department of Agriculture's use of master agreements*, 54 Comp. Gen.

606, 608 (1976), 76–1 CPD 40. The procurement method of placing orders under a BOA is a procedure predicated on a prequalification of competitors and is appropriate under the same circumstances where a sole-source procurement would have been justified. *Rotair Industries, et al.*, 58 Comp. Gen. 149 (1978), 78–2 CPD 410; *RAM Enterprises, Inc.*, B–198681, October 14, 1980, 80–2 CPD 274. As a general matter, any system of prequalification of competitors to some degree is in derogation of maximum competition in the procurement system. However, it is well accepted that procuring agencies are nonetheless vested with a reasonable degree of discretion to determine the extent of competition which may be required consistent with the needs of the agency and nature of the item to be procured. 54 Comp. Gen. at 608; *Department of Agriculture's use of master agreements*, *supra*, at 80. Even though procedures which prequalify potential offerors prior to bid opening limit competition to a certain degree, this Office has approved with reservation special agency procedures which limit competition where it is demonstrated that such limitations serve a *bona fide* need of the Government. 50 Comp. Gen. 542 (1971); *Department of Agriculture's use of master agreements*, *supra*, at 608, 609; *Department of Health, Education and Welfare's use of basic ordering agreement procedure*, 54 Comp. Gen. 1096, 1097 (1975), 75–1 CPD 392; *see Rotair Industries et al.*, *supra*. Where, however, the governmental interests cited to support such prequalification procedures do not in fact advance *bona fide* interests of the Government, or they do so in an overly restrictive manner, the general rule that such prequalification procedures are an undue restriction on competition is applicable. 54 Comp. Gen. at 608, 609.

The Navy's report indicates that this order was placed with McDonnell on the basis of the Navy's Determinations and Findings which concluded that competition was impracticable because the highly complex and technical nature of the aircraft's replacement components made it necessary that suppliers have a thorough knowledge of the aircraft's design and assembly in order to assure timely delivery of orders, and this knowledge was possessed solely by the manufacturer of the F–4 aircraft, McDonnell. It appears, therefore, that one of the Navy's principal justifications for placing the order for the parts with McDonnell was its concern with respect to McDonnell's capability to produce parts which would prove to be safe, reliable, and technically acceptable when installed in the F–4 aircraft. The Navy's position is supported by DAR § 1–313 which provides that any:

* * * part, subassembly, or component * * * for military equipment to be used for replenishment of stock, repair, or replacement, must be procured so as to assure the requisite safe, dependable, and effective operation of the equipment.

This provision further states that where is it feasible to do so without impairing the above-mentioned interests, "parts should be procured on a competitive basis." In those cases where competition is not feasible, § 1-313(a) also states that parts should be procured from the original manufacturer of the equipment or his supplier.

With regard to the Navy's argument that the procurement of these parts under its BOA with McDonnell was proper since Algonquin was not a qualified supplier at the time it placed its order and, therefore, competition was not feasible or practicable at that time, we do not believe this to be the dispositive inquiry in this case. In our view, the Navy's position that competition was not feasible or practicable at the time the order was placed is a separate question, the disposition of which is dependent upon the validity of the Navy's action prior to that time when it became aware that Algonquin was potentially an alternative supplier.

While we do not question the *bona fide* need of the Navy to obtain parts for the F-4 aircraft which meet the level of quality and reliability assurances necessary to insure the safe and efficient operation of this aircraft, or the need to prequalify potential suppliers of parts of a critical nature to achieve these assurances, these considerations do not serve as a justification for the procuring agency's failure to qualify a potential competitor who informs the procuring agency that it is a potential supplier who may demonstrate that it has the capability to supply the agency's requirements in a satisfactory manner. As we noted in *Rotair Industries*, *supra*, at pages 153 and 154, DAR § 1-313 does not prohibit a procuring agency from receiving and considering proposals from previously unapproved sources who could otherwise qualify under applicable regulations. To the contrary, this Office has recognized that requiring an offeror to furnish data and samples for examination and testing as a prequisite to the qualification of the offeror was consistent with that regulation and the needs of the agency to obtain assurances that such offerors would be capable of supplying parts which would be reliable and interchangeable. *Id.* at 154. We recommended for example, in 50 Comp. Gen. 184 (1970), that notwithstanding the applicability of DAR § 1-313 to the procurement of aircraft combustion chamber clamps, the Air Force should institute a qualification test program to determine the feasibility of procuring the subject clamps from a source other than the original manufacturer. *Id.* at 191.

In our decision in *D. Moody & Company, Inc.*, 56 Comp. Gen. 1005 (1977), 77-2 CPD 233, we stated that the use of a BOA to place orders was restrictive of competition in violation of procurement statutes and regulations where an alternative source offers a surplus item and

the Government disqualifies that supplier for purposes of future competitive procurements without adequate cause. Although the procuring agency in that case also had legitimate concerns over the quality and conformance of the parts offered by the alternative source, as the Navy does here, we determined that such concerns did not preclude a competitive procurement where adequate procedures were available to determine the quality of the parts offered by the alternative source. *Id.* at 1007, 1008.

Although we do not dispute the Navy's assertion that, at the time the order for the kits was placed, a competitive procurement may not have been feasible or practicable due to the urgent need for the aircraft parts, it is manifest from the record that the Navy knew that Algonquin was a potential supplier of the part as early as March of 1979, at which time Algonquin submitted a proposal for the part IV item involved here. In this connection, there is uncontroverted evidence in the record that the Navy was aware of Algonquin's potential as a supplier both before and after the March 1979 proposal. Nevertheless, there is nothing in the record to indicate that the Navy took any steps to begin qualifying Algonquin. Although the Navy began in December of 1979 a process to determine the feasibility of procuring the parts from Algonquin on a competitive basis, the import of the Navy's action in not instituting action before that time to formally qualify Algonquin for its upcoming fiscal year 1980 procurement contravened DAR § 3-101(d), which requires contracting officers to take such action as is necessary to foster competitive conditions for future procurements, including the breakout of parts.

Further, while the Navy advised Algonquin in early December 1979 that it would "study the possibility of considering Algonquin a qualified producer of Part IV" based upon Air Force qualification, and Algonquin furnished the Navy a copy of the Air Force approval by letter of December 8, 1979, the record fails to indicate what, if any, consideration was given to the fact that Algonquin's part had received Air Force approval. The only statement, without explanation, provided by the Navy for not considering Algonquin qualified is that the Navy "still had doubts about Algonquin's ability" and "successful continuous production of Air Force parts would have sufficed as a qualification criteria." In our view, it was incumbent upon the Navy to institute its own qualification program in March 1979 when it was informed that this potential supplier existed or, in the alternative, to have acted in conjunction with the Air Force's qualification process when it learned that Algonquin was being qualified to produce a similar part for the Air Force.

In sum, we conclude that the sole-source award of this order to

McDonnell was improper in that the Navy failed to follow available qualification procedures in derogation of the procurement and regulations which require negotiated procurements to be made on a competitive basis to the maximum extent possible and which require contracting officers to avoid noncompetitive procurements whenever possible by reviewing the reasonableness of delivery requirements and considering the possibility of breaking out components of an item for a competitive procurement. *See, e.g.*, 10 U.S.C. § 2304(a); DAR § 1-300.1; DAR § 3-101(a)(b)(d). Therefore, Algonquin's protest is sustained.

Algonquin contends that the Navy's part IV procurement from McDonnell must be terminated because it was improper and void *ab inito*. In Algonquin's view, the Navy intentionally contravened existing law and regulations requiring competition and that failure on the part of our Office to recommend termination here will result in the perpetuation of an illegal contract.

We have stated that the determination whether termination of an improperly awarded contract is in the best interest of the Government involves the consideration of several factors, besides the seriousness of the procurement deficiency. See *System Development Corporation*, B-191195, August 31, 1978, 78-2 CPD 159, and the cases cited therein. Among the other factors which we consider are the extent of performance, cost to the Government, the urgency of the procurement and the impact of a termination on the procuring agency's mission. *System Development Corporation*, *supra*. In view of the foregoing, it is clear that we cannot recommend termination here solely on the basis of the deficiencies noted above.

Algonquin also urges that once the Navy's procurement from McDonnell is terminated an immediate reprocurement should be made from Algonquin. Algonquin asserts that the overall cost to the Government for the part IV kits will be substantially less if procurement is made from it. In addition, Algonquin emphasizes that it can deliver the kits with as little as 5 months lead time so that there will be no stoppage in their supply to the Navy.

However, in furtherance of the objective of the procurement statutes and regulations in obtaining maximum competition, the most we could recommend would be termination and a competition between Algonquin and McDonnell for the part IV kits since obviously McDonnell is a qualified source.

The Navy asserts that termination for convenience is not appropriate in this case. According to the Navy, there has been considerable performance by McDonnell. In support of this, the Navy states that a good portion of the part IV kits are currently being machined by McDonnell and that any interruption in the machining process would have serious effects, leaving partially machined kits. Also by Decem-

ber 1980 McDonnell had received delivery of all forgings for machining of all of the part IV kits called for by the Navy under its March 20, 1980, order. The Navy believes that if the forgings were transferred upon termination from McDonnell to Algonquin, a complete loss of material would occur because the partially machined McDonnell Kits would not be compatible with Algonquin's machines.

The Navy further contends that there will be substantial costs to the Government if termination is ordered. The Navy estimates that the termination costs at this time for the March 20, 1980, order to be almost the full value of the order (apparently meaning part IV), approximately $2,000,000. Moreover, the Navy believes that McDonnell would have to raise the price on the remaining parts covered by the order.

With regard to a competitive procurement between Algonquin and McDonnell following a termination of McDonnell's contract, the Navy indicates that such a procurement would require 9 months if no difficulties occur. According to the Navy, both companies would have to be provided a solicitation containing a competitive data package including drawings, specifications and details and each would then have to have time to respond to the solicitation, including the providing of a protype article for first article demonstration. The proposals submitted under the solicitation would then have to be evaluated to determine the company that should be selected for award.

In response, Algonquin asserts that the Navy has presented no evidence to show that any significant performance has been made by McDonnell under the March 20, 1980, order. More specifically, Algonquin asserts that: (1) the Navy has not provided our Office with any meaningful, documented status of the delivery order; (2) the Navy has not provided our Office with any determination or tabulation of termination costs which would accrue from the termination of the order; and, (3) the Navy has not provided our Office with any documented, credible impact that termination of the order would have on the Navy's mission. In this regard, Algonquin alleges that the Navy has not conducted any audit or on-site analysis at Algonquin or McDonnell to determine the status of the part IV kits, any purported termination costs, or Algonquin's actual machining capabilities.

Algonquin further contends that the Navy's statements with regard to deliveries to McDonnell for machining and actual machinings by McDonnell do not indicate which fiscal year part IV kits are involved. (Apparently McDonnell is providing the same parts under a 1979 fiscal year contract as well as under the subject 1980 fiscal year contract.) Algonquin points to estimates by the Navy that the lead time to forge the kits to be machined is between 50 to 58 weeks. However, after receiving the March 20, 1980, order from the Navy, Algonquin alleges that McDonnell did not place an order with its subcontractor

for the forged kits until late April 1980. Therefore, Algonquin argues that McDonnell could not have possibly received forgings for machining under the March 20, 1980, order by December 1980. Rather, Algonquin alleges that any delivery of forgings to McDonnell in December 1980 would have been pursuant to the Navy's fiscal year 1979 order for part IV kits.

In further support of the foregoing argument Algonquin has submitted copies of letters dated March 19, 1980, and April 4, 1980, from McDonnell to the Navy in which McDonnell states that while the March 20, 1980, order specifies that the delivery of Part IV is to begin in March 1981 at a rate of seven a month, manufacturing and procurement lead time prohibit the delivery of the part until August 1982. Algonquin contends that the Navy has not rebutted its argument in this regard.

With respect to the Navy's statement that a partially machined part IV kit of McDonnell's would not be compatible with Algonquin's machines, Algonquin notes that it is currently producing part IV kits, for the Air Force and that there is no indication in the record that it has different machining capabilities and processes than McDonnell does. Algonquin further notes that the Navy has not to date conducted an on-site survey of its plant. Therefore, Algonquin argues that the Navy's statement regarding its machining capabilities and processes is completely unsupported and should not be considered by us.

As to the Navy's termination costs, Algonquin asserts that the Navy has provided us with alleged costs which might result from the termination of the entire March 20, 1980, order (parts I through V) and not the costs associated solely with the termination of the part IV kits. Algonquin argues that there is no indication in the record of the costs incurred to date by McDonnell for part IV alone. Moreover, Algonquin questions whether McDonnell has any forgings under the March 20, 1980, order on hand for machining or that McDonnell has already been machining these forgings.

Finally, in response to the Navy's position that a competitive reprocurement would require nearly 9 months, Algonquin contends that is unfounded. Algonquin cites evidence in the record showing that the Navy issued the part IV data package in June 1978 and that both Algonquin and McDonnell received such data package, including engineering drawings, in 1979. Also, Algonquin argues that both it and McDonnell have previously had part IV first article prototypes approved within the Department of Defense and that both companies have been qualified part IV kits producers prior to November 1979.

Further, as pointed out previously, the Navy indicated in December 1979 that the Air Force's qualification of Algonquin would suf-

fice for the Navy's purposes. After Algonquin was qualified by the Air Force, the Navy then required "successful continuous production of Air Force parts" without any explanation as to why this requirement was justified. It has now been more than a year of performance by Algonquin under the Air Force contract and the Navy has not questioned Algonquin's qualification.

From our review of the record we believe that Algonquin has raised sufficient doubt regarding the support for the Navy's arguments as to why termination for convenience would not be an appropriate remedy. We believe the record clearly shows that deliveries of the part IV kits will not begin in March 1981 as specified in the Navy's March 20, 1980, delivery order. The Navy admits that without its assistance McDonnell's deliveries of the 1980 part IV kits would likely have begun about November or December 1981. The Navy states though that in order to reduce delivery lead time, it borrowed forgings from the Air Force and turned them over to McDonnell. Hence, the Navy asserts that McDonnell will begin part IV deliveries under the March 20, 1980, order in May 1981.

However, the record reveals that the Navy's November or December 1981 estimate was based on a January 1980 message from McDonnell that delivery leadtime for part IV would be 19 months after receipt of the Navy's order. As pointed out by Algonquin, the record shows that after the Navy placed its order in March 20, 1980, McDonnell revised its delivery time from 19 months to 28 months. Therefore, even assuming that whatever number of borrowed forgings that the Navy turned over to McDonnell allowed the company to machine and deliver them in May 1981, we fail to understand how McDonnell will be able to machine and deliver by December 1981 the remaining part IV kits. Moreover, it appears from the record (a milestone chart) that at least 53 of the 91 part IV kits will not be needed until May 1982 for use by the Navy in fiscal years 1982 and 1983.

With regard to the part IV forgings borrowed from the Air Force, the Navy has failed to explain the nature and extent of its obligation for their return to the Air Force. Further, Algonquin believes that the Navy borrowed part IV kits in machined form from the Air Force and consequently machined parts corresponding to the number borrowed must be returned to the Air Force after May 1982.

In view of the foregoing, we recommend that the Navy reconsider the feasibility of terminating for convenience the portion March 20, 1980, order pertaining to part IV. Also, we think that the Navy should reconsider the time needed to conduct a competitive procurement between Algonquin and McDonnell in view of the fact there is evidence in the record to suggest that both companies have in the past undergone first article testing. Finally, we believe that there is some in-

dication in the record that the Navy already has the basic technical data package including drawings around which a formal solicitation could be prepared.

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

[B-202137]

General Accounting Office—Jurisdiction—Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Finality of Administrative Decision Where Appeal Procedure Provided For

Protest against propriety of cost evaluation performed under Office of Management and Budget Circular No. A–76 is dismissed where protester did not exhaust available administrative appeal process.

Matter of: JAC Management, Inc., April 9, 1981:

JAC Management, Inc. (JAC), protests the determination by the Department of the Army to perform laundry services in-house rather than contracting them out under solicitation No. DAKF57–81–B–0003. This determination was made as the result of a cost comparison which was conducted under the guidance of Office of Management and Budget Circular No. A–76 (A–76), as implemented by Army Circular 235–1 (February 1, 1980). Based on a cost comparison between the Government's in-house estimate and JAC's low bid, the Army decided to perform the services in-house.

JAC argues that the Army in-house cost estimate did not include all the costs related to the in-house operation and that the Army should comply with A–76 requirements before making a final determination on whether a contract award should be made.

Our Office will review A–76 cost evaluations to assure that bidders are not induced to prepare and submit bids which are then arbitrarily rejected because of an erroneous cost evaluation. *Crown Laundry and Dry Cleaners, Inc.*, B–194505, July 18, 1979, 79–2 CPD 38.

However, where, as here, a relatively speedy appeal procedure is has been exhausted. *Urban Enterprises*, B–201619, February 17, 1981, formally included as part of the administrative decisionmaking process, the administrative decision is not final until that review procedure 81–1 CPD 101. In this connection, we note that at bid opening on January 30 (attended by a representative of JAC) and by followup tele-

grams, the Army advised all bidders of the appeal procedure and that the final contracting decision would not be made during the period from February 3 to February 9. Apparently, however, JAC elected not to follow the administrative appeals procedure. Therefore, we will not consider this protest challenging the A–76 cost evaluation since the available administrative appeal process was not exhausted. *Urban Enterprises*, *supra; Direct Delivery Systems*, 59 Comp. Gen. 465 (1980), 80–1 CPD 343.

JAC notes that the administrative appeal procedure provided by the solicitation for challenging the cost comparison results is permissive, not mandatory, i.e., "interested parties may file * * * specific objections * * *." Therefore, JAC contends that it was not required to exhaust its administrative remedy with the agency prior to filing with GAO. However, our decisions in *Direct Delivery Systems*, *supra*, and *Urban Enterprises*, *supra*, are clear in this regard. We held that:

> Where, as here, a relatively speedy review procedure is formally included as part of the administrative decision-making process, the administrative decision is not final until that review procedure has been exhausted.

Furthermore, *Sanders Company Plumbing and Heating*, 59 Comp. Gen. 243 (1980), 80–1 CPD 99, cited as the basis for the above holding, involved our decisions not to review a grant related procurement where the complainant voluntarily did not first seek resolution of its complaint through an established Environmental Protection Agency (EPA) protest process which was part of the EPA grant administration function. The EPA protest procedures, 40 C.F.R. § 35.939 (1980), contained permissive language similar to the language used in this solicitation, i.e., "a protest * * * may be filed."

Thus, the fact that the administrative review is not mandatory does not relieve the protester of an obligation under our decisions to use the agency procedure prior to seeking review by our Office.

Accordingly, the protest is dismissed.

[B–200260.3]

Contracts—Awards—Small Business Concerns—Size—Appeal—Contract Termination Pending Awardee's Appeal

Awardee's filing of request for reconsideration with Small Business Administration Size Appeals Board provides no basis to withdraw recommendation that improperly awarded contract be terminated since for purposes of determining propriety of award, reliance on Size Appeals Board's initial determination is appropriate.

Matter of: Mil-Tec Systems Corp.; ACR Electronics, Inc.—Reconsideration, April 15, 1981:

Quadratec Electronics, Inc., requests reconsideration of our decision *Mil-Tec Systems Corp.; ACR Electronics, Inc.*, B–200260; B–200260.2,

February 9, 1981, 81-1 CPD 78. In that decision, we recommended termination of a contract awarded to Quadratec since the Air Force did not provide the pre-award notice to other offerors required by Defense Acquisition Regulation (DAR) § 1-703(b)(1) (1976 ed.), and the Small Business Administration (SBA) subsequently found Quadratec not to be small pursuant to a timely size status protest filed by ACR Electronics, Inc.

Quadratec argues that it is and always has been a small business and states that it has filed a request for reconsideration with the SBA Size Appeals Board. Therefore, Quadratec contends our February 9, 1981 recommendation for contract termination should be withdrawn.

We do not view Quadratec's filing of a request for reconsideration with the SBA Size Appeals Board as providing any basis on which to withdraw our recommendation. While it is possible that the Size Appeals Board might reverse its prior position on reconsideration, we believe that for the purposes of determining the propriety of a contract award, reliance upon the initial Size Appeals Board determination is appropriate.

In this regard, we note that in the case of an appeal the applicable regulations (DAR § 1-703(b)(3)) provide only for withholding contract award for 30 working days from the time the protest is initially filed with the SBA District Office. If no decision on the appeal has been rendered at the end of this period, the contract may be awarded on the basis of the SBA District Director's size determination. *S&G Services, Inc.*, B-195980, April 15, 1980, 80-1 CPD 268. There is no provision for withholding award for any length of time pending a request for reconsideration.

Thus, the applicable regulations establish a point at which the contracting officer may regard the SBA's decision as final for purposes of determining the propriety of an award under the pending procurement. As we have emphasized with respect to our own Bid Protest Procedures, the resolution of protests stemming from the award or proposed award of Government contracts requires the balancing of conflicting considerations: the need for the Government procurement process to proceed in an orderly and expeditious manner, and the need to afford protesters and interested parties a fair opportunity to present their cases. *Bird-Johnson Company—Request for Reconsideration*, B-199445.3, October 14, 1980, 80-2 CPD 275. To that end, we recognize the need for the resolution of such protests in an expeditious manner and at a point at which corrective action, if necessary, is most practicable and thus least burdensome on the conduct of the procurement. *Id.*

In this case, the Air Force failed to notify the unsuccessful offerors of the apparent successful offeror's identify prior to award, as required by DAR § 1-703(b)(a). This omission prevented the filing of a size

status protest prior to award, the time at which corrective action would have been most practicable, and for which the regulations established a procedure for determining the propriety of award in the face of such a protest. *See* DAR § 1-703(b)(3).

Had the applicable regulations been followed, award would have been made either on the basis of the District Director's size status determination or the Size Appeals Board's initial decision, depending on the circumstances of the case. *Id.* The filing of a request for reconsideration with the Size Appeals Board would have had no bearing on the propriety of award. We see no reason why the result should be any different where the established procedures have been circumvented by the agency's failure to provide the pre-award notice on which the procedures are predicated. Nor do we think it appropriate to allow an individual, by the simple expedient of filing a request for reconsideration with the Size Appeals Board, to delay the recommended determination of a contract beyond the point at which, based on the extent of contract performance, such termination remains a practicable remedy. See *Dyneteria, Inc.*, B-178701, February 22, 1974, 74-1 CPD 89.

Our decision of February 9, 1981, is affirmed.

[B-200283]

Appropriations — Permanent Indefinite — Judgments — Against Government—Availability for "Front Pay"

As a result of an employment discrimination suit brought by certain female employees, the Government Printing Office (GPO) was ordered in a court judgment to pay the plaintiffs back pay for past economic harm and an added increment of pay above that to which they were otherwise entitled, for continuing economic harm until a certain number of plaintiffs were promoted. The so-called award of "front pay" in this instance amounts to damages and should be paid from the permanent indefinite appropriations provided in 31 U.S.C. 724a. Agency appropriations are not available to pay compensation above the amount prescribed for the particular job level in question. 55 Comp. Gen. 1447 (1976) is distinguished.

Matter of: Payment of "Front Pay" Court Judgment against GPO, April 15, 1981:

The Acting Public Printer has requested a decision from this Office concerning the source of payment of one element of a judgment against the Government Printing Office (GPO). A class action suit was initiated by certain GPO female employees, hereafter referred to as plaintiffs, under the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d)(1) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* alleging that they had sustained economic loss from GPO discriminatory employment practices. In *Thompson* v.

Boyle, 499 F. Supp. 1147 (1979), the court found for the plaintiffs and rendered a judgment in their behalf. Among other things, the judgment awarded the plaintiffs back pay on a pro-rata basis in a lump sum, representing the difference in pay the class as a whole would have received had 50 percent of its members been promoted to the next higher position, less the pay the class as a whole actually received. In addition, the court awarded what it termed "front pay," which amounts to an added increment of pay over each class member's current pay for each future pay period after the date of the judgment until such time as GPO is able to promote members of the class into a designated number of higher grades.

GPO has correctly assumed that the back pay award may be paid from the permanent indefinite appropriations authorized by 31 U.S.C. § 724a. See *e.g.*, 58 Comp. Gen. 311 (1979). However, GPO is uncertain whether the "front pay" award may be paid from this appropriation or whether it must use appropriations available within the agency. The front pay question is further complicated by the fact that the above captioned case has been appealed and the judgment has been stayed pending review of the lower court decision and judgment. As a result of the stay, GPO wishes to know whether it should obligate and reserve its own appropriations to make the front pay payments if the judgment is affirmed. Based on the rationale set forth below, we are of the opinion that both front pay and back pay should be paid from the permanent indefinite appropriations provided by 31 U.S.C. § 724a and hence the agency appropriations should not be used for any part of the judgment.

The provisions of the judgment concerning front pay are as follows:

> VII FRONT PAY UNDER TITLE VII FOR DISCRIMINATION IN MAKING PROMOTIONS
>
> It is FURTHER ORDERED, that from the date hereof, until the class plaintiffs fill one-half of all promotion positions in the Bindery, for each pay period each Title VII plaintiff remains employed by defendant, she shall receive the difference between her wages and the wages she would have received on a pro-rata basis as if JBWs [journeyman bindery workers] for that pay period filled one-half of all promotion positions in the Bindery or a proportionate number of such promotion positions, whichever number is lower, provided, however, that no JBW receiving a promotion shall receive compensation under this paragraph after receiving said promotion. It is provided further that, because of the equalization of wages ordered in part III supra, the Grade 4 JBWs shall not receive any compensation under this paragraph.

The term "front pay" is used in the instant decision to differentiate the money award payable each pay period subsequent to the date of the decision from the lump sum award payable to redress discriminatory practices in the past. While the latter award is termed "Back Pay," there was no finding made that any individual plaintiff would

have been promoted but for the agency's discriminatory practices. The award, therefore does not represent a make-whole remedy; that is, the court is not attempting to place each plaintiff in the same financial position she would have enjoyed had she been promoted at some fixed date in the past. Rather, the court has awarded a measure of damages for lost promotional opportunities due to past discriminatory practices.

This distinction is important in considering the source of funds for the post-judgment payments ordered by the court. We had occasion to consider the issue of a judgment provision that ordered continuing future payments to employees in our decision concerning certain National Aeronautics and Space Administration (NASA) employees entitled: *Matter of the source of funds to pay judgment in favor of Jack M. Whaley and Victor C. Wolff*, 55 Comp. Gen. 1447 (1976). Among other things, the judgment in that case required the agency to pay the plaintiffs front pay beyond the date of the judgment. However, there, the court determined that NASA had erred in computing the rate of pay of certain wage grade employees that had been converted to the General Schedule. As a remedy, the court ordered NASA to pay the employees an added increment of pay to which they were duly entitled under applicable statutes and regulations and would have received except for the conversion error. We held that backpay to the date of the judgment should be paid from the permanent indefinite appropriations provided by 31 U.S.C. § 724a, but all pay after the date of the judgment for these employees should be paid from NASA appropriations at the corrected rate. In other words, the NASA employees were entitled to pay at the higher rate, and NASA's appropriations were available to pay the salary and benefits to which the employees were entitled on an ongoing basis.

The judgment in the instant case is different from the judgment in the NASA case. The court recognized that individual employees were not entitled to a higher rate of pay commensurate with the salary of the next higher grade. Again, there was no finding that any individual employee was entitled to be promoted. While the salary differential was taken into account in determining the dollar amount of the award, the award itself was simply a measure of damages. Therefore, GPO does not have authority under applicable statutes and regulations to pay the added increments to each individual plaintiff since its appropriations for salary are available only for the compensation prescribed for the particular grade level. We conclude that the added increments of pay authorized solely by the judgment must be paid out of appropriations provided under 31 U.S.C. § 724a.

If the instant judgment should be affirmed on appeal, front pay from the date of the judgment until the date of implementation may be

handled as if it were backpay, which is what it has in fact become during the period of the stay. At that time representatives of GPO and this Office can discuss the most efficient manner in which to handle the front pay payments from the judgment fund.

[B-202133]

Contracts—Protests—Interested Party Requirement—Bidder Refusing Bid Acceptance Time Extension

Where low bidder refuses to extend its bid when Government requests such an extension, bidder loses standing to protest subsequent award to second low bidder.

Matter of: Duraclean by Simpson, April 15, 1981:

Duraclean by Simpson (Duraclean) protested the award of a contract under solicitation GSI)-5DPR-00003 issued by the Property Rehabilitation Division, Federal Property Resources Service, General Services Administration (GSA).

The invitation for bids was issued on September 25, 1979. The bid opening date was originally scheduled for October 24, 1979, but was extended by amendment to November 1, 1979. Duraclean's bid was submitted on October 15 and included a 10-day acceptance limitation. Since Duraclean was the lowest bidder, GSA sent it a mailgram on December 26 requesting an extension of its bid and an answer by December 31. No response was received. Again, on March 24, 1980, Duraclean was requested to extend its bid but it refused because it could not get a subcontractor. The contract was awarded on April 30, 1980, to the second lowest bidder.

Duraclean inquired about the disposition of the contract and agreed to extend the date of acceptance of its bid in a letter which was postmarked June 24, 1980. On January 14, 1981, GSA informed Duraclean that its bid had expired and the contract had been awarded to another bidder. GSA received a letter from Duraclean on January 27, 1981. However, because the letter was addressed to the Comptroller General, but sent to GSA, and stated no basis of protest, GSA contacted Duraclean and found that it intended the letter to be a protest to the Comptroller General.

Duraclean's express refusal to extend its bid presents the threshold question of whether the firm is still an "interested party" entitled to maintain a protest before our Office. A party must be "interested" under our Bid Protest Procedures, 4 C.F.R. part 20 (1980), in order to have its protest considered by our Office. Determining whether a party is sufficiently interested involves consideration of the party's status in relation to the procurement. *Don Greene Contractor, Inc.*, B-198612, July 28, 1980, 80-2 CPD 74.

By refusing to extend its bid, Duraclean withdrew its offer and, therefore, rendered itself ineligible for award. Therefore, even if we were to sustain Duraclean's protest, it could not receive award of this contract. In view thereof, no useful purpose would be served by ruling on the protest even if it was otherwise for our consideration.

Accordingly, the protest is dismissed.

[B-199951]

Advertising—Newspapers, Magazines, etc.—Authorization Requirement—Applicability—Executive Branch Agencies—Environmental Protection Agency

Claimant, former Environmental Protection Agency (EPA) Assistant Regional Counsel, had notices published in newspapers without prior written authorization as required by 44 U.S.C. 3702 and EPA directives. Claimant paid newspapers from his own personal funds and sought reimbursement from EPA. Since EPA could not have paid claim by newspapers directly, and since employee may not create claim in his favor by voluntarily making payment from personal funds, claim must be denied.

Matter of: Richard A. Du Bey, April 16, 1981:

Mr. Richard A. Du Bey has requested reconsideration of the action of our Claims Group disallowing his claim in the amount of $89.93 arising in the circumstances set forth below. For the reasons that follow, we conclude that the disallowance was correct.

On January 5 and February 2, 1980, Mr. Du Bey, then the Assistant Regional Counsel, Region X, Environmental Protection Agency (EPA), requested that a notice of a public hearing be advertised in two Boise, Idaho newspapers. The notice had been provided for in a stipulation by the parties in a lawsuit brought against EPA by a homeowners' association. Upon discovering that he had failed to comply with a requirement, imposed by statute and EPA directive, that he obtain written authorization before placing the notices, Mr. Du Bey paid the newspapers from his own personal funds and sought reimbursement from EPA. EPA referred the matter to our Claims Group which disallowed the claim by Settlement Certificate dated June 10, 1980 (claim no. Z-2822295).

The primary reason Mr. Du Bey's claim cannot be allowed is 44 U.S.C. § 3702, which provides:

> Advertisements, notices, or proposals for an executive department of the Government, or for a bureau or office connected with it, may not be published in a newspaper except under written authority from the head of the department; and a bill for advertising or publication may not be paid unless there is presented with the bill a copy of the written authority.

An EPA directive, EPA Procurement Information Notice No. 79-25, dated May 21, 1979, implements this statute and prescribes the

procedures to be followed in placing orders for paid notices or advertisements.

An initial question is whether the statute applies to EPA. This question arises because the statute uses the language "for any executive department of the Government, or for a bureau or office connected with it," and, strictly speaking, EPA is not an "executive department" nor is it a bureau or office connected with an executive department. The question is thus whether Congress could have intended to make the statute applicable only to cabinet-level departments and not to executive branch agencies like EPA. Research discloses that 44 U.S.C. § 3702 was originally enacted in 1870 (16 Stat. 308). The practice of creating executive agencies outside of the departmental structure is essentially a 20th century phenomenon. Thus, when the statute was originally enacted, Congress could not have intended to exclude executive branch agencies outside of the departmental structure because such agencies did not exist at that time. On the contrary, it appears that Congress was taking extra caution to ensure that the entire executive branch (as it then existed) was included. Accordingly, we think 44 U.S.C. § 3702 was intended, and must be construed, to apply to the entire executive branch.

A long and consistent line of decisions of the Comptroller General and of his predecessor, the Comptroller of the Treasury, has held that, under the plain terms of the statute, a voucher cannot be paid nor can a claim by a newspaper be allowed unless the prior written authority required by section 3702 has been obtained. Also, in view of the mandatory language of the statute, after-the-fact approval or attempted ratification is not sufficient to remove the statutory bar against payment. 5 Comp. Dec. 166 (1898); 3 Comp. Gen. 737 (1924); 4 Comp. Gen. 841 (1925); 17 Comp. Gen. 693 (1938); 35 Comp. Gen. 235 (1955); B–181337, November 25, 1974; B–196440, April 3, 1980; B–199453, October 2, 1980. As an early Comptroller of the Treasury noted, "If any statute is mandatory this is. . . ." 5 Comp. Dec., *supra*, at 168.

Since EPA could not have paid the claim under the existing statutory language if filed directly by the newspapers, we see no legal basis to reimburse Mr. Du Bey. As stated in 3 Comp. Gen. 681, 682 (1924), "the voluntary intervention of claimant in the matter cannot operate to authorize the making indirectly of a payment that could not legally be made directly."

There is an additional principle involved here—the well-established rule that no officer or employee of the Government can create a valid claim in his favor by paying obligations of the United States from his own funds. *E.g.*, 33 Comp. Gen. 20 (1953); B–184982, October 13, 1976. Exceptions have been recognized where the necessity for an expend-

iture arose in urgent and unforeseen circumstances, which is not the case here. A recent decision, B–186474, June 15, 1976, stated:

> Voluntary payments of Government obligations from personal funds must be very strongly discouraged, and the general rule remains that reimbursement will not be authorized.

For the reasons stated above, the settlement action of our Claims Group must be affirmed.

[B–200665]

Leaves of Absence—Civilians on Military Duty—Unlimited Military Leave— Purpose of Duty Consideration—District of Columbia National Guard Duty

Employee of the District of Columbia was ordered to perform 20 days of full-time training duty and 15 days of annual field training as a member of the District of Columbia National Guard. Since full-time training duty directed under the authority of 32 U.S.C. 502 is active duty, employee is entitled to military leave under 5 U.S.C. 6323(a) for 15 of the 20 days of such duty. Because the additional 15 days of annual field training was ordered under the authority of title 39 of the District of Columbia Code, applicable specifically to the District of Columbia National Guard, he is entitled to military leave for that encampment under 5 U.S.C. 6323(c).

Leaves of Absence—Civilians on Military Duty—Charging—Legal Holidays

Employee of the District of Columbia was ordered to perform duty as member of District of Columbia National Guard for two periods that included holidays. Since the holidays in question were totally within the periods of absence on military leave, employee must be charged military leave for them. 27 Comp. Gen. 245 (1947).

Matter of: Reginald L. Campbell—Military Leave, April 16, 1981:

The Executive Officer of the District of Columbia Courts has asked our Office to furnish advice regarding the military leave entitlement of Mr. Reginald L. Campbell, a full-time employee of the Superior Court of the District of Columbia. During three periods in 1979 Mr. Campbell took the leave in connection with his duties as an officer in the District of Columbia National Guard (DCNG). For the 14-day period from May 19 through June 1, 1979, Mr. Campbell was ordered to full-time training duty at the DCNG Officer's Candidate School (OCS), Fort Meade, Maryland. From June 23 through July 7, 1979, he was ordered to 15 days' annual training at Fort Pickett and for 6 days in December 1979 he was directed to perform full-time training duty which involved the ferrying of aircraft from Texas to Fort Belvoir, Virginia.

The Executive Officer's questions concern the extent of Mr. Campbell's entitlement to military leave under the following two subsections of 5 U.S.C. § 6323 (Supp. I, 1977):

> (a) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary

indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for each day, not in excess of 15 days in a calendar year, in which he is on active duty or is engaged in field or coast defense training under sections 502–505 of title 32 as a Reserve of the armed forces or member of the National Guard.

* * * * * * *

(c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.

The Executive Officer first asks whether Mr. Campbell may be granted military leave under 5 U.S.C. § 6323(c) for all three periods that he was on duty with the DCNG. More specifically, he asks whether civilian employees who are members of the District of Columbia National Guard are entitled to unlimited military leave under 5 U.S.C. § 6323(c) for all DCNG duty regardless of purpose if such duty is supported by orders from the Commanding General. If not, the Executive Officer asks whether leave in excess of the 15 days authorized by 5 U.S.C. § 6323(a) may be granted for purposes such as OCS training and the ferrying of aircraft.

Subsection 6323(c) is a substantial reenactment of section 608 of title 39 of the District of Columbia Code. In 27 Comp. Gen. 78 (1947) we recognized that the provision which currently appears as 5 U.S.C. § 6323(c) authorizes unlimited military leave for members of the DCNG for specific purposes. In that case, we held that the 15-day limit currently found in 5 U.S.C. § 6323(a) has no application to employee members of the DCNG who are entitled under 5 U.S.C. § 6323(c) to military leave with pay, without time limitation, when ordered by the Commanding General to duty in connection with parades or encampments.

We have held that leave under 5 U.S.C. § 6323(c) may not be granted without regard to the purpose of the military duty. In 19 Comp. Gen. 687 (1940) we stated (quoting from the syllabus) :

There is no limit on the number of days [of] military leave with pay which may be granted civilian officers and employees who are members of the National Guard of the District of Columbia when ordered to active duty of the kind for which such leave is authorized under the act of March 1, 1889, as amended * * *.

The terms of the 1889 act, which provided for the organization of the militia of the District of Columbia, are currently embodied in title 39 of the District of Columbia Code. The title is incorporated by reference in 5 U.S.C. § 6323(c). Examples of the kinds of duties under title 39 for which such leave would be authorized are encampments, drills, and parades.

This Office has disapproved the use of military leave under 5 U.S.C. § 6323(c) to perform certain activities not within the scope of title 39 of the District of Columbia Code. In 15 Comp. Gen. 633 (1936) we held that the authority now contained in 5 U.S.C. § 6323(c) has no application to periods of attendance at a service school by members of the District of Columbia National Guard. In 6 Comp. Gen. 635 (1927) we held that that authority did not extend to participation by members of the DCNG in rifle tournaments in a foreign country. In reaffirming 6 Comp. Gen. 635 (1927) in A–17476, May 5, 1927, we rejected the argument that employees of the United States or District of Columbia who were members of the DCNG were entitled to unlimited military leave for any duty the Commanding General thought proper.

In answer to the Executive Officer's first question, while there is no specific limit on the duration of leave under 5 U.S.C. § 6323(c), such leave can be taken only for encampments, parades or other duties ordered or authorized under title 39 of the District of Columbia Code.

The term "encampment" as used in 5 U.S.C. § 6323(c) includes annual field training performed pursuant to the requirements of title 39 of the District of Columbia Code. The annual training duty performed by Mr. Campbell at Fort Pickett was directed by orders which cite 32 U.S.C. § 503, the general authority for participation of members of the National Guard in "encampments * * * or other exercises for field or coast defense instruction," as well as Permanent Order 14–1 promulgated by Headquarters for the DCNG. The Permanent Order relies in part on the authority of title 39 of the District of Columbia Code to require annual encampments of the DCNG. Thus, the 15 days of annual training duty performed by Mr. Campbell would qualify for military leave under either subsection 6323(a) or 6323(c). See 44 Comp. Gen. 224 (1964).

The two periods of full-time training duty performed by Mr. Campbell were directed by orders issued under the authority of 32 U.S.C. § 502(f). Because the duty did not involve an encampment or parade and because it was not otherwise ordered or authorized under title 39 of the District of Columbia Code, it does not come within the purview of subsection 6323(c) and Mr. Campbell is not entitled to unlimited leave therefor. However, Mr. Campbell may be granted military leave under 5 U.S.C. § 6323(a) for 15 of the 20 days that he was on full-time training duty. As used in that subsection and as defined at 32 U.S.C. § 101(22), the term "active duty" includes full-time training duty. Thus, subject to the 15-day limitation contained in that section, Mr. Campbell's time in a full-time training status qualified for military leave under 5 U.S.C. § 6323(a).

For 1979, Mr. Campbell should be granted 15 days of military leave under subsection 6323(a) for the time that he was in a full-time training duty status and he is entitled to military leave under subsection 6323(c) for the 15 days that he performed annual training duty at Fort Pickett.

The Executive Officer's final question relates to the fact that a holiday occurred during each of the first two periods of DCNG duty performed by Mr. Campbell. He asks whether Mr. Campbell's absence on these two holidays should be charged to military leave.

In computing leave of absence under 5 U.S.C. § 6323 nonworkdays, including holidays, must be charged to military leave unless the nonworkdays are not wholly within a period of absence on military leave. 27 Comp. Gen. 245, 253 (1947). Since the two holidays in question, Memorial Day and Independence Day, were wholly within the periods of DCNG duty Mr. Campbell must be charged military leave for them.

[B-201591]

Officers and Employees—Transfers—Relocation Expenses—Pro Rata Expense Reimbursement—House Purchase or Sale—Two Adjoining Plots Sold Separately to One Buyer

Transferred employee sold residence on one acre lot to single purchaser as two separate parcels to enable buyer to obtain financing on portion of land containing residence. Fact that portion of land not containing residence was too small to use as separate building site and fact that one-acre lot size was common acreage for single family residences in area rebut presumption raised by separate sale that smaller parcel was land in excess of that reasonably related to the residence site within meaning of paragraph 2-6.1h of the Federal Travel Regulations. Realtor's fees paid for sale of both parcels may be reimbursed.

Matter of: W. Carl Linderman—Pro rata reimbursement of real estate expenses, April 16, 1981:

We have been asked by a Certifying Officer for the Department of Agriculture to determine whether Mr. W. Carl Linderman may be reimbursed a $300 realtor fee incurred in connection with the sale of his former residence.

Mr. Linderman, a Department of Agriculture employee, was transferred from Pineville, Louisiana, to Pocatello, Idaho, in February 1980. In connection with that move, Mr. Linderman sold his Pineville residence which was situated on a one acre parcel of land. To enable the buyer to qualify for a low income, low interest loan, Mr. Linderman sold his residence to a single purchaser by means of two separate but related transactions. He sold the smaller portion of the land, consisting of less than one-half acre, to the buyer for cash. This enabled the buyer to purchase the residence with the remaining land

at a price that was sufficiently reduced to qualify for the financing sought.

The Department of Agriculture has reimbused Mr. Linderman for the realtor's fee paid in connection with the sale of the residence portion of the land. The agency is in doubt, however, whether the $300 realtor's fee associated with the smaller portion of the land may be reimbursed. In this regard, the Certifying Officer refers to our holding in 54 Comp. Gen. 597 (1975) and to the following provision at paragraph 2–6.1f of the Federal Travel Regulations (FTR) (FPMR 101–7, May 1973):

> f. *Payment of expenses by employee—pro rata entitlement.* * * * The employee shall also be limited to pro rata reimbursement when he sells or purchases land in excess of that which reasonably relates to the residence site.

In arguing that the smaller portion of land was reasonably related to the residence site, Mr. Linderman points out that the residence was located in a rural area where septic system limitations had the practical effect of requiring him to sell the entire one-acre parcel to one buyer. His assertion that the smaller portion is too small to be used as a residence site has been confirmed by the agency. Information obtained from the local county supervisor indicates that until recently the State of Louisiana had required a minimum of one acre of land to support a septic system. Subject to percolation tests, that requirement has recently been relaxed to permit a one-half acre parcel to support a single septic system.

In 54 Comp. Gen. 597, we discussed the proration requirement of the above-quoted regulation insofar as it relates to an employee's purchase or sale of a large tract of land. Where a transferred employee buys or sells a large tract of land, we held that FTR para 2–6.1f limits reimbursement of real estate expenses to those costs associated with conveyance of the residence itself and such land as reasonably relates to the residence site. The decision details those factors that may be considered in determining how much of the land relates to the residence site and how much is excess. That decision does not itself require proration where the employee purchases or sells a residence located on a reasonably small parcel of land that is comparable in size to those on which other single family dwellings in the area are situated.

We have recognized, in a line of decisions related to 54 Comp. Gen. 597, that where an employee divides his property into separate parcels for sale purposes, there is a strong presumption that parcels other than that on which the house is located do not relate to the residence site. B–171493, February 2, 1971. Where the separate parcels are sold to separate purchasers, we have treated that presumption as compelling,

regardless of the size of the parcels involved. See *Franklin J. Rindt*, B-199900, February 10, 1981, and *Harold J. Geary*, B-188717, January 5, 1978. Where the separate parcels are conveyed to an individual purchaser, however, we have treated the separate transactions as giving rise to a presumption that the parcel not containing the residence is excess, thus warranting consideration of the factors discussed in 54 Comp. Gen. 597.

In *William C. Sloan*, B-190607, February 9, 1978, we considered the claim of an employee who had divided his land into two parcels. Within a period of 3 days, he sold the two-acre parcel on which the residence was situated and the adjacent five-acre parcel to the same purchaser. In that case, we upheld the agency's finding, based on the factors set forth in 54 Comp. Gen. 597, that the five-acre parcel was not related to the residence site. In part, the agency's finding was based on the fact that one acre was generally regarded as an adequate building site in the area and the fact that the five-acre parcel could be developed separately from the parcel containing the residence.

Consistent with the above decisions, the fact that Mr. Linderman divided his residence and the one-acre lot into two parcels for the purpose of sale raises a presumption that he conveyed land in excess of that which reasonably relates to the residence site. However, the information obtained by the Department of Agriculture regarding land use in the vicinity of Mr. Linderman's residence reasonably rebuts any inference that any part of the land sold did not reasonably relate to the residence site. In fact the separate conveyances were part of a single transaction in which the entire one-acre parcel was transferred to a single purchaser for use as a residence.

Since the two realtor's fees paid by Mr. Linderman do not exceed the fee he would have paid to transfer the one acre as a single parcel, he may be reimbused the $300 amount claimed.

[B-202455]

Department of Energy—Advisory Committees—Establishment—Energy Policy Task Force—Federal Advisory Committee Act Compliance

The Energy Policy Task Force (EPTF), a Department of Energy (DOE) advisory committee, was not legally established on the date of its first meeting because the Secretary of Energy had not completed consultation with General Services Administration (GSA), published determination notice, or filed its charter with the Library of Congress or congressional committees with "legislative jurisdiction" at that time as required by the Federal Advisory Committee Act (FACA). But it is thought DOE officials made good faith attempt to follow approval and filing procedures. 5 U.S.C. App. I, sec. 9 (1976); OMB Circular No. A-63, Revised (1974).

Department of Energy—Advisory Committees—Establishment—Energy Policy Task Force—Federal Advisory Committee Act Compliance—Approval and Coordination Functions

FACA legislative history shows requirement for agency head approval of advisory committee, after consultation with Office of Management and Budget (OMB), was developed to limit growing number of advisory committees. Since coordination and approval functions, although late, were duly performed by both GSA and OMB, with final decision made to authorize creation of EPTF, responsible officials had made determination this advisory committee was necessary, so basic concerns motivating Congress to establish these requirements had been addressed.

Department of Energy—Advisory Committees—Establishment—Energy Policy Task Force—Federal Advisory Committee Act Compliance—Notice Requirements

FACA requirement for public notice of creation and objectives of advisory committee was met only minimally because first Federal Register notice, printed 8 days before first meeting of EPTF, gave only broad description of EPTF purpose without referring to its major function, i.e., preparation of the National Energy Plan draft. Congress and public had no access to EPTF charter or membership list prior to meeting.

Department of Energy—Advisory Committees—Establishment—Energy Policy Task Force—Federal Advisory Committee Act Compliance—Charter Statement Requirements

EPTF charter does not describe in sufficient detail its objectives and scope of activity or its duties as required by sections 9(c)(B) and (F) of FACA since no mention is made of the National Energy Policy Plan, even though development of a proposed plan is EPTF's sole function. Further, if EPTF's Plan drafting role gives it more than solely advisory functions, its charter should so state, citing authority given for those functions. Unless provided by statute or Presidential directive, advisory committees may be utilized solely for advisory functions under 5 U.S.C. App. I, sec. 9(b), but under 15 U.S.C. 776(a), DOE may be able to use advisory committee to perform some operational tasks.

Department of Energy—Advisory Committees—Establishment—Energy Policy Task Force—Federal Advisory Committee Act Compliance—Membership Balance Requirements

All interests need not be represented or represented equally to meet FACA and Federal Energy Administration Act balance of membership requirements. Required standard must be judged on case-by-case determination depending on statute or charter creating committee. EPTF does not achieve FACA minimum balance of interest or represent all interests required by Federal Energy Administration Act. Deficiency may be overcome by changing EPTF membership to achieve better balance of energy, environmental and consumer interests. 15 U.S.C. 776(a) (Supp. III, 1979); 5 U.S.C. App. I, secs. 5 (b), (c) (1976).

Department of Energy—Advisory Committees—Expenditures—Propriety—Energy Policy Task Force

Review of EPTF expenditure information supplied by DOE indicates all funds utilized to date were for travel expenses of task force members or incurred in connection with recording of meeting transcripts and were charged to Office of Secretary's Budget for travel, salary and related expenses. Since each agency is held responsible by section 5 of FACA for providing support services for each advisory committee established by or reporting to it, the use of these funds for this purpose seems legitimate.

To The Honorable Richard L. Ottinger, House of Representatives, April 20, 1981:

This refers to your letter of March 4, 1981, requesting an opinion on the legality of the establishment and operation of the Energy Policy Task Force (EPTF), an advisory committee of the Department of Energy (DOE). You expressed concern that not all requirements of section 17 of the Federal Energy Administration Act of 1974, the Federal Advisory Committee Act and DOE regulations had been followed in relation to the EPTF Charter filing requirements and the composition of its membership.

Due to the urgency of your request, there was insufficient time to obtain an official response from DOE. The information contained herein was developed through interviews with Office of Management and Budget (OMB), DOE, and General Services Administration (GSA) officials concerned with the formation of the EPTF, memoranda and other materials supplied by DOE, including the DOE Secretary's letter to you dated March 20, 1981.

Establishment of EPTF

Section 17 of the Federal Energy Act of 1974, Pub. L. No. 93-275, approved May 7, 1974, 88 Stat. 96, 110, 15 U.S.C. § 776 (1976), set forth procedures for the Administrator of the Federal Energy Administration, the predecessor of the Department of Energy, to establish advisory committees. Subsection (d), 15 U.S.C. § 776(d), provides that unless inconsistent with this section, the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. I (1976), will also apply to DOE's advisory committees. For the reasons discussed below, we conclude that some of FACA's provisions governing the establishment of advisory committees were not complied with.

Section 9(a) of the FACA prohibits establishment of an advisory committee unless there has been a formal determination by the head of the involved agency, after consultation with the Director of the OMB, that the proposed committee is "in the public interest in connection with the performance of duties imposed on that agency by law." A "timely" Federal Register notice of that determination is also required. 5 U.S.C. Appendix I, § 9(a) (1976). (Executive Order No. 12024, December 1, 1977, 42 Fed. Reg. 61445, under authority of Reorganiaztion Plan No. 1 of 1977 (42 Fed. Reg. 56101, October 21, 1977), transferred advisory committee act oversight functions from OMB to GSA.)

The required determination and request for concurrence was sent in a letter from the Secretary of DOE to the Acting Administrator of GSA on February 9, 1981, after reviews by the DOE Offices of

General Counsel and Committee Management found that it contained the necessary findings. Enclosed with the letter was a copy of the proposed EPTF Charter and a proposed Notice of Determination to Establish the Task Force.

The FACA, as modified by Executive Order 12024, requires GSA approval of an agency determination of need for an advisory committee. In this connection, section 6(a) of OMB Circular A-63, Revised (1974), requires that the GSA Committee Management Secretariat be "* * * satisfied that establishment of the advisory committee would be in accord with the Act * * *," before the agency head can publicly certify that the "* * * committee is in the public interest." This certification is then required by the Circular to be published in the Federal Register with a description of the nature and purpose of the proposed committee at least 15 days prior to the filing of the Committee's Charter. A shorter period between the notice and filing is permitted "* * * for good cause * * *." DOE requested a waiver of the 15 day period for EPTF.

Following review of the proposal for creation of the EPTF, GSA requested the Energy and Science Division of OMB to conduct a "substantive review" of it. Our interviews with GSA and OMB officials indicate that OMB reviews of advisory committee proposals have been routinely sought even though responsibility has been transferred to GSA. GSA's review of the EPTF was made following the recent release of OMB Bulletin 81-8, ordering a 5 percent reduction in expenditures for consultants and advisory committees. Additional caution by GSA in concurring in establishment of the EPTF may have been prompted by that bulletin. According to an OMB official, work on revising the Federal Budget prevented OMB from completing consideration of the EPTF proposal until after the February 19 meeting of the Task Force.

The GSA Committee Management Secretariat advised the DOE Deputy Advisory Committee Management Officer by telephone on February 27, 1981, that GSA concurrence had been granted "as of February 19," with termination for the EPTF set at June 30, 1981, instead of the two-year period requested. Waiver of the 15-day waiting period between publication of the Notice of Intent to Establish and the Charter filing was granted. However, the record indicates that both officials concluded that February 19 could not be used as the effective date of the Charter or in the establishment notice "since the Committee is not officially established until the Charter is filed." It was not until March 5 that the determination notice was published. 46 Fed. Reg. 15310. The EPTF charter was filed with the congressional oversight committees and the Library of Congress on the following day.

Technically then, the EPTF was not legally established on the date of its first meeting. Although the Secretary of DOE had made the necessary determination, consultation with GSA had not been completed, and no determination notice had been published. 5 U.S.C. App. I, § 9(a)(2). Additionally, at the time of the February 19 meeting, the Charter had not been filed "with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction" of DOE as required by section 9(c)(2) of the FACA. We understand that the DOE Office of General Counsel informed the Secretary that although the first EPTF meeting could be considered to violate the FACA, he felt that there had been substantial compliance with the law and that any postponement of the meeting could prevent the Department from making the deadline for submission of a National Energy Policy Plan, with respect to which the EPTF was to advise DOE.

Facing what they believe to be a choice between responding to an urgent need to develop a comprehensive energy plan for the new Administration within the time period promised, which would be two months after the deadline imposed by the DOE Organization Act, DOE officials concluded that the FACA violations constituted "harmless error" and opted to proceed with the EPTF meeting according to the schedule announced in the Federal Register on February 11. 46 Fed. Reg. 11858.

Although the FACA and OMB Circular A-63 were not complied with, we think that DOE officials acted in good faith in attempting to follow the approval and filing procedures for establishing an advisory committee and, in fact, addressed most of the concerns that motivated the Congress to establish these requirements. The delay in concurrence by OMB had not been anticipated. Our study of the legislative history of the FACA showed that the requirement for approval by the agency head, after consultation with OMB, was developed to limit the growing number of advisory committees. Since the coordination and approval functions, although late, were duly performed by both GSA and OMB, with a final decision made to authorize the creation of EPTF, the responsible officials had made the determination that this additional advisory committee was necessary.

There were, however, some more significant FACA provisions which were also not complied with. The requirement that the public be given notice of the creation and objectives of the advisory committee was met only minimally. The first notice appeared in the Federal Register just eight days before EPTF's first meeting. It provided only a broad description of the purpose for the Task Force without

reference to the National Energy Policy Plan. The tentative agenda for the meeting, however, clearly stated that the meeting would be open for the public and written and oral statements would be accepted.

The public did not have access to the advisory committee's charter or membership lists before the meeting, nor was Congress adequately informed so that it could perform its oversight functions before the February 19 meeting. However, as letters from the National Wildlife Federation and other groups demonstrate, at least some of the public was able to challenge the selection of members for the EPTF by the time of the first meeting.

EPTF Charter and the National Energy Plan

Section 9(c) of FACA requires that before an advisory committee meets, a charter describing, among other things, the committee's objectives and scope of activity must be filed. EPTF's charter does not appear to reflect its duties adequately since no mention is made of the National Energy Policy Plan, even though the imminence of the Plan's due date was cited by DOE in justification for proceeding with the February 19 meeting, and, as discussed below, the sole function of the EPTF seems to be to develop a proposed plan.

Section 801 of the Department of Energy Organization Act, Pub. L. No. 95-91, approved August 4, 1977, 91 Stat. 565, 610, 42 U.S.C. § 7321 (Supp. III 1979), requires the President to prepare and submit a National Energy Policy Plan to Congress "not later than April 1, 1979, and biennially thereafter" which is to "consider and establish energy production, utilization, and conservation objectives * * * necessary to satisfy projected energy needs of the United States * * *."

EPTF's Charter describes the committee's objectives, scope, activities and duties as follows:

> The DOE Energy Policy Task Force provides the Secretary of Energy with advice and recommendations on the broad range of policy and programmatic issues in energy. The functions of the Task Force will be fourfold. First, the task Force, individually and collectively, will identify and select critical national energy problems and issues. Second, the Task Force will suggest changes in energy policies and programs to address those issues and problems. Third, the Task Force will assess both the relative importance of particular energy policy or program initiatives and the feasibility of forming the national consensus necessary to their implementation. Fourth, the Task Force will examine for reasonableness both mature policy proposals and the analyses and assumptions on which they are based.

No mention is made of the Plan required by section 801.

It is thus not clear from the Charter precisely what role EPTF will play in the drafting of the National Energy Policy Plan. Nonetheless, when DOE asked GSA to waive the 15 day advance notice period, its rationale was its need to seek "advice immediately from a group of experts concerned with energy production, utilization and conserva-

tion" for use in drafting the National Energy Policy Plan. Further, we were informally advised that when GSA and OMB approved the Task Force, they limited its life to June 30 in the belief that its functions relative to preparation of DOE's contribution to the Plan would then be complete.

The DOE Organization Act requires that in developing the Plan, the President must consult with "consumers, small business, and a wide range of other interests, including those of individual citizens who have no financial interests in the energy industry." Apparently pursuant to this requirement, the EPTF was to hold a series of public meetings in a number of cities beginning in early March (later postponed to April).

We have also been advised the EPTF will actually prepare a draft of the National Energy Policy Plan for the Secretary's approval. It certainly appears that the evident haste in establishing the EPTF was connected with attempts to begin the Plan drafting process which was already behind the statutory deadline. (By letters of February 4, 1981, the Secretary of DOE informed the Congress that the April 1 statutory deadline would not be met but promised to have the Plan ready by about June 1, 1981.)

Accordingly, we believe that EPTF's charter does not describe in sufficient detail its objectives and scope of activity or its duties as required by section 9(c)(B) and (F) of FACA. Further, if EPTF's actual role in drafting the Plan gives it more than solely advisory functions, its charter should have so stated, citing the authority given for those functions. Section 9(c)(F). Unless provided by statute or presidential directive, advisory committees may be utilized solely for advisory functions, 5 U.S.C. App. I § 9(b). While it appears that under 15 U.S.C. § 776(a), DOE may be able to use an advisory committee to perform some operational tasks, EPTF's charter explicitly states that it has only advisory functions.

Balance in EPTF Membership

One of the primary concerns of Congress in enacting FACA generally and the more specific provisions of section 17 of the Federal Energy Act of 1974, 15 U.S.C. § 776, *supra.*, was to assure that advisory committee membership would not be dominated by any particular interest. The Congress wished to limit, as far as possible, advisory committee bias in the reports such committees furnish to the President or to the sponsoring agency.

As noted above, we do not have a clear idea of the extent of EPTF's involvement in preparing a draft National Energy Policy Plan for the Secretary's (and then the President's) approval. Since that Plan

is intended to address the interests of all citizens, it seems to us that the more involvement EPTF has in preparing a draft of the Plan, the more care is needed in selecting the committee's membership. Before turning our attention to the apparent imbalance in EPTF's membership, we will discuss the two statutory provisions requiring balance.

The provisions of 5 U.S.C. App. I §§ 5 (b) and (c) require "* * * the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee * * *" and that "the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest * * *."

The House Government Operations Committee's report on H.R. 4383, 92d Cong., which later was enacted as the FACA, stressed this point:

> Particularly important among the guidelines are [1] the requirement contained in § 4(b)(2) that "the membership of an advisory committee be fairly balanced in terms of the points of view represented and functions to be performed" and [2] the requirement contained in § 4(b)(3) that in creating an advisory committee the creating authority should include "appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest." H.R. Rep. No. 92-1017, 92d Cong. 2d Sess. 6 (1972).

Advisory committees were seen as wielding great influence and the Congress found that without the "balance" requirements and provisions to guarantee public access to meetings and committee records, they could become havens for special interests. The House report stated:

> One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony received at hearings before the Legal and Monetary Affairs Subcommittee pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests. *id.*

The Congress showed paritcular concern over the possibility of biased advisory committees in the FEA and its successor, the DOE. Instead of merely specifying that FACA should apply to the FEA, which is basically what H.R. 11793, 93d Cong., the House version of the FEA Act of 1974 had done, the Conference Committee accepted the Senate's more specific restrictions. H.R. Rept. No. 93-999, 93d Cong., 2d Sess. 30 (1974). Section 17 of the FEA Act of 1974, 15 U.S.C. § 776, *supra*, which now governs establishment of DOE advisory committees, directs that each advisory committee be reasonably representative of the various affected interests. Section 17(a) provides:

> Whenever the Administrator shall establish or utilize any board, task force, commission, committee, or similary group, not composed entirely of full-time

Government employees, to advise with respect to, or to formulate or carry out, any agreement or plan of action affecting any industry or segment thereof, the Administrator shall endeavor to insure that each such group is reasonably representative of the various points of view and functions of the industry and users affected, including those of residential, commercial, and industrial consumers, and shall include, where appropriate, representation from both State and local government, and from represnetatives of State regulatory utility commissions, selected after consultation with the respective national associations.

DOE's process for selection of members for the EPTF was marred at the outset by the pressures created by the short time allotted for its creation. It was not until February 4, only 15 days before the EPTF's first meeting, that the first tentative list of proposed members was compiled, and no prospective members were contacted before February 9. As a result, we were informally advised, only cursory attention could be given to the qualifications and characteristics of all the Committee members by reviewing officials. For example, officials in DOE's Office of General Counsel informed us that they had to accept the representations made on submitted lists as to the characteristics of the proposed members. The responsible GSA official said that he could only make a spot check on the membership and that it is the responsibility of the sponsoring agency to assure balance requirements are met.

While DOE representatives said that the list of candidates was compiled from suggestions made from staff throughout DOE, some of the persons named as contributing to the selection process said that they were only consulted after the list of candidates had essentially been compiled. The Director of the Office of Consumer Affairs, DOE, said she did not see the list until February 13. At that time, she informed the Secretary's Office that in her opinion, the proposed Task Force was illegal because it did not contain any minority members. She submitted a list of minority people with past advisory committee experience. Although none of her suggested members were appointed, a black woman was subsequently added to the EPTF. While we cannot say how much weight others' views were given in the selection process, all of the accepted nominations appear to have been made from within the Secretary's Office or by the Committee Chairman.

Twenty-two persons had been appointed to the EPTF at the time of its first meeting on February 19, 1981. While the DOE press release announcing formation of the Task Force, released on that date, described its members as including "a broad representation from the oil and gas industry, consumer interests, environment and conservation, civic, academic, and public service," the background of its membership appears to be of a considerably narrower composition. Half of its members are chief executives or senior executives of major energy

corporations, four are academicians, and three are from state governments, including a State Governor.

We conclude that there is an absence of effective representation from several of the interests specified in the FEA Act. Not only is there an absence of representation from residential and consumer users and of local government, some "functions" of industry, such as gas transmission lines, oil jobbers and service station dealers are also missing. At a minimum, the interests specifically named in 15 U.S.C. § 776(a) should be represented on DOE's advisory committee.

Further, if EPTF will have a major impact in formulating the National Energy Policy Plan, several groups not represented among current EPTF appointees suggest themselves:

(1) consumer advocates (the members identified as consumer representatives do not seem to be recognized spokespersons on consumer energy issues. Some appear to be members of research organizations rather than of consumer advocate groups, or representatives of individual consumers.)

(2) environmentalists (the only representation in this area is again by members of research oriented groups which do not cover the broad spectrum of environmental energy interests such as synthetic fuels, coal, and nuclear energy. Furthermore, the person designated as an environmentalist at the Task Force meeting denied that he fit this description, DOE, EPTF Meeting Transcript 13 (February 19, 1981)).

(3) labor
(4) local governments
(5) customer owned utility companies
(6) low-income consumers
(7) elderly persons
(8) oil jobbers
(9) natural gas transmission lines
(10) independent, small refiners
(11) rural interests
(12) independent marketers
(13) service station dealers.

We might point out that the statutory balance requirements do not require that all interests be represented equally or that all interests be represented in any given committee. The determination of whether the standard of balance is met must be made on a case-by-case basis and depends largely on the statute or charter creating the committee. However, we think that the EPTF as presently constituted does not achieve even a minimum balance of interests, as contemplated by the FACA, nor does it even have representation from all the interests specified by

the FEA Act. This deficiency might be overcome by changing the Task Force's membership. For example, the Secretary of Energy might immediately appoint additional members to the EPTF to provide for representation by interests now missing from the advisory committee.

Many of the problems encountered in the establishment of the EPTF might have been avoided if recommendations of past GAO reports concerning advisory committees had been followed. For example, in our February 2, 1979 report, "Use, Cost, Purpose, and Makeup of Department of Energy Advisory Committees," EMD 79–17, B–127685, we concluded:

> * * * DOE should formalize all its written guidelines to help insure that the criteria are consistently applied. Such criteria and overall guidelines are needed to insure that committee membership is balanced and at the optimum level necessary to meet the objectives of the committee." EMD 79–17, B–127685 at 2.

In that same report, we criticized existing DOE advisory committee charters as follows:

> The Federal Advisory Committee Act requires that each advisory committee's charter contain the scope and responsibilities of the committee and the time period necessary for it to carry out its purpose. * * * We found that although DOE's advisory committee charters contain general information on the committees' activities, responsibilities, and length of existence, 12 of the 20 charters do not contain specifics on these matters. These specifics are needed so that each committee has a clear understanding of its scope and objectives, which in turn helps to prevent the potential for overlap and duplication among the committees.
>
> In our previous report, "Better Evaluations Needed to Weed Out Useless Federal Advisory Committees" (GGD–76–104, April 7, 1977), we recommended that OMB require Federal agency committee charters to be clear and specific in stating their purposes and include specific timespans for committees to accomplish their purposes. * * * (R)esponsibility for these matters has been transferred to GSA. GSA officials told us that they have emphasized the need for committee charters to be clear and specific in their discussions with Federal agencies. However, * * * DOE is still producing charters which are vague and general, reinforcing our belief that formal guidance is needed. * * * Therefore, we reiterate the recommendation contained in our April 7, 1977, report. * * * *Id.* at 3.

Furthermore in our recent report, "Conduct of DOE's Gasohol Study Group: Issues and Observations," EMD 80–128, B–200545, September 30, 1980, we found:

> * * * that the process used to select Gasohol Study Group members was highly personalized and non-systematic. Members were selected primarily on the referral of others without detailed knowledge of their backgrounds or financial interests. * * * EMD 80–125, B–200545 at iii.

In that report we concluded:

> GAO believes problems with the study group member selection process are at the heart of the allegations raised concerning possible conflicts of interest and inadequate qualifications on the part of Gasohol Study Group members. * * * *Id.* at v.

We continue to believe the Secretary should take more care in the selection of advisory committee members and should adopt uniform guidelines to aid in the selection process.

Funding of EPTF

As agreed by your staff, in response to your request for us to audit the expenses of EPTF, we have reviewed expenditure information supplied by DOE and determined that $1272.25 in direct expenses were incurred in connection with the EPTF Task Force meeting of February 19, 1981. These are the only direct expenses attributable to EPTF to this date. Of this amount, $519.85 was spent as reimbursement for travel expenses of three task force members. Most of the members did not request reimbursement. The other $752.40 in expenses were incurred in connection with recording of the meeting transcript. These items were charged to the Office of Secretary's budget for travel, salary and related expenses (budget account no. 89X0232). Since each agency is held responsible by section 5 of FACA for providing support services for each advisory committee established by or reporting to it, the use of these funds for this purpose seems legitimate.

With your permission, we will release this letter to the Secretary of Energy and recommend actions be taken to reconstitute the EPTF so that a more satisfactory balance of energy interests may be represented in its membership. We hope this information will be useful to your subcommittee.

[B-202781]

Contracts—Buy American Act—Foreign Products—End Product *v.* Components—Small Business Set-Asides

Furnishing of foreign product by small business does not automatically negate its status as small business concern; firm may qualify as small even though item is not completely of domestic origin if it makes significant contribution to manufacturer or production of contract end item.

Contracts—Awards—Small Business Concerns—Size—Foreign-Made Component Use

Challenge to status of small business furnishing either item with foreign components or foreign end product must be resolved by Small Business Administration, rather than General Accounting Office, so protest on basis that firm does not qualify for set-aside will be dismissed.

Buy American Act—Small Business Concerns—Buy American Act *v.* Small Business Requirements

Buy American Act requirement that preference be given to domestic end items is separate and distinct from that for furnishing domestic end items in small business set-aside.

Matter of: Michigan Instruments Corp., April 20, 1981:

Michigan Instruments Corp. protests the award of four items under invitation for bids No. M1-48-81, issued February 4, 1981, by the Vet-

erans Administration Marketing Center, Hines, Illinois, as a total small business set-aside.

The protester asserts that the apparent low bidder, Medical Devices, cannot be considered a small business because it does not buy any raw materials, *i.e.*, forgings, in the United States. Medical Devices has previously submitted bids on scissors and instruments originating in Pakistan and England to the Defense Personnel Support Center, the protester continues. Acceptance of such a bid, the protester indicates, cannot help the nation achieve full productive capacity and would not be in the interest of our national defense program.

The solicitation in question defines a small business concern as one which, among other things, agrees to furnish items manufactured or produced by small business concerns in the United States, its territories and possessions, Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia.

We have previously considered protests involving surgical instruments in which it was contended that in a small business set-aside, the Government should not consider bids in which foreign material or labor was offered. Our holding has been that an indication that a small business will furnish a foreign product does not automatically negate its status as a small business concern. In such cases, a firm may qualify as a small business even though the item it offers is not completely of domestic origin if it makes a significant contribution to the manufacture or production of the contract end item. Therefore, if a bidder indicates that foreign components will be used, the procuring agency should question the extent of foreign involvement and, if appropriate, refer the matter to the Small Business Administration (SBA) for decision. *A&P Surgical Co., Inc.*, B–196843, B–196929, April 8, 1980, 80–1 CPD 262. If a foreign end product is offered, the procuring agency should question the bidder's self-certification as a small business and also refer the matter to the SBA. *Ammark Corporation*, B–192052, December 21, 1978, 78–2 CPD 428. In either case, any challenge to a small business' status must be resolved by the SBA, rather than by our Office.

As for productive capacity and the national defense, these are policy matters which the Congress has considered and sought to protect by requiring that preference be given to domestic end items under the Buy American Act. This, however, is a separate and distinct requirement from that for furnishing domestically manufactured end items in a small business set-aside. *A&P Surgical Co., Inc., supra.*

Since this protest deals with a matter not subject to review under our Bid Protest Procedures, 4 C.F.R. Part 20 (1980), we are dismiss-

ing it and have not requested or received a report from the Veterans Administration. See *Gateway Van and Storage Company*, B-198900, July 1, 1980, 80-2 CPD 4.

The protest is dismissed.

[B-198818]

Quarters Allowance—Basic Allowance For Quarters (BAQ)—With Dependent Rate—Child Support Payments by Divorced Member—Both Parents Service Members—Dual Payment Prohibition for Common Dependents

Where two Air Force members married to each other with one child are divorced, the male member paying child support and the female member having custody of the child, the child is the dependent of both members under 37 U.S.C. 401; however, since only one member may receive basic allowance for quarters (BAQ) based on the child as a dependent, only the member paying child support (in this case the male member) receives BAQ at the with dependent rate.

Quarters Allowance—Basic Allowance For Quarters (BAQ)—With Dependent Rate—Child Support Payments by Divorced Member—Both Parents Service Members—Declination of Claim Effect

Where two Air Force members married to each other with one child are divorced, the male member paying child support and the female member having custody of the child, the male member is entitled to receive basic allowance for quarters (BAQ) at the with dependent rate. However, if the member receiving the increased BAQ does not claim the dependent child, the female member who has custody of the child may claim BAQ at the with dependent rate.

Quarters Allowance—Basic Allowance For Quarters (BAQ)—With Dependent Rate—Child Support Payments by Divorced Members—Both Parents Service Members—Declination Evidence Acceptability

Where two Air Force members who are married to each other and who have one child are divorced with the male paying child support and the female having custody of the child, the male member receives increased basic allowance for quarters (BAQ) on account of the child, but the female member may claim increased BAQ on account of the child, if the male member declines to claim the child for BAQ purposes. When the male member acquires or has different dependents on which to base his claim for increased BAQ, it may be assumed (without a formal declination) that he is not claiming the common dependent for increased BAQ purposes.

Quarters Allowance—Basic Allowance For Quarters (BAQ)—With Dependent Rate—Child Support Payments by Divorced Member—Both Parents Service Members—Declination of Claim Revocability

A declination to claim a dependent for increased basic allowance for quarters purposes should be in writing when possible but need not be and should not be considered irrevocable since as dependents change so should a member's ability to claim a dependent be changeable.

Matter of: Dependency Determination for Basic Allowance for Quarters, April 21, 1981:

This action is in response to certain questions relating to the rate of Basic Allowance for Quarters (BAQ) payable to members of the uniformed services, either married or formerly married to each other, in various dependency situations.

The questions together with relevant facts were submitted by the Chief of Accounting and Finance, Comptroller, Headquarters Warner Robins Air Logistics Center, Robins Air Force Base. The request has been assigned Control Number DO-AF-1345 by the Department of Defense Military Pay and Allowance Committee.

Sergeant Martha A. Bedford, hereafter Ms. Bedford, was divorced from Staff Sergeant George C. Butts, hereafter Mr. Butts, in August 1978. Both members are on active duty in the Air Force. Custody of the one child of the marriage was awarded to Ms. Bedford and Mr. Butts was required to pay child support. As a result of these payments Mr. Butts has been receiving BAQ at the with dependent rate.

In September 1978, Ms. Bedford married Master Sergeant Claude V. Bedford, Jr. He is receiving BAQ at the with dependent rate on account of dependents of a prior marriage for whom he pays child support. Presumably Ms. Bedford is receiving BAQ at the without dependent rate.

Ms. Bedford is now claiming BAQ at the with dependent rate from January 1, 1980, on account of the child in her custody, since on that date Mr. Butts remarried another individual who is not a service member. Ms. Bedford contends that since Mr. Butts is now entitled to claim the increased allowance on the basis of his dependent wife, she should be entitled to the increased allowance on account of the child in her custody. She indicates that Mr. Butts will not decline to claim the child as his dependent.

In view of these facts the following questions are presented:

a. Where a member, claiming BAQ on the basis of paying court ordered support for a dependent child in the custody of a former spouse who is also a service member, acquires an additional dependent through marriage, may the former spouse then claim the child for BAQ purposes, if otherwise proper?

b. If the answer to "a" is affirmative, must the member paying court-ordered support decline to continue claiming the child for BAQ purposes as a prerequisite to the member having custody claiming the child for BAQ purposes?

c. If the answers to "a" and "b" are affirmative, what evidence of declination is required and under what circumstances, if any, may it be revoked?

With regard to questions "b" and "c" it is noted in the submission that the Air Force is of the view that a declination should be in writing, irrevocable, and endorsed by the member's commanding officer.

Under the provisions of 37 U.S.C. 403 (1976), a member who is entitled to basic pay is entitled to BAQ unless he is provided with

Government quarters adequate for himself and his dependents. There are two rates of BAQ, the with dependent rate and the without dependent rate, and this allowance is intended to at least partially reimburse a member for the expense of providing quarters for himself and his dependents. The term dependent as used in 37 U.S.C. 401 (1976), includes a member's spouse and child. However, members who are married to each other may not include each other as dependents for increased allowance purposes since 37 U.S.C. 420 (1976), prohibits the claiming of a dependent who is entitled to basic pay.

Under 37 U.S.C. 401, a child of members married to each other is considered the dependent of both members. However, the law does not contemplate the payment of increased allowances to both members on account of the same dependent. 51 Comp. Gen. 413 (1972). Therefore, only one of the members may claim the child as a dependent for increased allowance purposes.

Paragraph 30236a of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) deals with cases involving members who were married to each other but are subsequently divorced and have dependents of the marriage. These provisions generally provide that a member paying child support to the member with custody of the child is entitled to the increased allowance if the child support payments are equal to or greater than the difference in that member's with and without dependent rate of BAQ. The member with custody of the child can only claim the increased BAQ on account of the child if the other member declines to claim the child as a dependent for BAQ purposes. Further, the member receiving the increased allowance on account of the child loses entitlement if he remarries and is assigned to Government family quarters or the child is housed in Government quarters. See 58 Comp. Gen. 100 (1978) and paragraph 30237, DODPM.

At the outset, we would like to point out that Ms. Bedford's marriage to Sergeant Bedford has no bearing on this case unless they are assigned family-type Government quarters, in which case neither would be entitled to BAQ. Ms. Bedford indicates that her former husband will not decline to claim their dependent for BAQ purposes, even though he is entitled to the increased allowance on account of another dependent, his wife. Ordinarily, the dependent for whom he is paying child support would be considered part of the class of his dependents, the child and his new wife, and thus the child could not be claimed for BAQ purposes by Ms. Bedford.

In our decision 52 Comp. Gen. 602 (1973), we allowed payment of the increased allowance to a female member who had custody of a child of a former marriage to another member even though the other member

was paying child support. The decision noted that the female member contributed more than half of the child's support as was then required by 37 U.S.C. 401 (1970) for female members to claim dependents. This, together with the fact that the male member was entitled to an increased allowance on account of other dependents independently of that marriage, was the reason, for the conclusion. We followed this rule referring only to substantial support (not including child support payments) in decision B-189973, February 8, 1979, after the dependency criteria applicable only to female members was removed by Public Law 93-64, July 9, 1973, 87 Stat. 148, 37 U.S.C. 401(3), resulting from the United States Supreme Court's decision in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), declaring such requirement unconstitutional.

Thus, while it is no longer necessary for a female member to show that she contributes over one-half the support of a child to claim it as a dependent, it is our view that the relative costs of the respective members concerned (male and female) in supporting the child provide an equitable indicator for the purposes of determining which of the mmebers is entitled to the increased allowanecs authorized in chapter 7, of title 37, even though the specific allowance involved is quarters allowance. Accordingly, it is our view that Ms. Bedford may receive BAQ at the with dependent rate on account of the dependent child if she meets the substantial support criteria, since the child is also her dependent under 37 U.S.C. 401, and it is unnecessary for Mr. Butts to claim the child in order to continue receiving BAQ at the with dependent rate based on his wife as a dependent.

Question "b" involves whether a member in the circumstances presented must decline to claim the dependent in order for the member with custody to receive the increased allowance. While two members may not receive increased allowance on the basis of the same dependent (51 Comp. Gen. 413 (1972)), it is our view that when there is no need on the part of the member paying child support to claim the dependent in order to receive the increased allowance the member having custody should receive the increased allowance if that member is furnishing the substantial support to the dependent. Thus the answer to the question is no.

Question "c" relates to the form to be used if the member declines to claim the dependent for increased BAQ and whether such a declination is irrevocable. For accounting purposes, it is obviously preferred that a member who is not claiming a dependent provide such information in writing. However, as we noted in the answer to question "b" it is our position that a member's formal declination to claim a dependent is not necessary where the facts indicate that the other member is entitled to claim the dependent, particularly in circumstances such as

the instant case where one of the members will not make a declination. Accordingly, we do not believe any particular format is necessary, although a written declination would be preferable.

In addition, we do not see any advantage to having the member's commanding officer endorse the declination if a written one is provided, nor do we believe a declination should be considered or required to be irrevocable. Since it is possible that a member's dependents may change a member's ability to reclaim a dependent should also be flexible depending on circumstances. This question is answered accordingly.

The voucher is returned herewith and may be certified for payment if Ms. Bedford demonstrates she contributes substantially to the support of the child.

[B-187537]

Pay—Medical and Dental Officers—"Variable Incentive Pay"—Entitlement—Appointment to CORD Program After Expiration of Induction Authority—Status as "Disqualifying Active Duty Obligation"

Public Health Services (PHS) officer who agreed to accept a commission in PHS in October 1973 and thereafter signed a memorandum of understanding for participation in the PHS Commissioned Officer Residency Deferred program in August 1974, whereby he received a deferral from active military duty under the Military Selective Service Act, should not be considered to have disqualifying active duty obligation for purposes of variable incentive pay authorized pursuant to 37 U.S.C. 313 (1976) since induction authority, with certain exceptions not relevant here, under Military Selective Service Act expired June 30, 1973.

Matter of: Thomas G. Wise, M.D.—Variable Incentive Pay, April 22, 1981:

The issue presented is whether a commissioned officer in the Public Health Service (PHS) who was appointed and assigned to the Commissioned Officer Residency Deferred (CORD) program after authority for induction and training pursuant to the Military Selective Service Act had expired and who was otherwise qualified should have been denied Variable Incentive Pay (VIP). The answer is no.

Dr. Wise was appointed in the Public Health Service as an assistant surgeon in the inactive Reserve Corps effective October 12, 1973, and was assigned to the CORD program. He entered on extended active duty July 1, 1975, and served on active duty as surgeon in the Reserve Corps of the PHS until June 30, 1977.

In a letter dated September 6, 1973, from the Commissioned Personnel Division, Dr. Wise was informed of his selection for sponsorship under the CORD program contingent upon his being found fully qualified for a commission in the PHS. That letter also informed him that active duty in the Commissioned Corps of the PHS for a

period of 2 years would fulfill his obligation under the Military Selective Service Act and that in the event of resumption of induction under that Act, 2 years of active duty in the PHS would relieve him from further service and training. In a further letter dated October 12, 1973, from the Commissioned Personnel Division, Dr. Wise was informed of his appointment as a commissioned officer in the PHS with assignment to the CORD program. There was no explanation of the CORD program in that correspondence. The October 12, 1973 correspondence was accompanied by a PHS Commissioned Corps Appointment Affidavit to which he subscribed on October 26, 1973. No mention is made of the CORD program in the affidavit.

It also appears that Dr. Wise executed an undated "Request for Deferment and Hospital Agreement," for the period of July 1, 1974, through June 30, 1975, before serving his Selective Service obligation in the PHS Commissioned Corps. The hospital agreement portion of the form was completed by an official of Strong Memorial Hospital and dated August 14, 1974. On that same date, August 14, 1974, he signed a memorandum of understanding concerning participation in the CORD program.

On June 6, 1975, Dr. Wise was sent a VIP service agreement together with a memorandum explaining the VIP. On June 12, 1975, he signed the service agreement to remain on active duty for 2 years for purposes of qualifying for VIP. Dr. Wise was recommended for the VIP by his superiors in the PHS but his application was denied for the reason that his CORD status rendered him ineligble since it had been determined that all officers appointed in the CORD program prior to September 3, 1974, would have an initial active duty obligation to perform. 37 U.S.C. § 313(a)(4) (1976).

The purpose of VIP is to increase the pay provided to medical officers in the uniformed services in an attempt to provide an incentive for those professionals to remain voluntarily in the uniformed services in view of the disparity in pay between physicians in the private sector and the pay and allowances otherwise allowable to members of the uniformed services. H.R. Rep. No. 93–883, 93d Cong., 2d Sess. 7 (1974).

To effect this purpose of attracting physicians who would otherwise remain in the private sector, the Department of Health, Education and Welfare regulations in effect at the time, provided among other things, that the medical officer have no "disqualifying active duty obligation." This requirement is derived from section 313(a)(4) of title 37, which provides that VIP will not be paid to a medical officer "* * * serving an intial active duty obligation of four years or less

* * *." The regulations defined "disqualifying active duty obligation" to include an obligation to enter or remain on active duty incurred as a result of "An agreement entered into by an individual to serve after a period of deferment. (CORD, Berry Plan.)"

The CORD and Berry Plan programs implemented pursuant to section 4(j) of the Military Selective Service Act of 1967 (the forerunner of which was originally enacted June 24, 1948, ch. 625, 62 Stat. 604), as amended, 50 U.S.C. App. 454(j), incorporated an agreement whereby the participants agreed to serve for 2 years of active duty as Reserve commissioned officers of a uniformed service in return for a deferment from active duty to complete their medical training.

The issue as to whether Dr. Wise should have been considered disqualified from receiving VIP until his completion of 2 years' active duty under the CORD program is raised here because at the time of his election and appointment in the CORD program on October 12, 1973, he could not have been involuntarily inducted into the Armed Forces. Authority for induction for training and service in the Armed Forces under the Military Selective Service Act expired on June 30, 1973, the termination date for inductions as set forth in section 17(c), as amended (50 U.S.C. Appendix 467(c) (Supp. V. 1975)).

Although the induction authority under the Act expired, the law itself remained unchanged. Similarly, the CORD program was continued by the PHS. At the time the VIP regulations were promulgated in September 1974, it seems a determination was made that those already in the CORD program would be considered as serving an initial active duty obligation which would preclude the payment of VIP. 37 U.S.C. § 313(a)(4) (1976). Individuals who had entered the CORD program prior to expiration of the induction authority were properly considered to be serving an obligated period of active service. However, those entering the program after the expiration date did not have an obligated period of service and since the authority to induct had expired, there was no reason to grant a deferment.

In view of this, it is our opinion that individuals entering the CORD program subsequent to the expiration of induction authority under the Military Selective Service Act, should not be considered as serving an initial active duty obligation for the purposes of 37 U.S.C. § 313(a)(4) (1976).

Thus, it is our view that Dr. Wise should not have been considered as having a disqualifying active duty obligation under 37 U.S.C. § 313(a)(4) (1976), and if otherwise eligible, is entitled to VIP computed on the service he performed from July 1, 1975, to June 30, 1977.

[B-194861]

Public Lands—Interagency Loans, Transfers, etc.—Damages Restoration, etc.—Withdrawn Lands—Relinquishment—"Interdepartmental Waiver" Doctrine Inapplicability

Dept. of the Interior requests GAO's views on applicability of the "interdepartmental waiver" doctrine when an executive department relinquishes a withdrawn area under the Federal Land Policy and Management Act of 1976 (Act) (43 U.S.C. 1701 *et seq.* (1976)) and on proposed amendment to the public land regulations (43 C.F.R. 2374.2(b)). Doctrine ordinarily requires that restoration costs for property of one department which has been used by another department be borne by the department retaining jurisdiction over the property since restoration would be for future use and benefit of loaning department. Interior does not benefit in the sense contemplated by the doctrine from restoration of public lands. Accordingly, doctrine does not apply to withdrawn property. 59 Comp. Gen. 93 (1979) is distinguished.

Matter of: Interdepartmental Waiver Doctrine—Withdrawn Lands, April 22, 1981:

An executive department, using real property of another executive department, cannot pay either for the use of the property or, upon returning it, for its restoration to its original condition, unless authorized by statute. This is the so-called interdepartmental waiver doctrine. 59 Comp. Gen. 93 (1979); 44 *id.* 693 (1965); 32 *id.* 179 (1952); 31 *id* 329 (1952); see 10 *id* 288 (1930). We conclude that the doctrine does not prohibit payment for restoration when a department uses lands withdrawn from the public domain by the Department of the Interior under the provisions of the Federal Land Policy and Management Act of 1976, Public Law No. 94-579, 90 Stat. 2743 (1976) (classified to 43 U.S.C. §§ 1701 *et seq.* (1976)).

The Department of the Interior, which submitted this question, does not believe that the doctrine should apply when an agency uses withdrawn public lands, builds improvements, and then, when its need for the land ends, gives notice of its intention to relinquish it. Citing the 1976 Act (43 U.S.C. §§ 1701, 1712(c), and 1732(a)), the Deputy Assistant Secretary for Land and Water Resources says that United States policy favors retention of public lands for multiple use management. The doctrine, in Interior's view, can sometimes result in the property being disposed of contrary to Congressional intent, and the Department would like to issue regulations which would prevent that.

The Deputy Assistant Secretary cites the case of the Lewistown Air Force Station as an example of how the doctrine can prevent multiple land use and seemingly frustrate Congressional policy favoring retention of public lands. Between 1958 and 1961, public domain land was withdrawn for use by the Air Force as an air station near Lewistown, Montana. The Air Force built 67 buildings and used the Station for

about 10 years. In 1971, the Air Force notified the Bureau of Land Management that it intended to relinquish the land. The improvements had to be removed for the land to be suitable for retention by the United States for multiple use management, and a dispute arose over which agency should provide the funds for removal. The Station was situated within a block of Bureau-managed land classified for retention and multiple use management in public ownership. The Air Force maintained that the doctrine precluded it from paying for the removal, and requested the Bureau either to accept the property for return to the public domain with the improvements, or acknowledge that it was not acceptable so that it could be reported to the General Services Administration for disposal.

The doctrine frustrates the Congressional policy favoring retention of public lands because, in Interior's view, if the Air Force was not prevented by the doctrine from removing the improvements, the property could be made suitable for multiple use, and therefore, would not have to be disposed of. Interior believes that it would be more equitable for the withdrawing agency, and not the Department, to be responsible for removing improvements constructed on public lands. Requiring the Department to remove improvements from withdrawn public lands at the time of relinquishment may place a severe and unpredictable strain on its resources.

We understand that the Lewistown matter has been resolved. (A private individual interested in acquiring the boilers in the buildings at Lewistown agreed to remove all of the improvements at the Air Station as part of his bargain with the Government.) However, because similar situations are likely to occur, the Department plans to propose amendments to the public land regulations which would require an agency, at the time a parcel of public land is withdrawn, to assure the Department that it will remove any improvements it may add if, at the time the agency relinquishes the property, land use planning indicates that removal is desired. Interior suggests that the proposed amendment would provide a means of avoiding the operation of the interdepartmental waiver doctrine. Further, by providing advance notice to the agencies of their duty to remove improvements, the regulation would give them an opportunity to obtain an appropriation specifically for removal of improvements. Thus, the doctrine would not apply, because, in Interior's view, the appopriation obtained by the agency using the withdrawn land would provide the statutory authority necessary to overcome the doctrine's application.

We agree that, where an agency has an appropriation specifically for the purpose of removing improvements on land withdrawn for its use, this constitutes the statutory authority, required by the interde-

partmental waiver doctrine, which permits the using department to pay for restoration of the property. *Cf.* 59 Comp. Gen. 93 (1979).

It is still important, however, to determine whether the doctrine applies in a case involving relinquishment of withdrawn public lands when considering the efficacy of the proposed regulation. As stated above, under the doctrine a borrowing agency cannot pay for property restoration even if it has agreed with the lending agency to do so. Accordingly, if the doctrine applies, and a withdrawing agency does not seek a removal appropriation, or does not receive one, an agreement made pursuant to the suggested regulation would not be binding.

In our opinion, the Department may promulgate an enforceable regulation which would require an agency to agree to remove improvements it makes on withdrawn public land if the removal is necessary to make the property suitable for retention because we do not view the interdepartmental waiver doctrine as applying to the Lewistown-type situation.

The doctrine is based upon the premise that, since any repair or replacement of the borrowed property would be for the future use and benefit of the loaning department, the appropriation of the borrowing agency may not be charged with the cost. 59 Comp. Gen. 93 (1979), B–159559; August 12, 1968. Early statements of the doctrine involved personal property where the repair clearly benefited the lending agency. For example the Quarantine Service could not pay for a mule to replace one, borrowed from the Quartermaster Department of the Army, which accidentally drowned. 10 Comp. Dec. 222 (1903). Similarly, the Engineer Department could not pay for a lantern, borrowed from the Lighthouse Service of the Department of Commerce, which washed away during a heavy squall and could not be recovered. 22 Comp. Dec. 390 (1916). The Census Bureau, in another case, could not pay to recondition furniture borrowed from the Marine Corps. 10 Comp. Gen. 288 (1930). In such cases, restoration of the borrowed property clearly benefited the lending agency since it would use the property upon its return to carry out agency functions.

The Bureau of Land Management does not benefit, in the sense referred to in the cases, from restoration by another agency of withdrawn public lands. The public lands managed by the Bureau are simply those lands belonging to the United States which remain from all of the Nation's original lands. A parcel of public land is not dedicated to a specific purpose unless the Congress or the Bureau acts. (At the time of the Federal Land Policy and Management Act's passage, the Congress estimated that the public lands totaled more than 450 million acres, about one-fifth of the Nation's original total of

about 1,800 million acres. H.R. Rep. No. 1163, 94th Cong. 2d Sess. 2 (1976)).

The Bureau, when performing its withdrawal oversight duties, is acting as the Executive branch delegate of the Congress, in furtherance of the purposes of the Federal Land Policy and Management Act of 1976. At the time of the Act's passage, over 3,000 public land laws were in effect, presenting an incoherent expression of Congressional policies concerning the Nation's public lands. H.R. Rep. No. 1163, 94th Cong., 2d Sess. 1 (1976). Moreover, Congress believed that the Executive Branch "has tended to fill in missing gaps in the law, not always in a manner consistent with a system balanced in the best interests of all the people." *Id.* Therefore, the Act gave qualified withdrawal responsibilities to the Bureau, to be exercised in accordance with the Act's purposes in order to make the Nation's land use policy and practice stable and uniform. *Id.*

Furthermore, under the Act, Congress retained authority over certain important withdrawals. 43 U.S.C. § 1714(j) (1976). Thus, the Congress and the Bureau share the responsibility for withdrawals from the public domain. It is possible that a parcel of land may be withdrawn under the Bureau's authority, relinquished by the using agency, and then withdrawn by an Act of Congress to another agency for an altogether different purpose.

This situation is distinguishable from 59 Comp. Gen. 93 (1976), which involved land in the De Soto National Forest. De Soto was established from designated United States lands and from lands specifically acquired for the purpose of having the Forest Service permanently administer them as a National Forest. 1 Fed. Reg. 609; 49 Stat. 3524 (1936). Therefore, in contrast to the Bureau's situation involving public lands, restoration of property within the Forest's boundaries clearly benefits the Forest Service.

Moreover, charging removal expenses to the withdrawing agencies would not impair Congressional fiscal oversight. In fact, it would seem that the pertinent oversight committee could better determine an activity's true cost if the removal expense were charged against the appropriation available for the conduct of the activity than if the expense were charged against the Bureau's appropriation. Accordingly, we agree that the proposed regulation, requiring withdrawing agencies to agree to bear the cost of restoring the land to its former condition returning it to the public domain, is proper.

[B-200243]

International Organizations—Transfer of Federal Employees, etc.—Lump-Sum Leave Payments—Rate Payable

Employee of Nuclear Regulatory Commission transferred to international organization under 5 U.S.C. 3581, *et seq.* effective August 16, 1978, at which time

he elected to retain annual leave to his credit pursuant to 5 U.S.C. 3582(a)(4). On January 22, 1980, also pursuant to 5 U.S.C. 3582(a)(4) and prior to reemployment, employee requested lump-sum payment for annual leave retained. Consistent with computation provisions of 5 U.S.C. 3583 and implementing regulations, computation of employee's payment is based on rate of pay attaching to his Federal agency position at time of his request for lump-sum leave payment under 5 U.S.C. 3582(a)(4), not the date of the transfer.

Matter of: Alfred M. Garland—Lump-sum payment for annual leave—Transfer to International Organization, April 22, 1981:

In this action we consider the request of Mr. Angelo S. Puglise, Director, Division of Accounting, Office of the Controller, United States Nuclear Regulatory Commission, for a decision on the claim of Mr. Alfred M. Garland, for a lump-sum payment of annual leave. Specifically, Mr. Puglise has asked what rate of pay should be applied to the computation of Mr. Garland's lump-sum annual leave payment predicated on the following circumstances.

Mr. Garland transferred—within the meaning of 5 U.S.C. §§ 3581, *et seq.*—to the International Atomic Energy Agency effective August 6, 1978. At the time of his transfer Mr. Garland elected pursuant to 5 U.S.C. § 3582(a)(4) to retain to his credit all accumulated and current accrued annual leave to which he was then entitled and which would otherwise have been liquidated by a lump-sum payment. Acting in accordance with additional authority provided in 5 U.S.C. § 3582 (a)(4) Mr. Garland subsequently delivered a letter to the agency on January 22, 1980, requesting a lump-sum payment for his retained annual leave. As a result of these actions, Mr. Puglise asks whether Mr. Garland is entitled to have his lump-sum annual leave payment computed based on his rate of pay at the time of his transfer to the international organization on August 16, 1978, or his established rate at the time of his request on January 22, 1980.

The rights of Federal employees who transfer to an international organization are set forth in section 3582, title 5, United States Code (1976). Subsection (a) provides that an employee who transfers to an international organization with the consent of the head of his agency is entitled to certain rights and benefits pertaining to retirement, life and health insurance, compensation for work injuries, and annual leave. In regard to annual leave subsection (a)(4) specifically provides that the employee is entitled:

to elect to retain to his credit all accumulated and current accrued annual leave to which entitled at the time of transfer which would otherwise be liquidated by a lump-sum payment. On his request at any time before reemployment, he shall be paid for the annual leave retained. If he receives a lump-sum payment and is reemployed within 6 months after transfer, he shall refund to the agency the amount of the lump-sum payment. This paragraph does not operate to cause a forfeiture of retained annual leave following reemployment or to deprive an employee of a lump-sum payment to which he would otherwise be entitled.

In reviewing the legislative history of the Federal Employees International Organization Service Act, as amended (Pub. L. No. 85-795, 72 Stat. 959, August 28, 1958) House Report No. 2509, August 7, 1958, states as follows in regard to the section presently codified at 5 U.S.C. § 3582(a)(4) (1976):

> Section 4(a)(4) authorizes a transferred employee to retain his accumulated annual leave to his credit rather than to liquidate the annual leave by a lump-sum payment at time of transfer. This section is intended to operate entirely within the framework of the act of December 21, 1944 (5 U.S.C. 51b), providing for lump-sum payments for annual leave unused at time of separation, and the Annual and Sick Leave Act of 1951. [The Act of December 21, 1944, is presently codified at 5 U.S.C. §§ 5551, *et seq.*; the Annual and Sick Leave Act of 1951 is presently codified at 5 U.S.C. §§ 6301, *et seq.*] The section is intended to protect the transferring employee's annual leave rights by reason of those acts; but it is not intended to place the employee in a more advantageous position than he otherwise would be entitled to under those acts.

Under 5 U.S.C. § 5551 specified employees who are separated from the service are entitled to receive lump-sum payments for accumulated and current accrued annual leave to which they are entitled by statute. The lump-sum payment shall equal the pay the employee would have received had he remained in the service until expiration of the period of the annual leave. On January 22, 1980, and prior to his reemployment on August 29, 1980, Mr. Garland exercised his specific statutory prerogative under 5 U.S.C. § 3582(a)(4) to receive a lump-sum payment liquidating his existing annual leave account. The exercise of this right under 5 U.S.C. § 3582(a)(4) requires a "computation" under 5 U.S.C. § 3583 which in turn mandates payment in the same manner as if the employee received basic pay at the rate at which it would have been payable had the employee continued in the position in which he was serving at the time of transfer.

Therefore, Mr. Garland's lump-sum payment is to be computed on the basis of 272 hours of annual leave at the rate of pay attaching to his Federal agency position at the time of his request under 5 U.S.C. § 3582(a)(4). Thus, the computation is to be based on a rate of pay that includes all established pay adjustments affecting his Federal agency position during the intervening period from the date of his transfer on August 16, 1978, to the date of his request on January 22, 1980. See, in that regard 5 C.F.R. § 352.314 (1979) and, in accordance with 5 U.S.C. § 5551, the computation of the lump-sum payment shall equal the pay Mr. Garland would have received commencing with the day following his request until the expiration of the period of the annual leave.

Mr. Puglise has also presented several additional questions including the applicable date to be applied in handling further requests of this nature. Although this question is hypothetical in nature, we generally believe that in the absence of a contrary statute, regulation, or agency policy, the date that the employee's request is received in the

Federal agency is sufficient to establish the employee's compliance with the provisions of 5 U.S.C. § 3582(a)(4). We believe that the other additional questions have been dispositively treated in the text of our decision here.

Accordingly, we conclude that Mr. Garland should receive a lump-sum payment for 272 hours of annual leave computed in accordance with the above.

[B-201590]

Leaves of Absence—Court—Jury Duty—Commencing Day—Reporting/Returning to Work Duty—Administrative Discretion

When it appears that an employee will be expected to perform jury duty for a substantial part of the day on the date stated in the summons commencing jury service, the employee is not required to report to work that same day. Once summoned by a court for jury duty an employee's primary responsibility is to the court. When it is apparent that an employee will be required to perform jury duty for less than a substantial part of the day, and when it is reasonable to do so, the employee's agency may require the employee to report for work prior to reporting for or after being excused from jury duty.

Matter of: Nora Ashe—Leave of Absence for Jury Duty, April 22, 1981:

This action is in response to a request dated December 17, 1980, by Gordon E. Grainger, President, Local 977, National Federation of Federal Employees, concerning entitlement to court leave of Nora Ashe, and other employees at George Air Force Base (AFB), when called to report for jury duty. A decision is being rendered pursuant to 4 C.F.R. Part 21 (1980). As amended August 21, 1980, Part 21 contains the provisions under which this Office settles issues on the legality of appropriated fund expenditures that arise in the Federal Labor-Management Relations program. See 45 F.R. 55689. The issue presented was initially the subject of a grievance. The grievance has been withdrawn in favor of a joint request for decision pursuant to 4 C.F.R. § 21.7(b).

The issue concerns the propriety of the Air Force's action in charging Mrs. Ashe 3 hours of annual leave because she did not report to work prior to reporting for jury duty on the first day of her term of jury service. This procedure has not been consistent throughout George AFB; some supervisors have required employees to report to work prior to jury duty and some have not. We understand that all employees are presently required to report to work before they are given court leave to report for jury duty. The union questions this requirement in view of the instructions in Federal Personnel Manual (FPM), Supplement 990-2, Book 630, subchapter S10-2e, and our decisions at 20 Comp. Gen. 131 and *id.* 181, which indicate that employees on jury duty are assigned to the court and are to be given court leave for

all hours until they are released by the court. The union feels it is unreasonable to expect employees to report to work for a very brief period and then report to the court.

Under 5 U.S.C. § 6322 (1976), an employee is entitled to leave of absence without loss of or reduction in the leave to which he is otherwise entitled, during a period of absence when he is summoned by a court to serve as a juror. That statute, derived from the act of June 29, 1940, Chapter 446, 54 Stat. 689, states the long-standing policy of the Congress that Government employees should be permitted to perform jury service without loss of compensation or leave.

In 20 Comp. Gen. 181 (1940) we held that an employee properly summoned by a State or Federal Court to serve on a jury is under the jurisdiction and control of the court for the term of jury service. As defined in that decision the term of jury service runs from the date stated in the summons on which he is required to report to the court until the employee is discharged by the court.

Although an employee is not strictly under the jurisdiction and control of his employing agency during the term of jury service, we have nonetheless recognized the employing agency's authority to require an employee to return to duty during periods that he is excused from jury duty. In 20 Comp. Gen. 181 (1940) we held that an employee excused or discharged by the court either for an indefinite period subject to call or for a definite period in excess of one day is not entitled to court leave for such days but must report to duty or have his absence charged to the otherwise appropriate leave account. That holding was amplified in 26 Comp. Gen. 413 (1946) in which we discussed the scope of an agency's discretion to require an employee who has been excused from jury duty for one day or less to return to his regular duties. We there stated:

> * * * in cases where no hardship would result, it would be within administrative discretion to inform a prospective juror that, if excused from jury duty for one day or even a substantial portion thereof, he would be expected to return to duty or suffer a charge against his annual leave to the extent that he failed so to do. * * *

The determination of whether to require an employee to report to work during the term of jury service is a matter of administrative discretion to be exercised in a reasonable fashion in light of the particular circumstances. B–158954, April 25, 1966.

The decisions discussed involve employees excused or discharged after beginning their terms of jury service. However, the principle involved is applicable to the commencement of jury duty. An employee who is not required to report for jury duty until late in the day stated in the summons may be required to report to his/her regular duties if it would not pose a hardship.

However, an employee's primary responsibility once summoned by a

court for jury duty is to the court. Thus, if it appears that an employee is or may be required to perform jury duty for a substantial part of the day, on the first day of duty or on any day thereafter, then the employee should not be required to report to work that same day. However, when it is apparent that the employee will be required to perform jury duty for less than a substantial part of the day and when it is reasonable to do so, that employee may be required to report for work prior to reporting for jury duty. The employee's duty schedule, the commuting time involved, and the employee's need for rest should be considered in making this determination. See B–70371, August 5, 1975, and 54 Comp. Gen. 147 (1974).

We have not been furnished the particular facts in Mrs. Ashe's case. Therefore, we do not have sufficient information to determine whether the Air Force exercised its discretion reasonably in charging her 3 hours of annual leave on her first day of jury duty. If it was anticipated that Mrs. Ashe would perform jury duty for a substantial part of the day on which she was summoned, her absence from work for 3 hours prior to reporting for jury duty should not have been charged to annual leave. Thus, if she was required to report in the morning, with the possibility of serving on active jury service for a substantial part of a working day, she should not have been charged leave. This is so even if her normal work hours began early, such as 6 or 7 a.m., whereas jury service was not scheduled to begin until 9 or 10 a.m. To charge her annual leave in such circumstances would be an unreasonable burden and thus an unreasonable exercise of discretion on the part of the agency.

[B–202099]

General Accounting Office—Jurisdiction—Grants-In-Aid—Grant Procurements—Timeliness of Complaints Against

General Accounting Office (GAO) will no longer review complaints regarding procurements by Federal grantees which are not filed within reasonable time. Prompt filing is required so that issues can be decided while it is still practicable to take action if warranted. B–188488, Aug. 3, 1977, and B–194168, Nov. 28, 1979, overruled in part. This decision was later extended by 61 Comp. Gen. ——— (B–201613, Oct. 6, 1981).

General Accounting Office—Jurisdiction—Grants-In-Aid—Grant Procurements—Timeliness of Complaints—Solicitation Improprieties

Complaint alleging that Federal grantee's specifications for particular type of bus washer unduly restrict competition, filed more than 2 months after bid opening, was not filed within reasonable time and therefore will be dismissed. In order to be considered filed within reasonable time, future complaints based on alleged improprieties in grantee solicitations which are apparent prior to bid opening or receipt of initial proposals must be filed in accordance with time standards established for bid protests in direct Federal procurements.

Contracts—Awards—Notice—To Unsuccessful Bidders—Grant Procurements

GAO is not aware of any regulation requiring notice to unsuccessful bidders in procurements by Federal grantees; even in direct Federal procurement, lack of notice constitutes mere procedural irregularity which, in absence of prejudice, does not affect otherwise proper award.

Matter of: Caravelle Industries, Inc., April 24, 1981:

Caravelle Industries, Inc. complains concerning award of a contract for furnishing and installing a drive-through vehicle (bus) washing system by the Fairmont Marion County Transit Authority, Fairmont, West Virginia. The system is being funded by an Urban Mass Transportation Administration grant which will cover 75 percent of total costs.

Caravelle alleges that the specifications in the solicitation issued by the transit authority were unduly restrictive, in that they were provided by and identical to those for a system manufactured by N/S Corporation, the low bidder. Caravelle also alleges that transit authority personnel, after viewing its "roll over" model, changed the specifications to require a drive-through system. Caravelle further complains that although it submitted a bid bond on December 3, 1980, it was not formally advised of the award to N/S Corporation until its check was returned in late January.

We decline to consider the first issue because we believe the complaint concerning the specifications was not filed within a reasonable time. (Bid opening was December 5, 1980, but the complaint was not received in our Office until February 6, 1981.)

We have often stated that the timeliness provisions of our Bid Protest Procedures, 4 C.F.R. § 20.2 (1980), do not apply to complaints regarding procurements by Federal grantees. Rather, these are governed by our Public Notice appearing at 40 Fed. Reg. 42406 (1975), which states "It is important that complaints be received as promptly as possible," but sets no specific times for filing.

Because we did not impose specific time limits in the Public Notice, we have considered complaints which clearly would be untimely under the Bid Protest Procedures. For example, *Johnson Controls, Inc.*, B–188488, August 3, 1977, 77–2 CPD 75, involved an award made on May 28, 1976, but the complaint was not filed until March 4, 1977. Somewhat more recently, in *Burroughs Corporation*, B–194168, November 28, 1979, 79–2 CPD 376, in a complaint involving a July 1978 solicitation by a Department of Labor grantee, the complainant alleged, among other things, that a 1977 solicitation for the same equipment should not have been canceled. We stated that this objection would have more appropriately been presented when the first request for proposals was canceled, rather than after rejection of the com-

plainant's proposal under the second, although we did go on to decide that the cancellation and resolicitation with revised technical specifications were proper.

The complaints in these cases were post-award; neither was sustained. If there had been some legal basis for doing so, however, our ability to provide an effective remedy would have depended upon such countervailing considerations as degree of performance, delay in the delivery of needed goods and services, termination costs, and effect upon the integrity of the competitive system of corrective action after bids had been opened and prices exposed.

In light of these considerations, our Bid Protest Procedures require protests involving alleged deficiencies which are apparent on the face of a solicitation to be filed either before bid opening or before the closing date for receipt of initial proposals. In all other cases, a protest must be filed within 10 days of adverse agency action, in the case of a protest initially lodged with the contracting agency, or 10 days after the basis of protest is known or should have been known.

While those time limitations are not literally applicable here, and while it may not, in all cases, be appropriate to establish strict time limitations for grant complaints, we believe such complaints must be filed within a reasonable time. The purpose is the same as for bid protests—to enable us to decide an issue while it is still practicable to take action if warranted. *Page Airways, Incorporated and Omni Coast International, Inc.*, B–197896, June 5, 1980, 80–1 CPD 391; *United States Contracting Corporation*, B–198095, June 27, 1980, 80–1 CPD 446.

In Caravelle's case, we do not believe that filing of a complaint regarding specifications more than two months after bid opening is filing within a reasonable time. Therefore, we are dismissing this portion of the complaint without requesting or receiving a report from the grantor agency. Moreover, since it is only a complaint filed before opening that would allow review of the allegedly restrictive specifications and, if necessary, amendment of the solicitation before prices were made public and performance begun, we believe that in most instances the only reasonable time for complaints regarding solicitation deficiencies to be filed is that required by the Bid Protest Procedures, *i.e.*, prior to bid opening or the time for receipt of proposals. We shall apply this standard in the future. To the extent that our prior decisions are inconsistent with this one, they will no longer be followed.

As for the transit authority's delay in returning Caravelle's bid bond and notifying it of the award, we are not aware of any regulation which requires notice to unsuccessful bidders in procurements by Federal grantees. We note, however, that even in a direct Federal procure-

ment, lack of notice constitutes a mere procedural irregularity which, in the absence of prejudice, does not affect the validity of an otherwise proper award. *A.R. & S. Enterprises, Inc.*, B–197303, July 8, 1980, 80–2 CPD 17.

The complaint is dismissed in part and denied in part.

[B–200817]

Compensation—Downgrading—Saved Compensation—Increases in Saved Salary

Civil Service Reform Act repealed some salary protection benefits for downgraded employees and enacted new ones. FAA Air Traffic Controller, downgraded after effective date of changes but erroneously advised he was entitled to more liberal repealed benefits, claims unjustified personnel action and backpay. Claim must be denied. Government is not bound by erroneous advice and it does not constitute unjustified personnel action. FAA had no authority to grant repealed benefits and no alternative but to apply law in effect at time of downgrading.

Matter of: Melvin Ackley, Jr.—Salary Protection Benefits, April 27, 1981:

The Professional Air Traffic Controllers Organization (PATCO) and the Federal Aviation Administration (FAA) have jointly submitted to the Comptroller General for decision the claim of Mr. Melvin Ackley, Jr., an Air Traffic Control Specialist. PATCO contends Mr. Ackley suffered an unjustified or unwarranted personnel action entitling him to backpay because FAA misinformed him about salary protection benefits incident to a change to lower grade. For the reasons hereinafter explained, the claim may not be allowed.

This case arose because title VIII of the Civil Service Reform Act of 1978, Public Law 95–454, October 13, 1978, 92 Stat. 1218 (5 U.S. Code 5301 *et seq.*), made some changes in the provisions of title 5, United States Code, relating to the protection of employees who are reduced in grade. Among these were the repeal of section 5337, Pay savings, and the enactment of a new section, 5363, Pay retention. As applicable to the case at hand, the difference between these provisions is as follows. Under the repealed section an eligible employee would have continued to receive the rate he was receiving before downgrading plus full comparability increases in that rate for up to 2 years. Under the new section the employee continues to receive the rate he was receiving before downgrading plus 50 percent of the comparability increases in the maximum rate of the grade to which reduced until he becomes entitled to an equal or higher rate by operation of law. The effective date of these changes was January 11, 1979.

Although the record does not specify the date, it was apparently early in 1979 when Mr. Ackley, then a journeyman Air Traffic Control

Specialist GS–14, step 5, at FAA's Indianapolis Air Route Traffic Control Center (ARTCC), applied for a transfer to the Seattle ARTCC and a change to lower grade, GS–13, the journeyman level there, under a program called the National Seniority Opportunities Program. This program provided for salary protection for those changed to lower grade under its provisions. Mr. Ackley was advised of his tentative selection for the Seattle position on March 9, 1979, and his selection was confirmed by a letter to him dated April 5, 1979. However, the FAA Northwest Region which issued this letter had not yet received instructions concerning the changes made by the Reform Act and this letter erroneously informed Mr. Ackley that he was entitled to the "pay savings" benefits provided by section 5337 which, as has been indicated, had been repealed nearly 3 months earlier on January 11, 1979.

The reassignment from Indianapolis to Seattle and the changes from grade GS–14 to GS–13 was effective June 17, 1979. The personnel action reiterated the erroneous information but Mr. Ackley's pay was properly continued at the rate for grade GS–14, step 5, $36,766, the rate he was receiving immediately prior to his change to lower grade. This was in accord with both the repealed and the new section. However, before the next comparability increase became effective on October 7, 1979, the FAA Northwest Region became aware that there was some question concerning the amount of the increase due Mr. Ackley. Therefore, the adjustment of his pay was delayed.

Subsequently, some time in November 1979, instructions on the Reform Act changes were received from FAA headquarters and it then became apparent that Mr. Ackley was and since his reassignment and change to lower grade on June 17, 1979, had been entitled only to the "pay retention" benefits provided by the new section 5363. Thereupon, a corrective personnel action retroactive to June 17, 1979, was issued, Mr. Ackley's pay was adjusted in accordance with the provisions of section 5363 retroactive to October 7, 1979, and he was notified by letter dated December 13, 1979.

The adjustment in Mr. Ackley's pay resulted in his being placed in step 10 of grade GS–13 at $38,1886 per annum and the termination of his "pay retention" effective October 7, 1979. Under the repealed section 5337, his pay would have been adjusted to the new rate for grade GS–14, step 5, $39,341 per annum, which is $1,155 more than he actually received, and his "pay savings" would have continued for up to 2 years from the date of his change to lower grade, June 17, 1979.

PATCO alleges that Mr. Ackley was induced by the erroneous information to accept the change to lower grade and that the erroneous information and FAA's corrective action constituted an unjustified or unwarranted personnel action resulting in the loss of pay under the

Back Pay Act, 5 U.S.C. 5596. Therefore, he is entitled to have his pay adjusted effective October 7, 1979, and his "pay savings" continued in accordance with the provisions of the repealed section 5337. FAA, while acknowledging that Mr. Ackley was inadvertently misinformed, asserts that there has been no unjustified or unwarranted personnel action within the purview of the Back Pay Act and that it has no alternative but to apply the new law which was in effect at the time of Mr. Ackley's transfer and change to lower grade.

We find in the foregoing no unjustified or unwarranted personnel action and no entitlement to backpay under 5 U.S.C. 5596 and the implementing regulations, 5 C.F.R. 550.801, *et seq.* For entitlement to relief under this law and these regulations there must have been an act or omission which violated or improperly applied a nondiscretionary, mandatory requirement imposed by law, regulation, established policy, or binding agreement, *and* which resulted in the withdrawal, reduction, or denial of pay otherwise due the employee.

The erroneous information furnished by FAA, while unfortunate, does not meet the foregoing requirements and it is well established that the Government is not bound by information furnished by its agents which proves to be erroneous. *James A. Shultz*, 59 Comp. Gen. 28 (1979). Moreover, there may be some question as to how much Mr. Ackley relied upon this information since the record before us indicates that he had applied for the transfer and change to lower grade before he received it.

Neither was the corrective action taken by FAA an unjustified or unwarranted personnel action since it was mandatory under the law to apply the salary protection benefits in effect at the time of the action in question. Contrary to what may be the perception of both parties to this controversy, Mr. Ackley never acquired entitlement to any benefits under the repealed section 5337 since, with one exception not here applicable, these had been put out of existence by an act of the Congress well before Mr. Ackley's change to lower grade. Clearly they could not be resurrected and bestowed merely by erroneous information that they continued in effect. Therefore, Mr. Ackley was never denied pay that was otherwise due him. As the United States Supreme Court stated in *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917):

> The United States is neither bound nor estopped by acts of its officers or agents in entering into arrangements or agreements to do or cause to be done what the law does not sanction or permit.

Accordingly, it is our opinion that FAA properly adjusted Mr. Ackley's pay in accordance with the provisions of section 5363 of title 5, United States Code, and that he is not entitled to any backpay.

[B-200323]

Travel Expenses—Headquarters—Inadequacy of Transportation—Public Transportation Strike

Employees of Urban Mass Transportation Administration are not eligible for reimbursement of excess cost of commuting by private or General Services Administration rental car over normal public transit fares, despite complete public transit shutdown during April 1980 strike. Cost of transportation to place of business is personal responsibility of employee except in limited emergency circumstances not applicable here. B-158931, May 26, 1966, and 54 Comp. Gen. 1066 (1975), are distinguished.

Matter of: Reimbursement of Excess Commutation Costs During New York Transit Strike, April 30, 1981:

During the 10-day New York City transit strike in April 1980, Federal employees who normally relied on public transit to commute to city offices were forced to find alternate means of transportation, often at a cost in excess of normal transit fares. After the strike, two employees of the Urban Mass Transportation Administration (UMTA) submitted vouchers requesting reimbursement for the excess cost of commuting via privately-owned vehicle, and another UMTA commuter submitted a voucher for the rental fees on a General Services Administration (GSA) vehicle, plus other associated costs. The certifying officer refused to certify the three vouchers, and the matter was subsequently referred to this Office for an advance decision. We affirm the certifying officer's action in denying reimbursement.

The settled rule is that employees must bear the cost of transportation between their residences and official duty loactions. 11 Comp. Gen. 417 (1932); 15 *id.* 342 (1935); B-189114, February 14, 1978. The fact that emergency conditions necessitate additional trips or otherwise increase commuting costs does not alter the employee's responsibility. 36 Comp. Gen. 450 (1956); B-189061, March 15, 1978. Similarly, the unavailability of public transportation alone does not shift this personal obligation to the Government. 19 Comp. Gen. 836 (1940); 27 *id.* 1 (1947); B-171969.42, January 9, 1976. These general rules clearly assign the responsibility for home-to-work transportation to the individual employee in nearly every circumstance. We have made exceptions to the general rule only in emergency situations where even alternate transportation was unavailable or scarce and Government operations were closed down except for a few essential personnel who were ordered to report to work. However, none of those circumstances are applicable to the 1980 transit strike or the UMTA employees claiming reimbursement.

Most directly on point of our transit emergency cases is B-158931, May 26, 1966. This decision arose out of the 1966 New York transit strike. During that strike, all affected Federal employees were per-

mitted to remain at home without charge to annual leave. An employee at the Internal Revenue Service's Manhattan office was nonetheless directed by his supervisor to report to work and to transport five co-workers in his privately-owned vehicle. 5 U.S.C. § 5704 provides that mileage is payable to employees using their privately-owned vehicles in the conduct of official business. We approved reimbursement of the employee's commuting costs in that case, analogizing the required conduct of a carpool transportation arrangement to the performance of official duties. We noted that had the group riding arrangement not been administratively directed, all six employees would have been authorized to remain at home without a charge to leave. Thus the Government benefitted by having essential work of the office carried out at minimal additional expense instead of saving the transportation expenses but losing the services of the six employees who had to be paid anyway.

Although we approved reimbursement to the employee in question, the case does not stand for the proposition that whenever a public transit strike occurs, Federal employees may be reimbursed for the excess cost of alternative transportation. Rather, we observed that the particular circumstances warranted a limited exception to our general rule.

There are none of these exceptional circumstances in the present case. According to the Federal Executive Board (FEB), a planning and coordinating group, Federal employees in the New York metropolitan area were under a "liberal leave" policy during the 1980 strike. This meant that employees were asked to make every reasonable effort to come to work and that failure to report would have resulted in an involuntary charge to annual leave. In other words, unlike the 1966 case, employees were under the usual obligation to report to work and no specific instructions to report were given or required.

Additionally, the file does not disclose that the carpool arrangements had official UMTA sponsorship or sanction. Although the FEB urged agencies to use prearranged private and GSA carpools to facilitate the presence of key employees, there is no indication that the claiming employees had been induced to believe they would be performing official duties while transporting themselves and colleagues to and from work. Neither did the employees have any advance expectation of reimbursement on the basis of the FEB statement. Thus, the limited exception created by B–158931, *cited above*, does not apply to the present case.

The employees requesting reimbursement have relied on 54 Comp. Gen. 1066 (1975). That case, too, dealt with a complete transit shutdown, but it is also distinguishable from the present situation. There, a San Francisco transit strike caused a high rate of absenteeism

among employees of the Social Security Administration. A particularly high rate of absenteeism occurred among those employees responsible for processing approximately 15 percent of the national weekly total of Social Security checks. Continued absence of approximately 99 critically-needed employees would have impaired a vital Government function. To combat the situation and to facilitate the presence of essential personnel who would otherwise have chosen to remain at home during the strike, the Administration contracted for private bus service to transport employees to its offices. We agreed that the rental of buses was within the realm of administrative discretion which this Office has always acknowledged with regard to the use of Government-procured vehicles for home-to-work transportation in emergency situations. 31 U.S.C. § 638a(c)(2) (1976); 54 Comp. Gen. 855 (1975); 25 *id.* 844 (1946). Again, we stressed the overriding Government interest in continuing an essential Government service, the distribution of weekly payments to Social Security recipients dependent upon that money.

As to whether the "administrative discretion" theory could be applied to the situation of the UMTA carpooler in the GSA rental car, several important distinctions must be drawn. The interest of the Government in the presence of the five employees in the GSA vehicle carpool seems significantly less. While the record contains an assertion that they were "key personnel", there is no indication that they were engaged in continuing essential services, temporary cessation of which would have significantly affected public safety or welfare. An additional distinction exists in that the GSA car was rented by one of the carpooling employees rather than by UMTA. Although the rental was apparently approved by the employee's immediate supervisor, he lacked authority to obligate agency funds for this purpose. Further, there is no indication that the carpool members were designated by UMTA, as were the bus passengers in 54 Comp. Gen. 1066.

In sum, the unavailability of any particular mode of public transportation, even for an extended period of time, does not entitle a Federal employee to reimbursement of excess commuting costs resulting from use of an alternative, more expensive mode. Insofar as strikes by public transit employees are likely to occur with increasing frequency, Federal employees should be prepared to assume responsibility for finding as well as paying for alternate means of transportation. At the same time Federal offices in metropolitan areas should be flexible in planning for transit emergencies.

In accordance with the foregoing, we affirm the certifying officer's action denying reimbursements to the claiming employees, and we will retain the original vouchers and supporting documentation in this Office.

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