Decisions of The Comptroller General of the United States

VOLUME 60 Pages 97 to 150

DECEMBER 1980
WITH
INDEX DIGEST
OCTOBER, NOVEMBER, DECEMBER 1980

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300116400

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1981

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price $1.50 (single copy) ; subscription price : $17.00 a year ; $21.25 for foreign mailing.

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Cite Decisions as 60 Comp. Gen. —

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-197595]

Contracts—Specifications—Restrictive—Protest—Timeliness

Opening of bids on scheduled date constitutes initial agency action adverse to protest against specifications filed with agency. Subsequent protest to General Accounting Office not filed within 10 days of notification of adverse agency action is untimely.

Contracts—Awards—Small Business Concerns—Set-Asides—Withdrawal—Nonacceptance of SBA Responsibility Determination

Where contracting officer finds small business nonresponsible, matter of small business responsibility is to be conclusively determined by Small Business Administration (SBA). Contracting officer is bound by SBA decision and cannot cancel solicitation absent compelling independent justification.

General Accounting Office—Jurisdiction—Contracts—Small Business Matters—Responsibility Determination by SBA—Conclusiveness

General Accounting Office will not question affirmative responsibility determination (issuance of certificate of competency) by SBA unless fraud or failure to consider vital information is shown.

Matter of: Baxter & Sons Elevator Co., Inc., December 3, 1980:

Baxter & Sons Elevator Co., Inc. (Baxter) protests the cancellation of invitation for bids (IFB) No. 671–1–80, issued by Veterans Administration Audie L. Murphy Memorial Veterans Hospital, San Antonio, Texas (VA), on July 26, 1979, for elevator maintenance. Baxter also contests the VA's resolicitation of the contract as a sole-source procurement from the Otis Elevator Co. (Otis).

The IFB was issued as a 100-percent set-aside for small business, with date of bid opening scheduled for August 27, 1979. Specifications in the IFB required that prospective contractors maintain a supply of original manufacturer's replacement parts in the hospital machine room and a maintenance stock inventory of new parts for repair of each elevator located within a 24-hour delivery time from San Antonio. It was emphasized that "genuine manufacturer's new parts" be used and that "no substitutions shall be permitted."

On August 23, 1979, Baxter sent a letter to the contracting officer opposing the specifications as unduly restrictive to small businesses and seeking their amendment. Baxter claimed the listing of replacement parts was unnecessarily extensive and the 24-hour delivery requirement was unreasonable. It was alleged that both restrictions had been incorporated into the specifications for the sole purpose of retaining Otis (the original installer) as maintenance representative.

On August 27, 1979, three bids were opened and Baxter was the low bidder.

During the months of September and October 1979 the hospital's chief engineer and contracting officer visited Baxter's offices in San Antonio and Dallas. At that time it was found that Baxter did not

have the repair parts on hand as required by the specifications. Similar inquiries were made at the offices of the next lowest bidder, with the same result.

On November 27, 1979, a certificate of competency (COC) for Baxter was requested from the Small Business Administration (SBA) Dallas Office. In December 1979, VA informed the SBA that Baxter was considered to be responsive but nonresponsible because sufficient elevator parts were not in its warehouse inventory. On January 11, 1980, the SBA informed VA that a COC would be recommended for Baxter. On January 16, 1980, a meeting was held between representatives of the VA and SBA, at which time the IFB specifications and the needs of the hospital were discussed.

The next day, January 17, 1980, VA hospital officials met and decided to cancel the IFB. The SBA was notified of this decision by letter dated January 24, 1980. The following day, January 25, 1980, Baxter sent a mailgram to our Office protesting the cancellation. On January 28, 1980, the Dallas SBA issued a COC to Baxter. Subsequently, a sole-source contract was awarded to Otis.

In its protest, Baxter raises the following three issues: (1) reasonableness of the specifications, (2) propriety of the cancellation, and (3) validity of VA's resolicitation as a sole-source procurement.

Baxter presents evidence intended to prove the unduly restrictive nature of VA's specifications. However, we must dismiss this portion of the protest because of the failure to meet the filing deadline prescribed by our Bid Protest Procedures, 4 C.F.R. part 20 (1980). Section 20.2(a) requires that if a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days after notification of adverse agency action. The opening of bids on the scheduled date constituted initial action adverse to the protester's interest (i.e., to its protest of the IFB specifications). See *Hydraulic Technology*, B-196450, January 7, 1980, 80-1 CPD 19, and cases cited therein. Therefore, Baxter's protest against the specifications in the IFB is dismissed as untimely.

Since the VA found Baxter to be nonresponsible, it was required by the Small Business Act to refer the matter to the SBA, which conclusively determines the matter by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7)(A) (1976). See *Old Hickory Services*, B-192906.2, February 9, 1979, 79-1 CPD 92; *Prestype, Inc.*, B-194328, August 17, 1979, 79-2 CPD 127.

In this case, the VA properly referred the question of Baxter's responsibility to the SBA Regional Office in Dallas, Texas. However, after learning of the SBA's intention to issue a COC to the protester, and after meeting with representatives of the Dallas SBA in an attempt to resolve the matter, the VA canceled the IFB. The heart

of this protest, then, goes to an agency's authority to cancel a small business solicitation, allegedly to change the specification, in the face of an anticipated issuance of a COC by SBA.

Federal Procurement Regulation (FPR) § 1-2.404-1(a) (1964 ed. circ. 1) allows solicitations to be canceled only for compelling reasons. A compelling reason for cancellation exists where the solicitation no longer represents the Government's needs or the agency determines that its needs can be met by a less expensive approach than that called for in the solicitation. See *Honeywell Information Systems, Inc.*, B-193177.2, December 6, 1979, 79-2 CPD 392, at p. 5, and cases cited therein.

In its report dated June 9, 1980, the VA offers the following as reasons for cancellation of the IFB:

> a. Small Business Administration indicated in the meeting of January 16, 1980 that they would not support the Veterans Administration in enforcement of the spare parts requirement. (This dictated a requirement to rewrite the solicitation.)
>
> b. The specifications as written in the IFB of July 26, 1979 do not have any performance requirement. The specifications instead relied on the requirement to maintain a spare parts inventory. It was reasoned that a competent contractor, providing they have the required spare parts on hand, should be able to provide prompt service and maintain the elevators satisfactorily. It was also reasoned that an elevator contractor normally maintaining this type of elevator equipment would maintain substantial spare parts in his inventory.

The validity of the VA cancellation of this IFB is dependent upon whether these facts constitute a compelling reason under the cited regulation. We find that the VA has failed to present a sufficiently compelling reason to justify cancellation of the IFB in this case.

As to the first alleged ground for cancellation, we cannot agree with the VA's parenthetical assertion that a rewrite of the solicitation was warranted by its dispute with the SBA over the spare parts restriction. We are aware of no limitation binding the SBA to the conditions stated in the IFB. We have held that contracting agencies cannot overcome the SBA's statutory authority to make determinations regarding all aspects of small business responsibility by specifying "special standards" or "definitive criteria" in the solicitation. *J. Baranello and Sons*, 58 Comp. Gen. 509 (1979), 79-1 CPD 322; *Microforms Management Corp.*, B-195350.2, February 4, 1980, 80-1 CPD 88.

Additionally, GAO is not empowered to question SBA's issuance of a COC unless the record shows that it was fraudulent, or that certain vital information bearing on the small business bidder's responsibility was not considered. *J. Baranello and Sons, supra.* Here, there is neither evidence of fraud nor of SBA's failure to consider the spare parts issue. In fact, the record discloses that on January 16, 1980, representatives of the VA hospital and the Dallas Regional Office met and discussed the parts requirement and the need for parts availability

(VA memorandum dated April 15, 1980). This clearly indicates SBA's full awareness of the issue. *Microforms Management Corp.*, *supra.* Consequently, the SBA's decision not to enforce the spare parts restriction in the solicitation did not "dictate" or justify a new solicitation.

As to the second factor offered as a basis for cancellation, we do not see the significance of the specific "performance requirement" as stated by the VA. A reading of the entire report concerning the necessity to change the specification makes it clear that this suggested revision of the specification is nothing more than a restatement of the spare parts requirement. It does not reflect any change in Government needs, nor does it clarify any ambiguity or correct a deficiency present in the original solicitation. *See* FPR § 1-2.404-1(b)(1).

This revision of the IFB specifications was apparently designed to circumvent the affirmative responsibility determination by the SBA. The VA's explanation relates to the bidders' ability to comply with the specifications, which is by definition a matter of responsibility. Further, the record indicates that while the SBA did not disagree with the VA's need for prompt performance as required by the specifications, the SBA concluded that Baxter could meet the performance requirement without maintaining the spare parts inventory required by the solicitation to insure timely performance. The SBA's resolution of the issue is binding upon the contracting officer, appealable only to the SBA Central Office in Washington, D.C., as prescribed by FPR § 1-1.708-2(e). It cannot be overcome by rewording the disputed restriction and calling it a "performance requirement." See *J. Baranello and Sons*, *supra.*

Accordingly, we find the VA has failed to provide a cogent reason on which to base its cancellation of the IFB. Therefore, the sole-source award to Otis was not justified.

The protest is sustained.

The VA has informed us that the current maintenance contract with Otis is operating on a month-to-month basis. In considering an appropriate remedy, then, extent of performance and cost to the Government are not relevant factors. We therefore recommend that the VA terminate the contract with Otis and make an award to Baxter and Sons Elevator Co., Inc.

By letter of today, we are advising the Administrator of Veterans Affairs of our recommendation.

Since this decision contains a recommendation for corrective action to be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees

on Government Operations and Appropriations in accordance with section 326 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

[B-200237.2]

Contracts—Subcontracts—Administrative Approval—Review by General Accounting Office—Active Agency Participation in Subcontractor Selection—What Constitutes

Prior decision dismissing protest of subcontractor award is affirmed where evidence submitted in support of request for reconsideration—a statement that agency, prior to approving subcontract, will examine prime contractor's methods for selecting subcontractor—does not establish active agency participation in selection of subcontractor so as to invoke GAO bid protest jurisdiction.

Matter Of: Reflectone, Inc., December 4, 1980:

Reflectone, Inc. requests reconsideration of our decision B-200237, November 6, 1980, 80-2 CPD 342, a matter involving a subcontract award by IBM, a prime contractor to the Department of the Navy. We dismissed Reflectone's protest because it did not fall within any of the limited criteria under which GAO will consider subcontractor protests.

The request for reconsideration is based on additional evidence which we did not receive until after the decision had been signed. The additional evidence consists of an October 21, 1980 letter from the Commander of the Naval Air Systems Command to a Congressman, in which it is stated that the methods employed by IBM in selecting a subcontractor would be examined prior to Government approval of the subcontract award. We have consistently held that the Government's approval of a subcontract award is insufficient for invoking our bid protest jurisdiction; what is required is a showing that the Government in effect controlled the subcontractor selection or significantly limited subcontractor sources. *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. We do not believe a statement that the Navy will examine IBM's methodology for selection of a subcontractor prior to exercise of its approval rights establishes that the Navy actively participated in the subcontractor selection process so as to bring the case within the *Optimum Systems* tests.

Reflectone has also requested a conference on the merits of its protest. However, in view of the fact that the protest is not for review by our Office, such a conference will serve no useful purpose and the request therefore is denied. *Cacciamani Bros.*, B-194434, July 20, 1979, 79-2 CPD 45.

The prior decision is affirmed.

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[B-195550]

Contracts—Protests—Interested Party Requirement—Direct Interest Criterion

Labor unions protesting exercise of contract option because firms that might compete if solicitation were issued employ persons who are or might become affiliated with unions are not "interested" parties under General Accounting Office Bid Protest Procedures.

Matter of: Marine Engineers Beneficial Association; Seafarers International Union, December 5, 1980:

The Marine Engineers Beneficial Association, District 2 (MEBA), and the Seafarers International Union (SIU), protest the decision of the Department of the Navy, Military Sealift Command (MSC) to exercise an option under contract No. N0033-75-C-T006 with Marine Transport Lines (MTL) to allow for the continued operation of nine oil tankers. The contract awarded to MTL provided for the world-wide operation of the oil tankers for an initial contract period of five years with a series of two-year options. The exercise of the first option is the subject of this protest.

Our Bid Protest Procedures require that a party be "interested" in order that its protest may be considered. 4 C.F.R. § 20.1(a) (1980). The threshold question to be resolved is whether MFBA and SIU are "interested" parties within the meaning of our Bid Protest Procedures. We conclude that they are not.

In determining whether a protester satisfies the interested party criterion, we examine the degree to which the asserted interest is both established and direct. In making this evaluation, we consider the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. *Kenneth R. Bland, Consutlant*, B-184852, October 17, 1975, 75-2 CPD 242. Thus, we have recognized the rights of nonbidders to have their protests considered on the merits where there is a possibility that recognizable established interests will be inadequately protected if our bid protest forum is restricted to bidders in individual procurements. *See* 49 Comp. Gen. 9 (1969); *Abbott Power Corporation*, B-186568, December 21, 1976, 76-2 CPD 509.

We discussed the interested party principle in *American Satellite Corporation (Reconsideration)*, B-189551, April 17, 1978, 78-1 CPD 289, in which we affirmed our earlier dismissal of a protest concerning the degree of competition for the prime contract award filed by a subcontractor named in the proposal of an offeror for the prime contract. We stated:

> The party's relationship to the question raised by the protest must be direct. Where there is an intermediate party of greater interest, we generally have considered the protester to be too remote from the cause to establish interest within the meaning of our Bid Protest Procedures * * *

As explained in both the initial decision and its affirmation on reconsideration, we did not consider the protester an interested party for protest purposes because the firm, only a named subcontractor, in our opinion was "too remote from the subject matter to establish direct interest." In the absence of a protest by a prime offeror, we did not consider the merits of the issues raised.

MEBA and SIU claim to be interested parties by virtue of their status as maritime unions representing licensed officers and unlicensed seamen. The unions state that they have collective bargaining agreements with various tanker companies, many of whom have in the past responded to solicitations issued by MSC and have been operators of MSC chartered vessels. The unions claim that their interest is both direct and substantial "since all of the men filling the billets for the officers and crew of the sealift class tankers are available for affiliation with the protesting unions." In support of their position MEBA and SIU refer to our previous decision in *District 2, Marine Engineers Beneficial Association—Associated Maritime Officers, AFL-CIO*, B-181265, November 27, 1974, 74-2 CPD 298, where we considered a protest filed by a labor union.

However, in the cited case the labor union was protesting a nonresponsibility determination made against the low offeror under a Government solicitation essentially on the basis that the nonresponsibility determination was in fact a negative reflection upon the union rather than the firm. Therefore, in our view the union's interest was direct and substantial.

In contrast, MEBA's and SIU's protest against MSC's exercise of the contract option essentially is based on the proposition that firms which might compete if a solicitation were issued employ persons who are or might become affiliated with the unions. We believe that there clearly are "intermediate part[ies] of greater interest" for purposes of raising a protest of this nature, *i.e.*, those firms which MEBA and SIU allege would have responded if a competition was held. It is those parties—firms that could be awarded a contract if MTL's option were not exercised (or if a protest against the option exercise were sustained)—that here represent the type of direct interest contemplated in this circumstance by section 20.1(a) of our Procedures. Since no such firm expressed a timely indication of interest in performing the services involved in MTL's option by, for example, filing a bid protest, we do not believe that our consideration of the matter raised by MEBA and SIU would be appropriate under the principles discussed above.

Accordingly, we find the interests of MEBA and SIU to be too remote for the unions to be considered "interested" parties here as contemplated by our Procedures. The protest is dismissed.

MEBA and SIU also request that our Office take steps to insure that

expenditures under the MTL contract and similar MSC contracts are properly reviewed and audited, and that we review the MSC tanker "build and charter" program in general, to which the instant procurement relates. (The program as instituted involved the private financing and construction of the tankers with a commitment from the Navy that it would lease them, with renewal provisions for 20 years.)

To the extent that MEBA and SIU are suggesting that we become involved in the administration of MSC's contract with MTL, we point out that contract administration is a function of the procuring agency, not the General Accounting Office. See *Nuclear Research Corporation*, B–198909, June 5, 1980, 80–1 CPD 393.

Further, we are advised by the Navy that MSC contract expenditures, including those under the build and charter program, are reviewed by the Navy audit group, the Inspector General, and the Defense Contract Audit Agency.

Finally, our Office reviewed MSC's build and charter program in general in a report to the Congress, "Build and Charter Program for Nine Tanker Ships," B–174839, August 15, 1973.

[B–198360]

Contracts—Film and Video Services—Office of Federal Procurement Policy—Uniform Contracting System—Small Business Concerns—Negative Responsibility Determination Referral Requirement

Determination, made under Office of Federal Procurement Policy's uniform system for contracting for film and videotape productions, that small business concern is not qualified to participate in competition for Government contracts is essentially negative responsibility determination which must be referred to Small Business Administration under certificate of competency program.

Contracts—Film and Video Services—Office of Federal Procurement Policy—Uniform Contracting System—Notice in *Commerce Business Daily* Requirement

Office of Federal Procurement Policy's (OFPP) prequalification of offerors in connection with its uniform system for contracting for film and videotape productions is not unwarranted restriction on competition because all firms may attempt to qualify. However, use of OFPP's qualified list by procuring agencies in soliciting for particular procurements is unduly restrictive of competition unless procurements are synopsized in *Commerce Business Daily* and interested firms on the prequalified lists are afforded opportunity to compete.

Contracts—Film and Video Services—Office of Federal Procurement Policy—Uniform Contracting System—Qualified List Agreements—Contract Status

Procurements under OFPP's uniform system for contracting for film and videotape productions are not "made by placing an order under an existing contract" because agreement between qualified firm and OFPP's executive agent is not "contract" within meaning of 15 U.S.C. 637(e) (1976) and, therefore, must be synopsized in *Commerce Business Daily*.

Matter of: Office of Federal Procurement Policy's films production contracting system; John Bransby Productions, Ltd., December 9, 1980:

This decision results from (1) our current survey of the uniform Government-wide system for contracting for motion picture and videotape productions established by the Office of Federal Procurement Policy (OFPP), and (2) a protest filed by John Bransby Productions, Ltd. (Bransby), against limitations on competition inherent in the uniform system. We have also considered the comments of the Small Business Administration's Chief Counsel for Advocacy (SBA) that the uniform system violates 15 U.S.C. § 637(b)(7)(A) (Supp. I, 1977), which empowers the SBA to conclusively certify the responsibility of small business concerns.

Bransby essentially contends that the system's prequalification of offerors, the limitation on the number of offerors that may respond to a solicitation, and the failure to require notice of requirements in the *Commerce Business Daily* violate procurement statutes and laws enacted for the protection of small business concerns. OFPP responds that the uniform system has resulted in more meaningful competition by providing fair and open prequalification of sources, by establishing uniform evaluation criteria, by standardizing contract terms and conditions, and by establishing a central location for information concerning procurement activity.

This decision will address only the legal issues presented by the parties, and our views on the efficacy of the uniform system will be reserved for consideration of our current audit investigation.

We conclude that:

(1) the uniform system's prequalification of offerors, without referral of negative determinations to SBA, violates SBA's conclusive authority to make responsibility determinations regarding small business concerns;

(2) the uniform system's prequalification of offerors does not constitute an unwarranted restriction on competition;

(3) the use of random lists of offerors in connection with the uniform system does not restrict the number of qualified firms that may compete in individual procurements; and

(4) procurements under the uniform system must be synopsized in the *Commerce Business Daily*.

By letters of today, we are bringing our views to the attention of the Administrators of OFPP and SBA.

I. Background

In the early 1970's, studies of audiovisual activities by the executive and legislative branches revealed waste, mismanagement, duplication,

and inadequate on the private sector for expertise. In 1972, the Office of Telecommunications Policy, under the Office of Management and Budget's direction, suggested that the General Services Administration establish national requirements contracts or basic ordering agreements for audiovisual productions. In 1976, OFPP assumed the responsibility of directing improvement in audiovisual management. The main problem areas were: (1) prospective contractors could not obtain adequate information on opportunities and requirements; (2) prospective contractors did not have adequate time to submit proposals after publication in the *Commerce Business Daily;* (3) proposal evaluation procedures and criteria differed widely and resulted in unacceptably high administrative costs to the agencies; (4) in some instances more than 100 proposals were received in response to one solicitation, requiring extensive agency resources to evaluate proposals; (5) agencies lacked audiovisual expertise which resulted in costly delays and unsuitable final products; and (6) potential offerors experienced difficulty in establishing credentials and qualifications because of differing agency requirements.

OFPP Policy Letters 78–5 and 79–4, the culmination of 5 years of effort, established the uniform procurement system for motion picture and videotape productions with the following features:

(a) The Directorate of Audiovisual Activities (now called Directorate for Audiovisual Management Policy), Department of Defense, is designated as executive agent to establish and maintain the uniform system and to serve as the central information source on motion picture and videotape production programs.

(b) All firms interested in doing motion picture or videotape production work for the Government are invited to qualify for contracts containing general terms and conditions and for listing in the central automated source list (Qualified Film Producers List (QFPL) or Qualified Videotape Producers List (QVPL)), by submitting sample films to the Interagency Audiovisual Review Board (IARB). Contractors are also asked to provide a statement explaining the purpose of the film, the sponsor, the contract price and/or production costs.

(c) The IARB, which represents about 20 agencies, is responsible for evaluation of the sample films and videotapes in accordance with the following standardized criteria: achievement of purposes, creativity, continuity, and technical quality. Producers who attain a minimum score of 70 out of 100 points and who enter into a contract with the executive agent are placed on the QFPL or QVPL. These lists are always open for producers to submit films and videotapes to the IARB for qualification for a contract and placement on the QFPL or QVPL. Notice of the opportunity to submit films for consideration by the IARB is published at least semi-annually in the *Commerce Business Daily* and as often as feasible in the trade press.

(d) The QFPL and QVPL are mandatory for use by agencies with requirements for contracted motion picture or videotape production except in limited circumstances, such as where procurements under section "8(a)" of the Small Business Act are utilized or sole source is justified by the agency; thus, producers not on the lists are ineligible to receive Federal Government contracts for these services.

II. Prequalification System

A. *Violative of Small Business Laws?*

SBA refers to 15 U.S.C. § 637(b)(7)(A) (1976 and Supp. I, 1977) as the statute empowering the SBA to certify to Government procurement officers all elements of responsibility of small business concerns. SBA notes that Government procurement officers may not preclude a small business concern from being awarded a contract on responsibility grounds without referring the matter to SBA for final disposition; therefore, the prequalification procedure established by OFPP is legally defective in that it deprives small businesses of the right to obtain a final responsibility determination from SBA. In SBA's view, the uniform system makes a determination on product quality, which is an element of responsibility. SBA believes that under the uniform system firms are disqualified due to their alleged lack of capacity without the benefit of an SBA determination.

Finally, SBA cites our decision, B–152757, July 15, 1964, as an example of a situation where a bidder prequalification procedure for a particular procurement was found to be defective because it deprived SBA of making the final determination on the capacity and credit of small business firms. In that decision, we found that the agency's prequalification of bidders in connection with specific proposed construction projects was inconsistent with SBA's statutory authority to make conclusive determinations of small business concerns' competency to perform Government contracts. The uniform system here is far worse, in SBA's view. Rather than merely disqualifying a small business from participating in a particular procurement, the failure of a small firm to qualify would disqualify it from all Federal audiovisual and videotape procurements, thus having the same effect as a *de facto* debarment, citing *Myers & Myers, Inc.* v. *U.S. Postal Service*, 527 F. 2d 1252 (2d Cir. 1975).

OFPP explains that the IARB evaluates the quality of a vendor's sample production to determine if it meets the minimum acceptable level of quality, i.e., 70 points or more out of a possible 100, so that the vendor can be listed on the QFPL or QVPL; this qualification system remains open for submission, or resubmission in the event of failure to qualify, of films and videotapes at all times. OFPP states

that product quality, as a factor affecting contractor responsibility, is a matter which, in general, is initially a determination to be made by the procuring agency or in this case by the executive agent. OFPP notes that a second opportunity for evaluation of a vendor's competency arises when the procuring agency receives proposals for motion picture or videotape production. It is the procuring agency here, not the executive agent, that makes responsibility determinations, which, if negative, would automatically be referred to SBA.

OFPP essentially admits that the IARB's evaluation of the work sample for purposes of determining the firm's technical competency is a responsibility determination. Further, OFPP's reliance on similarities between the uniform system and the prequalification system in the matter of *Department of Agriculture's Use of Master Agreements*, 56 Comp. Gen. 78 (1976), 76–2 CPD 390, leads us to conclude here, as we did there, that any small business firm found not to qualify for contracts for responsibility-related reasons should be referred to SBA. Unlike negotiated procurements, where the relative capability of offerors is considered to determine the relative technical merits of the proposals, and the question of referral to SBA is not involved (*Electrospace Systems, Inc.*, 55 Comp. Gen. 415 (1979), 79–1 CPD 264), here, OFPP's purpose is to determine the responsibility of potential offerors.

Thus, SBA is correct and OFPP should revise the program to refer such negative determinations involving small business concerns to the SBA under the certificate of competency program. We note, however, that only one firm has protested its failure to qualify since the program started.

B. *Violates Requirement for "full and free" Competition?*

Bransby contends, relying on our decision in the matter of *D. Moody & Company, Inc.; Astronautics, Corporation of America*, 55 Comp. Gen. 1 (1975), 75–2 CPD 1, that the OFPP prequalification requirement for the purpose of administrative convenience is not justified because it results in an unwarranted restriction on full and free competition as contemplated in applicable procurement statutes and regulations. We note that Bransby is on the qualified list and we are addressing this aspect of the matter in connection with our audit investigation and not because Bransby is an interested party relative to this issue.

OFPP contends that its prequalification process actually enhances competition and is in accord with our decisions in the matter of *Department of Agriculture's Use of Master Agreements*, *supra*, and *Department of Health, Education, and Welfare's use of basic ordering type agreement procedure*, 54 Comp. Gen. 1096 (1975), 75–1 CPD 392.

In reply, Bransby argues that a qualified products list might be used where a Government agency has a need for a product whose specifications may readily be standardized; an example would be tires. Bransby states that tire manufacturers would submit samples, which would be evaluated by the agency, and tires which meet the agency standards would be placed on the qualified products lists. In Bransby's view, use of the lists assures the agency of a satisfactory end product; however, there is no way that evaluation of a motion picture film made in the past will assure an agency that it will receive a satisfactory film on a different subject in the future.

In the *Department of Agriculture* decision, we concluded that Agriculture's proposal to prequalify firms in connection with procurements for consulting services was not objectionable because (1) master agreements would be entered into with *all* qualified firms, and (2) it appeared that competition would be enhanced since (a) small firms would be better able to compete for individual project requirements rather than large requirements-type contracts, (b) the costs of responding to subsequent solicitations would be reduced, and (c) the pressures for curtailing competition because of delays inherent in soliciting and evaluating a large number of proposals for each project would be eliminated.

In the *Department of Health, Education, and Welfare* decision, we concluded that the agency's proposal to prequalify firms in connection with procurements of expert services for studies, research, and evaluation was not objectionable because (1) all firms found to be within the competitive range would be eligible, and (2) the agency proposed to limit its use of the procedure to instances where award on a sole-source basis would otherwise be made. *See also* 36 Comp. Gen. 809 (1957) (the use of a Qualified Products List was approved because necessary testing was so extensive that, as a practical matter, it could not be performed within the time constraints of a procurement); B-135504, May 2, 1958 (approved use of Qualified Manufacturers List); 50 Comp. Gen. 542 (1971) (approved prequalifying microcircuitry manufacturers).

Thus, while prequalification of competitors is generally inconsistent with the requirement for full and free competition (52 Comp. Gen. 569 (1973)), we have not objected where prequalification serves a legitimate need of the procuring activity and not mere expediency, or administrative convenience (*D. Moody & Company, Inc., supra*).

Here, as in the *Department of Agriculture* and *Department of Health, Education, and Welfare* decisions, the uniform system permits all firms meeting a certain level of acceptability to participate. More than 540 firms have qualified and only one firm protested its rejection to our Office. Second, Bransby's contention—that new busi-

nesses cannot qualify because there are no work samples to submit—presents an academic question in view of the number of firms already qualified, the lack of protests, and the availability of assistance to small business concerns from the SBA. Third, although the uniform system is designed to be used as the normal procurement method as compared with the exceptional method envisioned in the *Department of Agriculture* and *Department of Health, Education, and Welfare* decisions, we do not view this as a basis to object because as a practical matter, all qualified firms can participate. Thus, we cannot conclude that the OFPP's current prequalification of offerors constitutes an unwarranted restriction on competition.

III. Restrictions on Individual Procurements

A. *Limits on the Number of Bidders?*

Under the uniform system, a contracting agency notifies the executive agent of its need to contract for a motion picture or videotape production and the executive agent supplies the names of five producers selected at random by computer from the list. At the contracting agency's request, more names are provided in groups of five. For each group of five names supplied, the contracting agency can add the names of two producers of its selection from the list. For any particular procurement, solicitations are sent only to those few firms. As a result, Bransby has been invited to participate in only one procurement and since agencies' procurement needs are not announced in the *Commerce Business Daily*, Bransby has no means available to discover when particular procurements are in process.

OFPP explains that the uniform system requires that proposals be solicited from at least five producers for each requirement but agencies determine whether more than five proposals should be solicited, except when the estimated cost is less than $100,000; then, generally only two increments of producers should be requested. OFPP also explains that agencies retain the ability to solicit the number of producers considered appropriate to assure a satisfactory end product.

OFPP contends that the uniform system does not violate 10 U.S.C. § 2304(g) (1976), as Bransby argues, because proposals are solicited from the maximum number of qualified sources consistent with the nature and requirements of the service to be procured. In OFPP's view, this aspect of the uniform system enhances competition because many small businesses with limited resources that were unable to cope with multiple agency requirements and thus were discouraged from engaging in business with the Government now are able to compete.

Bransby disagrees with OFPP's assessment and argues that since the average number of producers solicited is 7.2 out of 540, the maxi-

mum number of qualified sources is not being solicited. Further, Bransby points out that about 70 percent of the awards during the first year of the uniform system's operation went to one of the producers added to the random list by procuring agencies; thus, Bransby believes that the system unduly restricts competition.

In our view, the uniform system does not restrict the number of competitors that may compete in a particular procurement because the procuring agency is free to request all the names on the list and notify all listed firms of its requirements. In practice, however, procuring agencies may have used the uniform system so as not to maximize competition in individual procurements. For now, we will reserve comment on these and other aspects of the uniform system's operation until our current audit investigation is completed. Further, as discussed below, in the future, because procuring agencies are required to comply with statutory synopsis requirements, potential offerors will be able to compete for these contracts, thus maximizing competition.

B. *Synopsis in Commerce Business Daily?*

Bransby believes that competition would be enhanced if producers could learn of agency requirements through the *Commerce Business Daily* and express their interest in the procurement. Bransby contends that 15 U.S.C. § 637(e) (1978) requires synopsis of all proposed procurement actions (in excess of specified dollar amounts) and that the uniform system does not comply with that requirement.

OFPP states that there is an exception to the synopsis requirement: procurement actions which are made by an order placed under an existing contract do not have to be synopsized; each qualified firm under the uniform system has a contract. In reply, Bransby argues that "contracts" under the uniform system are basic ordering agreements and not "contracts" within the meaning of the exception to the synopsis requirement because it contains no promise for the breach of which the law gives remedy; it contains no promise of performance which the law recognizes as a duty; and it does not contain a promise enforceable at law directly or indirectly.

The language of 15 U.S.C. § 637(e) provides that publication of notice of proposed procurements in excess of certain dollar amounts is required unless the procurement involves one of a few exceptions, for example, when the procurement is made "by an order placed under an existing contract." Subsection (e) was added by the Small Business Act Amendments of 1961, Public Law No. 87-305, September 26, 1961, 75 Stat. 666. The legislative history of that act reveals that Congress intended to "secure for small business a greater participation in Government procurement" by requiring that all procurements in excess of low dollar amounts be synopsized to give notice to a larger number of businessmen of Government procurements. The amendment ex-

cepted procurements which for security reasons are classified, procurements for perishable substances, public utility services, and procurements in emergency situations. Although military and civilian agency procurement regulations were amended, prior to passage to the act, to provide for the synopsis requirement, Congress deemed it necessary to make the synopsis requirement a permanent statutory provision. The twofold purpose of subsection (e) was to obtain benefits from a nearly complete public listing of procurement actions for large and small businesses, as well as for the Government itself through maximized competition. Congress believed that small businesses need this additional assistance to better compete for Government contracts. S. Rep. No. 802, 87th Cong., 1st Sess. 4, 5 (1961); H.R. Rep. No. 8762, 87th Cong., 1st Sess. (1961) (conference report); Cong. Rec. S1759 (daily ed. Feb. 9, 1961).

Thus, in view of the legislative intent of subsection (e), we believe that the exception to the synopsis requirement must be narrowly interpreted, and we conclude that the document issued to qualified firms under the uniform system is not a "contract" within the meaning of the exception to the synopsis requirement of subsection (e). In our view, it is not possible to place an order under the document issued to each of the 540 qualified firms because too many essential elements are missing: there is no description of the item to be procured, there are no delivery terms, and there is no price to be paid. Therefore, procurements under the current uniform system do not qualify for that exception to the synopsis requirement.

We recognize that OFPP has the authority, under 41 U.S.C. § 402 (1976), to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies but OFPP must do so in accordance with applicable laws (*Id.*). Thus, we disagree with OFPP's conclusion that it is within the statutory authority of OFPP to determine for the purposes of procurement policy within the executive branch that the agreement resulting from Policy Letter 79–4 is a "contract" for purposes of subsection (e). In our view, OFPP's authority does not extend to redefining the meaning of the synopsis requirement set forth in 15 U.S.C. § 637(e).

Regarding the use of rotating lists of potential offerors, we have considered situations involving the Government Printing Office's "rotating bid list" procedure and the General Services Administration's "rotation of bidders mailing list" procedures and we have not found these procedures inherently improper. *Coastal Services, Inc.*, B–182858, April 22, 1975, 75–1 CPD 250; *American Drafting and Laminating Company*, B–186425, July 26, 1976, 76–2 CPD 82. In both cases, the synopsis requirement was not observed and we recommended that future procurements strictly adhere to it. Thus, the uniform system's employment of a computer–selected list of offerors to receive a request

for proposals is not improper as long as the synopsis requirements are observed.

C. *Negotiation v. Formal Advertising?*

Bransby points out that all procurements under the uniform system are negotiated but 41 U.S.C. § 252(c) (1976) requires the use of formal advertising unless certain circumstances are present. Barnsby argues that the uniform system's blanket determination—that all film contracting involves situations where it is impracticable to secure competition with formal advertising—constitutes an interference prohibited by 41 U.S.C. § 405(f) with the determinations of executive agencies regarding specific actions in the award of contracts.

OFPP contends that its authority under 41 U.S.C. § 408 supersedes the authority of executive agencies under any other laws to prescribe policies for procurement and authorizes it to determine that motion picture and videotape production procurements should be negotiated pursuant to the authority of 41 U.S.C. § 252(c)(10).

It seems apparent to us that because of the nature of film and videotape productions, generally the negotiation authority of 41 U.S.C. § 252(c)(10) would be appropriate since it is impracticable to secure competition through formal advertising.

IV. Conclusion

Our consideration of OFPP's uniform system to date reveals that the program's prequalifications of offerors should be revised to refer negative determinations involving small business concerns to SBA.

We also conclude that, while the use of computer-selected lists of offerors to receive solicitations in individual procurement is not improper, such procurements must be synopsized in the *Commerce Business Daily* as required by statute. Further, procuring agencies or the executive agent must provide a copy of the solicitation to potential offerors, upon request, and procuring agencies must consider proposals submitted by all offerors on the prequalified lists.

[B-195982]

Contracts—Protests—Procedures—Bid Protest Procedures—Time for Filing—Clarification *v.* "Initial Adverse Agency" Actions

When, at time exchanges occurred, both protester and contracting officer regarded series of letters and meetings an opportunity to clarify agency's requirements, exchanges do not constitute protest and subsequent "initial adverse agency action" which would require filing of protest to General Accounting Office within 10 days.

General Accounting Office — Jurisdiction — Contracts — Benchmark—Standard of Review

General Accounting Office standard of review for benchmark is same as for any other technical evaluation procedure: if benchmark is rationally based, its use as evaluation tool is within discretion of procuring agency.

Contracts—Specifications—Tests—Benchmark—Use as Evaluation Tool—Administrative Discretion

When benchmark programs appear to represent system workload and, combined with functional demonstration, provide reasonable basis for identifying offeror with lowest life-cycle cost, use of benchmark as evaluation tool is within discretion of procuring agency.

Matter of: Computer Sciences Corporation, December 12, 1980:

Computer Sciences Corporation (CSC) protests the award of a contract for teleprocessing services to support the Army's recruiting, training, and reenlistment programs to Boeing Computer Services Company.

CSC, the incumbent contractor, argues that the programs which comprised the benchmark which all offerors were required to run did not accurately or completely represent the actual work to be performed under the contract.

On Accounting and Financial Management Division has performed a technical review of the benchmark. Based on this review and the record before us, we deny CSC's protest. The details are as follows:

Background

This procurement was conducted by the General Services Administration for the Army Military Personnel Center in connection with the Army's "REQUEST" and "RETAIN" systems. These systems permit recruiters and career counselors to identify and reserve training spaces for new recruits and reenlistees, based on their individual preferences and qualifications. In addition, all Army enlisted assignments are processed through RETAIN.

Both REQUEST and RETAIN were installed during the 1970's on CSC's INFONET system, with software developed by Systems Automation Corporation (SAC). The protested procurement was a new competition for the services which CSC has been providing since that time.

The solicitation, No. CDPA 78–5, was prepared by SAC in conjunction with the Army over a period of approximately 2½ years, beginning in May 1976. It included a series of computer programs, designed to represent the REQUEST and RETAIN workload, which offerors converted, compiled, and executed on their own systems prior to submitting cost and technical proposals. Those who found it necessary to make changes in order to adapt the programs, based on the INFONET system, to other manufacturers' equipment were required to submit all such changes to the contracting officer's technical staff for approval.

Approved offerors then completed a pre-proposal benchmark which tested their systems for certain mandatory capabilities listed in the

solicitation. They also ran the various programs 10 times each and averaged the results. These results were used to complete cost tables, contained in the solicitation, which offerors were required to submit to GSA along with detailed written descriptions of their execution of the benchmark programs and printouts of the results.

After evaluating cost and technical proposals, GSA scheduled a second, Government-witnessed benchmark for all offerors who were in the competitive range. According to the solicitation, the primary purpose of this supervised benchmark was to validate results of the pre-proposal run. GSA also indicated that it intended to use it to monitor costs and performance of the successful contractor by re-running the programs at random intervals during the life of the contract. If costs were more than five percent over those developed from the benchmark, the contractor's monthly invoice was to be adjusted according to a specific formula contained in the solicitation.

Award was to be made to the offeror whose system, meeting all mandatory requirements, had the lowest evaluated life-cycle cost.

Timeliness

A threshold issue is whether, as GSA argues, CSC's protest is untimely. The agency contends that a series of letters and meetings between CSC and the contracting officer constituted protests and that "initial adverse agency action" occurred on or before June 14, 1979, when the contracting officer informed CSC by letter that its assumptions regarding the benchmark were "erroneous."

CSC, on the other hand, asserts that these letters and meetings were part of a "continuing process" by which it "attempted to gain clarification of the RFP's requirements and GSA's interpretation" of them.

Our Bid Protest Procedures state that if a protest is filed with the contracting agency, any subsequent protest to our Office must be received within 10 days after the protester knew or should have known of "initial adverse agency action." 4 C.F.R. § 201(a) (1980). The contracting officer in this case characterized his letter of June 14 as an "opportunity to clarify and correct CSC's misconceptions," and it does not appear than any of the parties regarded it as a denial of a protest at that time. We therefore do not believe this letter constituted adverse action by GSA.

CSC's protest was filed with our Office more than 30 days before the amended closing date for receipt of initial proposals, as required by section 20.2(b) of our Procedures, *supra*, as well as before the date for submission of benchmark data, as required by our decision in *Information International, Inc.*, 59 Comp. Gen. 640 (1980), 80-2 CPD 100; *id.*, *SSA—Request for Reconsideration*, October 7, 1980, 80-2 CPD 246. Therefore, except for an issue involving reentrant code capability

which was not raised until after the closing date for receipt of initial proposals, we find the protest is timely.

Sufficiency of the Benchmark

CSC contests the legality of the benchmark as an evaluation tool from both a technical and cost standpoint. (The firm has stated that a number of other grounds of protest raised with our Office were rendered "moot" by actions taken by GSA.)

A. *Simultaneous Access*

Specifically, CSC alleges that the benchmark failed to test offerors' ability to handle a large number of simultaneous users. CSC points out that according to the solicitation, the average number of simultaneous users of REQUESTS and RETAIN will vary from 16 to 80, depending on time of day, and may be as high as 139. A benchmark for a system requiring simultaneous access capability—but concededly not testing that capability—is insufficient, CSC argues.

According to CSC, the benchmark could not provide an accurate picture of a system's "level of resource consumption." In most systems, CSC contends, more computer resources may be consumed as more simultaneous users come "on line." Although such is not the case with INFONET, CSC states, the Army has no way of verifying this from the benchmark.

B. *File Access Method*

CSC further complains that the benchmark did not require offerors to exercise their "random access capability," although this is a requirement of REQUEST and RETAIN. (Random or direct access indicates that a record can be entered into or obtained from the file in a manner which depends only on the location of that particular record, and not on the location of all previously entered records.) If random access for multiple simultaneous users is not provided, CSC states, a system's performance will degrade and costs will increase as the number of users increases (presumably because in sequential access, more records must be read, taking more time and using more computer resources).

C. *Performance Demonstrations*

CSC also criticizes the "functional" or "performance" demonstrations which GSA used to test system capabilities *not* included in the benchmark—such as ability to support multiple simultaneous users and method of file access—because the demonstrations (1) did not consider costs and (2) involved only two users. CSC contends that an offeror could "pass" the demonstrations and the Government would still have no idea of what actual costs of operating the system would be.

GSA's Response

GSA responds that the benchmark, combined with the performance demonstrations, provided an acceptable means of evaluating technical proposals and estimating life-cycle costs.

The only alternative means of testing offerors' ability to handle multiple simultaneous users, GSA states, would have been "load" or "stress" testing. This type of testing requires either use of Remote Terminal Emulation (RTE) (a new technique in which a microcomputer simulates a large number of users) or a live test demonstration in which as many as 139 users actually would attempt to access the system at the same time. According to GSA, not all offerors have RTE capability, and there is no assurance that all RTEs are functionally equivalent. A live test of the total proposed network, GSA continues, would have given incumbent CSC an unfair advantage, since its equipment was already in place; in addition, such a test would have been difficult to control, non-repeatable, time-consuming, and expensive.

GSA therefore argues that its decision to benchmark "a logical subset of the teleprocessing capability" and use the results to project "total system performance through extrapolation" was an appropriate one. (In other words, GSA believes that the benchmark programs consumed the same amounts and types of computer resources as REQUEST and RETAIN, and that the results, including costs, of running those programs could be accurately projected and were valid regardless of the number of simultaneous users.)

GAO Analysis

Benchmarking generally can be defined as a test under controlled circumstances, intended to produce descriptive data which the Government needs to evaluate proposals. It can be used, as here, both to assess the technical capability and to compare the expected operating costs of a proposed system. See generally *Computer Network Corporation; Tymshare, Inc.*, 56 Comp. Gen. 245 (1977), 77-1 CPD 31.

In deciding a protest involving benchmarking, our standard of review is the same as for any other evaluation procedure, *i.e.*, the establishment of qualification and testing procedures is a matter within the technical expertise of the cognizant procuring activity. We will not question the use of such procedures unless they are without a reasonable basis. *Tymshare, Inc.*, B-190822, September 5, 1978, 78-2 CPD 167.

Thus, if a benchmark is rationally based, its use as an evaluation tool is within the discretion of the procuring agency. *Cf. Information International, Inc., supra*, (in which we found that the benchmark

methodology used provided a reasonable basis for determining the competitive range).

A. Simultanous Access

In developing the benchmark for REQUEST and RETAIN, the Army used the concept of a "single composite transaction." It determined, based on historical data and current estimates, the average mix of programs required to enlist one person in the Army and included these programs in the benchmark. The Army then used the number of enlistments and reenlistments expected to occur each year for the next 5 years as the factor to project costs of running the benchmark and to estimate life-cycle costs.

The first question presented by CSC's protest is whether the single composite transaction developed by the Army was valid. Our review indicates that a relatively small number of functions represents the majority of REQUEST and RETAIN transactions. Most of these transactions are associated with enlistment or reenlistment and involve similar operations, such as selection of a school or a duty station. In addition to combining these functions to produce a "model" transaction, SAC and the Army tested the benchmark programs against actual REQUEST and RETAIN operations, using "machine level utilization measurements" (central processing unit time, input-output counts, memory, and the like) to insure representativeness.

We have carefully examined the record, including those test results. In our opinion, the benchmark programs do consume amounts and types of system resources equivalent to REQUEST and RETAIN, and accurately represent work to be performed under the contract. We therefore find no basis to object to the use of the "model" transaction.

The second question is whether, when the system may be used simultaneously by nearly 140 users, the cost data developed from a single composite transaction reasonably can be projected to estimate life cycle costs. In our opinion it can, because the costed portion of the benchmark is in fact a "linear representation" of the system load. In other words, the average amount of computer resources consumed by a single user in completing a transaction appears to be the same, regardless of the number of users. For example, the resources consumed and the costs generated will be equivalent for 140 simultaneous users and for one user multiplied by 140.

We believe the benchmark would be invalid (1) if any element in an offeror's billing algorithm (formula) depended upon the number of simultaneous users, or (2) if a significant number of "collisions" occurred when two or more users tried to access the system at the same time, requiring computer resources to "referee" their requests. Neither, in our opinion, is the case here.

The Army informs us that it has inspected all offerors' algorithms and finds that none varies in proportion to the number of simultaneous users. As for collisions, some of the REQUEST and RETAIN files are "segmented" so that each user—each Army activity, for example—has its own data base, so that collisions are impossible. For files which are shared, the Army has structured them so that either a counter is incremented or the record is re-read before it is updated. With the "counter" approach, the system merely keeps track of the number of places being reserved, such as school seats, until capacity is reached. With the second approach, if, while one recruit is considering an assignment which the system has indicated is available, another selects the same assignment, when the first user subsequently attempts to reserve it, he will be told that the place has been taken. Whether a reservation is accepted or rejected, the user is advised, so similar amounts of computer resources are consumed.

In our opinion, this type of collision will not have a significant impact on cost because the user receives a message in any case. More importantly, the REQUEST and RETAIN data base is so large—more than a million records—that very few collisions occur. The reservation file alone, for example, contains about 80,000 records on which there are approximately 16,000 transactions a month; the greatest number of collisions reported by the Army in a given month is 10.

Further, the great majority of users are limited to certain functions for which REQUEST and RETAIN software has been programmed, and do not use all possible capabilities of the system. Only personnel responsible for maintenance and control of the system have unrestricted access, which was not tested in the benchmark and which might increase costs.

We therefore find that the single composite transaction provided a reasonable basis for identifying the offeror with the lowest evaluated life cycle costs, and that the benchmark was sufficient—from a cost standpoint—as an evaluation tool, even though it did not test simultaneous access capability.

B. *File Access Method*

CSC alleges that the benchmark did not require offerors to demonstrate their direct access capability. This appears to be true. However, GSA states that this capability was tested during the performance demonstration. CSC's real concern appears to be that, unless direct accessing was required during the benchmark, costs which were evaluated on the basis of the benchmark would bear no relation to actual system costs. In operation, the Army's extremely large data base will require use of direct access in order to meet performance specifications,

particularly response time. Thus, CSC correctly indicates that unless offerors use the same access method during the benchmark as they will be using during REQUEST and RETAIN operations, any comparison of costs among offerors will be invalid.

The Army, however, assures us that it has manually reviewed benchmark listings, control language, and output to insure that direct access was used during the benchmark. We therefore believe CSC's protest on this ground is academic. Although the solicitation did not specifically require direct access to be used in the benchmark, failure to so specify has not prejudiced any offeror nor adversely affected cost evaluation.

C. *Performance Demonstrations*

We believe it was essential that GSA use the performance demonstrations to determine whether offerors had the technical capability to handle simultaneous users. However, in view of our conclusion that the number of such users will not have a significant impact on costs, we do not believe that these demonstrations had to be costed exercises. In addition, as GSA points out, offerors have guaranteed simultaneous access capability, and will be required to provide any additional resources needed to meet this requirement at no additional cost to the Government. We therefore do not believe it was absolutely necessary to test more than two users during these demonstrations.

In short, we find that the evaluation procedures used by GSA in this case were within the range of discretion possessed by a procuring agency.

The protest is denied.

[B-198319]

Contracts — Protests — Timeliness — Negotiated Contracts — Exclusion From Competitive Range

Protest, based primarily on manner in which proposals were evaluated and competitive range determined, need not be filed before closing date for receipt of initial proposals, since alleged improprieties occurred after that date.

Contracts—Negotiation—Competition—Competitive Range Formula—Determination by Comparison With Other Proposals—Quick Reaction Work Order Contracting

In quick reaction work order procurement, competitive range may be relative one. Proposal which is technically acceptable or capable of being made acceptable need not be considered for negotiation if, in light of all proposals received, it does not stand real chance for award.

Energy—Department of Energy—Contracts—Master—Quick Reaction Work Orders—Small Business Preference

In quick reaction work order procurement, establishment of competitive range for small businesses only is proper when (1) 25 percent set-aside was announced in solicitation and (2) small business proposals have real chance for award when compared with each other and preference is taken into account.

Contracts — Negotiation — Evaluation Factors — Additional Factors—Not in Request for Proposals—Quick Reaction Work Order Contracting

When evaluation is in accord with stated criteria, all offerors are treated alike, and evaluation reflects reasoned judgment of evaluators, protest will be denied. Although disclosure of an agency's additional considerations, including number of quick reaction work order contracts to be awarded and relative competitiveness of potential contractors, would have given offerors better understanding of selection process, notice of these factors and opportunity to amend would not have helped any firm to improve its proposal.

Contracts—Negotiation—Evaluation Factors—Source Evaluation Board—Authority

When Source Evaluation Board follows procedures outlined in agency handbook—which requires more than mere determination that proposals are either "acceptable" or "not acceptable"—protest that Board usurped its authority will be denied.

Matter of: Hittman Associates, Inc., December 17, 1980:

Hittman Associates, Inc. protests its exclusion from the competitive range by the Department of Energy under a solicitation for Quick Reaction Work Order master contracts for planning, analytical, technical, and other required services.

Hittman argues that all technically qualified offerors—which it is conceded to be—should have been selected, rather than only those determined by DOE to have been "best qualified."

DOE has completed negotiations, but has withheld awards pending our decision. For the reasons outlined below, we are denying the protest.

Background

Under the request for proposals No. DE–RP01–79–AD10163, DOE will make multiple awards of master contracts encompassing three broad areas of work: Support for Program Planning and Monitoring; DOE Staff Support; and Special Tasks. DOE intends to award both a firm-fixed-price and a cost-plus-fixed-fee contract to selected offerors in each work area. In the solicitation, the agency stated that 25 percent of the awards in the first two areas and 100 percent of the awards in the third area would be reserved for small businesses.

After award, when specific, urgent needs arise in one of the stated areas of work, DOE will solicit three or more master contracts, who will be required to submit cost and technical proposals for the specific task. This second competition—generally on the basis of price—will result in modification of the successful contractor's master contract to include the specific task.

Basis of Protest and DOE Responses

Hittman was one of 90 firms submitting timely proposals; since it is not a small business, it competed only for work areas one and two.

In its protest, the firm lists 15 reasons why it believes DOE's conduct of this procurement arbitrarily limited competition. These reasons for the most part involve (1) determination of the competitive range; (2) evaluation criteria; and (3) source selection procedures.

1. *Competitive Range*

As noted above, Hittman believes all qualified offerors should have been included in the competitive range, and that "preselection" of only the best qualified for negotiation was contrary to the general rule that the competitive range should include all responsible offerors whose proposals are either technically acceptable or capable of being made acceptable.

Hittman believes our opinion in B-196489, February 15, 1980, a letter to Chairman John D. Dingell of the Energy and Power Subcommittee, House Interstate and Foreign Commerce Committee, in which we discussed quick reaction work order contracting, supports this view, since in it we cited an earlier case in which we had approved a prequalification scheme only "after it was modified to provide that all qualified firms in particular skill areas would receive master agreements." *See Department of Agriculture's Use of Master Agreements*, 56 Comp. Gen. 78 (1976), 76-2 CPD 390.

DOE, however, contends that if a technically acceptable proposal is so much lower in quality than other proposals that it stands no real possibility of award, meaningful negotiations are not possible. Since this was the case with Hittman, DOE indicates, the firm was not included in the competitive range.

Hittman also objects to the fact that when DOE determined that not enough small businesses were initially ranked highly enough to qualify for 25 percent of the awards in work areas one and two, the Source Evaluation Board decided to augment the competitive range by further extending it for small businesses only. This modification of the method of establishing the competitive range was improper, prejudicial, and inconsistent with normal procurement rules and practices, Hittman states.

DOE responds that the Board took this step only after considering various alternatives which would have included a significant number of large businesses determined to have little or no change of award. However, DOE continues, the small businesses had a real chance for award when their proposals were compared with other small business proposals and when the 25 percent preference was taken into account. Thus, DOE maintains, they could not properly have been excluded from the competitive range; similarly-rated large businesses, which did not enjoy the preference, had no real chance, so their exclusion was proper. This procedure did not prejudice Hittman, DOE concludes, since it was not included in the initially-established competitive range.

2. *Evaluation Criteria*

Hittman further contends that in establishing the competitive range, DOE used evaluation criteria other than those listed in the solicitation, without giving offerors notice or an opportunity to amend their proposals. Specifically, Hittman alleges that Source Evaluation Board members considered the number of master contracts which they believed were likely to be awarded in determining the competitive range, and made their own individual evaluations of the ability of each contractor to vigorously participate in work order competitions. In the request for proposals, Hittman states, there was no indication that any specific limit would "arbitrarily" be placed on the number of selected contractors as part of the evaluation process or that Board members would attempt to anticipate the subsequent competitiveness of each master contractor.

Hittman implies that if the evaluation criteria listed in the solicitation—experience, personnel, project management, and personnel management and corporate resources—had been strictly followed, there would have been no question of the capability of the team composed of Hittman and its subcontractor, Arthur Young Company. Instead, Hittman argues, the listed criteria were ignored and two undisclosed criteria were substituted.

DOE responds that it should have been apparent to Hittman from the solicitation that awards were to be made on a "best qualified" basis, and that no standard for determining the number of awards was set forth in the solicitation. DOE argues that any protest as to the limited number of awards (and presumably the limited number of firms in the competitive range) is therefore untimely.

DOE also argues, however, that there was no need to list the number of firms to be considered for award as an evaluation factor, since this information would not have helped offerors to improve their proposals. The factors which ultimately determine the number of selections, DOE continues, included aggregate capacity of offerors to handle normal and peak workloads, potential attrition, anticipated rates of unacceptable work order proposals, and "other matters which bear on maintaining a viable competitive environment for work order competitions." These were not within the control of offerors, DOE points out.

DOE further states that while a competitive group of master contractors was an objective of the procurement, the technical and cost criteria stated in the solicitation were the sole means of achieving this objective.

3. *Source Selection Procedures*

Hittman also contends that DOE's Source Evaluation Board usurped the responsibilities of the Source Selection Official and the contracting officer, as outlined in the Source Evaluation Board Hand-

book. The Board's proper function, Hittman asserts, was simply to determine which proposals were technically acceptable and to present that information to the selecting officials.

Hittman additionally argues that Board members lacked sufficient information from proposals as submitted to enable them to rank prospective contractors. For example, Hittman states, the Board could not possibly have considered the relative qualifications of its 53 specific technical personnel in identified disciplines as compared with those listed by some other, probably larger organization. Such evaluations necessarily had to be subjective, Hittman concludes.

DOE's position, on the other hand, is that judgments as to the probable for ranking of proposals. The Board found a wide range of corcontracting, were properly made by the Source Evaluation Board as part of its overall responsibility for establishing the competitive range.

DOE also states that the information furnished by offerors was suitable for ranking of proposals. The Board found a wide range of corporate experience and facilities, proposed management approaches, and experience in energy-related activities among offerors, DOE states.

4. *Additional Bases of Protest*

Hittman also objects to DOE's consideration of the need to provide incentives to competition by limiting the number of master contractors and thus increasing the dollar volume of work order awards which each can anticipate. The risks and rewards of competition, Hittman states, are those of contractors, and there was no need for DOE to inject itself into this process.

In addition, Hittman believes that DOE may have favored larger contractors with larger staffs, and indicates that the likelihood of organizational conflicts of interest will be far less with smaller firms such as itself.

Finally, Hittman takes issue with DOE's position that part or all of its protest is untimely because it deals with matters apparent from the solicitation but was not filed before the closing date for receipt of initial proposals. Hittman states that it had every reason to expect that the normal source selection procedures outlined in DOE's own Handbook and in the solicitation would be followed. Since the protested actions occurred after the closing date, Hittman concludes, "it is patently obvious that the protest could not have been submitted at any earlier time."

GAO Analysis

At the outset, we note that Hittman's protest is based primarily on the manner in which proposals were evaluated and the competitive range was determined. Since these were not apparent from the solicita-

tion itself, and in some cases became known to Hittman only when discussed in DOE's report to our Office, we consider the protest timely.

We also note that our Office has found quick reaction work order contracting to be reasonable and not unduly restrictive of competition *per se*. B–196489, *supra*. It is true that as a general rule, we approve prequalification only when all offerors meeting a certain level of acceptability are permitted to participate; otherwise, such schemes are inconsistent with the requirement for full and free competition.

Quick reaction work order contracting, however, differs from the prequalification schemes discussed in our most recent decision on this subject, *Office of Federal Procurement Policy's films production contracting system; John Bransby Productions, Ltd.*, 60 Comp. Gen. 104 (B–198360, December 9, 1980), 80–2 CPD 419, in which we approved a prequalification system for film and videotape productions because all firms might attempt to qualify (but recommended that particular procurements be synopsized in the *Commerce Business Daily*).

Unlike OFPP's random lists of offerors, quick reaction work order contracts are not intended to be used automatically or as a substitute for the normal procurement process. Rather, they are used only in urgent situations, with strict procedural safeguards. When a DOE program office identifies a specific requirement, it must determine in writing that the cost will be $250,000 or less; that the task falls within the area of work covered by a master contract; that the work order will result in a discrete deliverable; and most importantly, that the services are urgently required, due to circumstances beyond the control of the program office. In addition, the program office must certify with a contracting officer concurring that the Government will be adversely affected if a quick reaction work order is not issued. B–196489, *supra*.

In connection with our opinion to Chairman Dingell, DOE acknowledged that it had previously met urgent requirements by awarding sole-source or level-of-effort contracts, authorizing pre-contract costs, entering into letter contracts, or ratifying informal commitments by unauthorized personnel. We therefore concluded that the quick reaction work order system of contracting (although it needed modification in certain aspects not relevant here) was less restrictive than other methods used by DOE to meet urgent needs. *Id.*

We also reviewed the solicitation for the instant procurement and found that in selecting contractors, DOE would emphasize experience and require cost realism. We stated:

> *** * * It appears that DOE, in using these evaluation procedures, will award master contracts to all qualified offerors, although the competitive range in some cases may be a narrow one.** *Id.*

In this context, "qualified" is a relative term. The solicitation indicates this: "Evaluation is conducted to determine the offeror's * * *

comparative ranking with competing offerors." In addition, DOE's Source Evaluation Board Handbook directs each member to rate and *rank* proposals after considering them individually in light of each evaluation criterion but *before* the competitive range is established. The Handbook states that a proposal is in the competitive range unless there is no real possibility, *taking into account other more acceptable proposals*, that it can be improved to the point where it becomes the most acceptable. According to the Handbook,

> There is no purpose in considering a proposal to be in the competitive range simply because it could be improved to the point where it would be acceptable to the Government if better proposals were not submitted when, in fact, such better proposals have been received. * * * [Procurement Regulations Handbook, Source Evaluation Board, DOE/PR-0027 § 405c (June 30, 1979).]

Although it is an exception to the general rule cited by Hittman, the concept of a relative competitive range is neither new nor improper. In 52 Comp. Gen. 382, 387 (1972), a case involving a proposal determined to be technically unacceptable because it fell below a predetermined point score, we objected generally to the use of such a cutoff, but stated that in view of the offeror's "low score in comparison to the array of scores achieved by the other offerors," we did not find the agency's decision to exclude it from negotiations improper.

Similarly, in *Peter J. T. Nelsen*, B-194728, October 29, 1979, 79-2 CPD 302, we upheld a determination that an offeror was not within the competitive range when it received a point score of 72, compared with other technical proposals rated 78.4 and 87.2; it was also the highest priced. We stated that a proposal need not be considered to be within the competitive range if, in light of the competition for that procurement, the offeror did not have a reasonable chance of being selected for the final award.

Even in a procurement where the competitive range consisted of one firm, we considered that selection within the discretion of the agency when, in its judgment, meaningful discussions could not be held with other offerors because their proposals could not be brought up to the level of the superior one. The protester's proposal was found to be "acceptable" or "marginally acceptable" in each individual technical rating category, but corporate past experience concededly could not have been improved through discussions, and proposed cost savings might not have been realized. *Art Anderson Associates*, B-193054, January 29, 1980, 80-1 CPD 77.

In view of the foregoing, we do not agree with Hittman's contention that all technically qualified offerors necessarily should have been included in the competitive range. Rather, we believe, it was within DOE's discretion to select those it found best qualified.

As for extension of the competitive range for small business proposals, in our opinion to Chairman Dingell we discussed DOE policies

with regard to small business under quick reaction work order contracting. DOE had stated that it would give special recognition of the needs of small businesses in solicitations, and that it generally would set aside a minimum percentage of awards for such firms. DOE also stated that its Director of Small and Disadvantaged Business Utilization would screen work orders for the purpose of adding small businesses to the firms solicited whenever possible. B-196489, *supra.*

In this case, the Source Evaluation Board report indicates that the 25 percent partial set-aside was DOE's response to a Small Business Administration appeal that 100 percent of this procurement be set aside for small business concerns. The determination to reserve this portion of work areas one and two, and all of work area three, was made by DOE's Deputy Secretary and was announced in the solicitation. However, for the Source Evaluation Board to be able to implement this policy, a corresponding number of small business firms obviously had to be included in the competitive range.

Since DOE had authority to set aside 100 percent of the procurement for small businesses, we cannot question its setting aside a lesser amount or conclude that it was unreasonable for the Source Evaluation Board, in effect, to establish a second competitive range for small firms which it determined had a real chance for award. Rather, as we noted in our opinion to Chairman Dingell, it appears that the agency is taking steps to insure that it meets its statutory obligation to place a fair proportion of total Federal purchases and contracts with small business concerns. *Id.*, citing 41 U.S.C. § 225(b) (1976) and Federal Procurement Regulations § 1-1.702 (1964 ed. amend. 192).

On the issue of evaluation criteria, we have carefully examined the Source Evaluation Board report to determine whether (1) evaluation was in accord with the stated criteria; (2) all proposals were subject to the same detailed technical evaluation; and (3) that the evaluation reflected the reasoned judgment of the evaluators. *See Peter J. P. Nelsen, supra.* For this procurement, 130 proposals were received on or before the closing date (two additional proposals, received late, were returned without being considered). These were first evaluated and point-scored by a technical evaluation committee. Source Evaluation Board members then individually evaluated and scored all proposals before meeting to develop consensus scores, based on the composite scores from the technical evaluation committee and on their own individual evaluations.

Each proposal could receive up to 1,000 points under the four criteria listed in the request for proposals. Maximum points for these were: Experience, 350; Personnel, 300; Project Management, 200; and Personnel Management and Corporate Business, 150. There were three subfactors under each criterion; in general, the most important

of these dealt with general experience or suitability, and the less important with specific experience or ability in DOE programs and functions or in programs with comparable requirements.

Upon reviewing the evaluation sheets, we find that Hittman and all other offerors were considered in light of the criteria listed in the solicitation, and that each of the subfactors on which they were graded could reasonably have been included under the four listed criteria. In view of the broad general nature of the work covered by the solicitation, there was no "technical approach" which could have been evaluated in the sense that the Government was seeking the "best" solution. Rather, offerors were evaluated in terms of their capability and capacity to perform the work covered by the solicitation. Each received a narrative summary of strengths and weaknesses, as well as a point score.

The "undisclosed" criteria which Hittman alleges were employed—anticipated number of awards competitiveness—did not come in for consideration until Board members attempted to determine how many of the offerors should be included in the competitive range. In quick reaction work order contracting, the exact number of awards is not determined until the time of source selection and depends, as DOE points out, on factors such as aggregate capacity of all offerors.

The number of awards likely to be made, we believe, was a necessary consideration since if, for example, it was determined that the work orders to be issued over the term of the master contracts would require only a dozen firms in each work area, negotiation with 90 offerors would have been an undue burden on both the agency and the lower-ranked offerors who were not ultimately selected.

Competition for work order solicitations also was a valid concern, since our Office had previously criticized DOE for having made sole source awards of work orders under earlier master contracts. *See* B-196489, *supra*.

While Hittman and other offerors might have better understood the selection process if these considerations had been spelled out in the request for proposals, notice and an opportunity to amend would not have helped any firm to improve its proposal. Moreover, these "criteria" were applied uniformly to all offerors.

Nor does it appear that the Source Evaluation Board overstepped its authority or made subjective decisions, as alleged by Hittman. For example, as DOE points out, the Board took the extra step of checking with the Source Selection Official before defining the actual competitive range. In all other respects, the Board appears to have followed the procedures outlined in the Handbook, which states that:

> * * * The Board will not recommend the selection of a contractor, but will report its findings and conclusions and answer all questions raised by the Source Selection Official and assist him with any special analyses or other requirements for clarifying matters related to the final selection. [Procurement Regulations Handbook, *supra* at § 103a.]

This appears to require more than a mere designation of proposals as "acceptable" or "not acceptable," as Hittman would have the Board do. We have no reason to doubt that final selection will be made by the Source Selection Official.

As for other bases of protest, there is no indication that DOE favored larger contractors than Hittman; on the contrary, if any group was favored, although justifiably, it was small business concerns. All offerors will be required to make complete disclosure statements regarding potential conflicts of interest as a condition precedent to award; these statements will be updated and cross-referenced during selection of contractors for work orders, and final determinations of whether a conflict exists will be made when specific tasks are identified.

In the final analysis, then, Hittman's protest is that it believes it is as well or better qualified than other offerors, and that its proposal should have been included in the competitive range.

Hittman initially received technical scores of 621 and 656 in work areas one and two, respectively; these scores were increased slightly following a determination by the Board that the relative values as signed to subcriteria under Personnel Management and Corporate Resources should be changed to reflect their relatively equal importance as specified in the solicitation. Hittman's final technical scores were 625.6 and 660.6.

Among the 12 offerors initially selected for the competitive range in each work area, technical scores ranged from 952 to 683.6 in work area one and from 988 to 674.6 in work area two. Thus, Hittman was below the cut-off point for large businesses in both areas of work.

It is not our function to reevaluate proposals. We have repeatedly emphasized that decisions as to their relative merits are the primary responsibility of the contracting agency, and will not be disturbed unless shown to be arbitrary or in violation of procurement statutes and regulations. Mere disagreement between a protester and evaluators does not mean that evaluations were unreasonable. *National Motors Corporation, et al.*, B–189933, June 7, 1978, 78–1 CPD 416.

In this case, we find the selection of offerors for negotiation represented the reasoned judgment of DOE evaluators, and violated neither statute nor regulation.

The protest is denied.

[B–199478]

Pay—Retired—Survivor Benefit Plan—Spouse—Social Security Offset—Mother's Benefit

A widow's Survivor Benefit Plan annuity payments were offset to the extent of the Social Security mother's benefit to which she would have been entitled based on the deceased service member's military Social Security coverage. However, she was actually receiving Social Security benefits based on her own work record and, therefore, received a reduced mother's benefit due to the benefits payable based on her own record. She is not entitled to reimbursement of the

Survivor Benefit Plan annuity withheld for the difference between the mother's benefit to which she would have been entitled had the mother's benefit not been reduced in her case and the reduced mother's benefit which she actually received.

Matter of: Mary L. Lott, December 23, 1980:

This action is in response to a letter from the Disbursing Officer, United States Army Finance and Accounting Center, Indianapolis, Indiana, submitting a voucher and requesting an advance decision as to whether or not the Survivor Benefit Plan annuity of Mrs. Mary L. Lott should be offset by Social Security benefits in the circumstances described. This request was assigned Control No. DO-A-1348 by the Department of Defense Military Pay and Allowances Committee, and was forwarded to this Office by the Office of the Comptroller of the Army on June 30, 1980. We hold that Mrs. Lott's Survivor Benefit Plan annuity was properly offset to reflect the full mother's benefit before that benefit was reduced on account of benefits payable based on her own work record.

Master Sergeant Bobby W. Lott was placed on the temporary disability retired list on February 22, 1977, under the provisions of 10 U.S.C. § 1202, with 26 years, 9 months, 8 days for basic pay, 26 years, 5 months, 14 days for percentage purposes, and a disability rating of 100 percent. He elected, under the provisions of the Survivor Benefit Plan (SBP), to provide an annuity based on full retired pay for his wife and child. Sergeant Lott died on April 16, 1978.

An annuity was established in favor of the deceased's widow, Mary L. Lott, effective July 1, 1978, retroactive to April 17, 1978, in the amount of $550.23, less a Social Security offset of $193.80. The annuity was increased by cost-of-living adjustments to $577.19 on September 1, 1978, and to $599.70 on March 1, 1979. The offset, which was increased to $206.40 as of June 1, 1978, was equal to the amount of the mother's benefit to which Mrs. Lott would ordinarily have been entitled as a result of the deceased's active duty earnings. However, Mrs. Lott did not receive a mother's benefit of either $193.80 or $206.40. Since she had apparently been receiving Social Security benefits on her own work record prior to her husband's death, her mother's benefit was reduced by the Social Security Administration to $25.80 as of April 1978 and $27.40 as of June 1978. The mother's benefit and offset were discontinued on July 31, 1979, due to the fact that Mrs. Lott's daughter attained the age of 18 on August 28, 1979.

Mrs. Lott, as the surviving spouse of a retired member who died of service-connected causes, was entitled to Dependency and Indemnity Compensation (DIC) payments from the Veterans Administration (VA), as well as Social Security benefits. The Survivor Benefit Plan provides, however, that a widow or widower who is entitled to both DIC and SBP benefits will receive as a Survivor Benefit Plan annuity only the amount by which the SBP benefit exceeds the DIC entitle-

ment. 10 U.S.C. § 1450(c). In such a case, the amount deducted from the member's retired pay which corresponds to the cost of that part of the SBP entitlement not paid because of the DIC payment will be refunded to the spouse. 10 U.S.C. § 1450(c). Since at the time Mrs. Lott's SBP annuity was established DIC information was not available, Mrs. Lott was paid both benefits concurrently. On May 1, 1979, the annuity was reduced to the amount by which the SBP benefit exceeded the DIC payment, and an overpayment of annuity was computed, retroactive to April 17, 1978, in the amount of $4,546.00. According to the submission, the VA is currently remitting payments to liquidate the overpayment.

We are asked to determine whether the amount of overpayment was incorrectly computed, and whether, as a consequence, when the amounts withheld from her current benefits to liquidate the overpayment were subtracted from the amount Mrs. Lott actually received, she was underpaid. The voucher presented to us for certification totals $3,214.63, a sum arrived at by adding the amounts of Social Security offset applied to payments made for the period April 17, 1978, through July 31, 1979.

Specifically, we are asked:

1) Should the widow's annuity be reduced by a Social Security offset?

2) If the answer to question 1 is affirmative, should the offset be computed using the ratio formula, as when the "mother's" benefit is reduced because of earnings?

3) If the answer to question 1 is negative, should full refund be made?

Where a widow has one dependent child, the monthly annuity to which she is entitled must be reduced by—

> an amount equal to the mother's benefit, if any, to which the widow would be entitled under subchapter II of chapter 7 of title 42 based solely upon service by the person concerned as described in section 410(*l*)(1) of title 42 and calculated assuming that the person concerned lived to age 65. 10 U.S.C. § 1451(a).

As is noted above, the Social Security Administration determined that Mrs. Lott's "mother's benefit," which she received based on her deceased husband's Social Security coverage, must be reduced since she was receiving Social Security benefits based on her own work record. Thus, the question is whether her SBP annuity is to be reduced by what the "mother's benefit" would have been based on her husband's Social Security coverage, or whether her annuity should be reduced by the lesser mother's benefit she actually received.

The Survivor Benefit Plan established by Public Law 92–425, 10 U.S.C. 1447, was designed to build on the income maintenance foundation of the Social Security system in order to provide survivor coverage to military widows and dependent children in a stated amount

from retirement income derived by a member from his military service. Since the Government contributes substantial amounts to the Social Security system on behalf of members of the uniformed services it was determined that there should be an offset against the Survivor Benefit Plan annuities when a survivor becomes entitled to Social Security survivorship benefits. See page 29, Senate Report No. 92-1089, September 6, 1972. Thus, when survivors who are receiving annuities under this Plan receive Social Security survivor benefits or become entitled to receive such benefits a reduction of the annuity under the Plan is required and is calculated on the basis of the Social Security survivorship benefit which would be attributable solely to a retired member's years of military service. In this regard, it is to be noted that the actual Social Security benefit to which a survivor is entitled is not affected by this computation. See 53 Comp. Gen. 758, 759 (1974).

We have held that the Social Security offset of the SBP annuity for a widow aged 62 or more is determined by the Social Security payment attributable to the military service of the member on whose death the SBP annuity is payable even where the widow may receive Social Security payments based on her own employment or the employment of some other person. 57 Comp. Gen. 339, 343 (1978). Similary, we believe that amount by which an SBP annuity is to be reduced for the Social Security mother's benefit should be the amount to which the widow "would be entitled" based upon the military service of the deceased member, regardless of whether the widow is actually receiving that amount or some other amount based on her own Social Security employment record.

Accordingly, question 1 is answered yes, question 2 is answered no, and question 3 requires no answer.

[B-194197]

Travel Expenses—Actual Expenses—Reimbursement Basis—Ten-Hour Rule—Applicability—High-Rate Area Travel

Although Administrator of General Services (GSA) is authorized to promulgate Federal Travel Regulations (FTR), the General Accounting Office (GAO) must interpret the laws and regulations in settling claims. Guidance issued by Assistant Administrator of General Services interpreting FTR does not bind agencies as do the FTR but GAO will accord great deference to such guidance. Since GSA employee relied on GSA guidance interpreting FTR as precluding application of 10-hour rule in case of actual subsistence reimbursement, and since decision B-184489, April 16, 1976, was similarly interpreted by a number of agencies the 10-hour rule shall not be applied to employee or in cases of actual subsistence reimbursement prior to issuance of 58 Comp. Gen. 810, but the rule shall apply after September 27, 1979, the date of issuance of our decision.

Matter of: Nicholas M. Veneziano—Reconsideration, Actual Subsistence Expense Status, December 24, 1980:

Mr. Nicholas M. Veneziano, an employee of the General Services Administration (GSA), has requested reconsideration of our decision *Nicholas M. Veneziano*, 58 Comp. Gen. 810 (1979), in which we denied

his claim for actual subsistence expenses incurred incident to duty he performed in Newark, New Jersey, on July 20, 1977.

BACKGROUND

Mr. Veneziano, whose official duty station is New York, New York, and whose residence is in Brooklyn, New York, was ordered to perform official business in Newark, New Jersey, where he incurred the expense of $2.75 for lunch. Citing decision B–184489, April 16, 1976, and paragraph 1–8.6 of the Federal Travel Regulations (FTR) (FPMR Temporary Regulation A–11, Supp. 4, Attachment A) (1977), Mr. Veneziano claimed reimbursement for lunch.

We denied Mr. Veneziano's claim in B–194197, September 27, 1979, (58 Comp. Gen. 810) on the basis that the prohibition against the payment of per diem for travel of 10 hours or less, found in FTR para. 1–7.6d(1), is applicable to employees' travel to high-rate geographical areas, and Mr. Veneziano had performed his travel to a high-rate geographical area in less than 10 hours. We reasoned as follows:

> In decision B–184489, April 16, 1976, cited by Mr. Veneziano, we held that since the regulations pertaining to high-rate geographical areas did not contain special provisions for reimbursement of actual subsistence expenses for travel of 24 hours or less when no lodging is involved an agency could not set a per diem rate of $24 or less for such travel to a high-rate geographical area. The regulations have since been amended so that a per diem rate may be set in a high-rate geographical area when circumstances warrant it. See para. 1–8.1b(1) of the FTR, FPMR Temporary Regulation A–11, Supp. 4, Attachment A. (April 29, 1977.)
>
> We do not think it follows, however, that the absolute prohibition against the payment of per diem for travel of 10 hours or less found in FTR para. 1–7.6d(1) has no application to employees' travel to high-rate geographical areas. The payment of actual expenses in high-rate geographical areas is normally contingent under Part 8 of the FTR is likewise limited. Decision B–184489, April 16, 1976, allowed in cases of travel of 10 hours or less, actual expenses reimbursement under Part 8 of the FTR is likewise limited. Decision B–184489, April 16, 1976, is distinguishable since in that case we held that the per diem method of reimbursing an employee had no application to an employee's reimbursement when his entitlement was under the distinct actual expense mode. This was later corrected by an amendment to the regulations. In the case at hand, however, there is an absolute bar on the payment of per diem for travel of 10 hours or less and this bar is applicable to the payment of actual subsistence expenses in like situations.

Mr. Veneziano, in his request for reconsideration, states that our decision is in conflict with guidance provided by GSA's Assistant Administrator for Administration. Mr. Veneziano cites a memorandum from the Assistant Administrator dated November 5, 1975, which, by means of an attachment, provided guidance on the preparation of travel vouchers. The salient portion of the attachment provides as follows:

> e. *Travel of less than 24 hours (per diem).* * * * If the travel was 10 hours or less, he would not be allowed per diem unless the travel was at least six hours and the trip began before 6 A.M. or ended after 8 P.M. * * *
>
> f. *Travel of less than 24 hours (high rate geographical area).* For travel of less than 24 hours in a high rate geographical area with no lodging required. the traveler will be paid actual expenses not to exceed the maximum authorized allowance. *The 10-hour limitation as in e, above, does not apply.* [Italic supplied.]

Mr. Veneziano states that his voucher was approved by the approving official under the guidance in the above instructions which he assumes were within the Assistant Administrator's authority to issue. He says what is involved here is the issue as to who has the authority to prescribe regulations regarding travel allowances. He asks whether it is the Administrator of General Services or the Comptroller General.

OPINION

The Administrator of General Services is given the authority to prescribe regulations necessary to administer the laws relating to travel and subsistence expenses and mileage allowances. 5 U.S.C. 5707 (1976). These regulations are the Federal Travel Regulations (FPMR 101–7) and they govern the payment of travel expenses of Federal employees. The General Accounting Office (GAO), however, is required by law to settle claims against the Government of the United States. 31 U.S.C § 71. In performing this function GAO is necessarily called upon to construe the laws and regulations which may be pertinent to an individual's claim against the Government.

The guidance from the Assistant Administrator concerning the 10 hour rule which is cited by Mr. Veneziano has not been issued as a part of the Federal Travel Regulations. Rather the guidance appears to be in the nature of internal regulations. Since the guidance at issue is not a part of the Federal Travel Regulations, we are not bound to follow its instructions and we are free to construe the FTR's in a contrary manner.

However, it is a general principle of administrative law that an agency's construction and interpretation of its own regulations will generally be accorded great deference by a court or reviewing authority. *Udall* v. *Tallman*, 380 U.S. 1 (1964); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410 (1944). When we originally considered Mr. Veneziano's claim the Assistant Administrator's guidance was not a part of the record before us. Although the Assistant Administrator's guidance is not binding on us, as the FTR's are, we will reconsider Mr. Veneziano's claim in the light of this internal GSA guidance.

In this connection, we have been informed that a number of agencies besides GSA have interpreted our decision B–184489, April 16, 1976, as prohibiting the extension of the 10 hour rule to travel to high-rate geographical areas. We recognize that the FTR's and our decision B–184489, April 16, 1976, could have been construed as prohibiting the application of the 10 hour rule in actual subsistence cases. Accordingly, since the Assistant Administrator's interpretation of GSA's own regulations, the FTR's, was not clearly erroneous and since decision B–184489, April 16, 1976, may have encouraged such an interpretation by others, we shall not apply our decision to the con-

trary in 58 Comp. Gen. 810 to travel performed before or on its date of issuance, namely September 27, 1979.

It is still our view, however, for the reasons set out in 58 Comp. Gen. 810, that subsistence expenses may not be paid for travel of 10 hours or less to high-rate geographical areas. Accordingly, that rule is applicable for travel performed after September 27, 1979, the date of issuance of 58 Comp. Gen. 810.

Mr. Veneziano's voucher, having been duly approved by the appropriate official, may be certified for payment for the reasons stated above.

[B-199805]

Transportation—Rates—Section 22 Quotations—Construction—"LTL Rate or Class"—Quotation Expressly Subject to NMFC

Definition of less than truckload, "LTL," as published in National Motor Freight Classification, controls interpretation of "LTL rate or class" in quotation, since quotation is expressly governed by Classification.

Transportation—Rates—Less Than Truckload (LTL)—Applicability to Various LTL Quantities

Abbreviation "LTL," under "scale" column or tariff's rate table, means quantity of freight of less than 500 pounds; "LTL," as well as other weight groups, expressly made subject to LTL classes.

Transportation—Rates—Section 22 Quotations—Less Than Truckload (LTL) Quantities—Applicability of LTL Class Rate to Various LTL Quantities

Applicability of quotation, referring to "currently applicable class 55 LTL rates" in tariff, is not limited to class 55, LTL rates on "LTL" weight line of rate table but extends to class 55 LTL rates, corresponding to any weight scale of less than truckload quantity.

Transportation—Rates—Less Than Truckload (LTL)—What Constitutes—Governing Classification's Definition

General Services Administration properly based deduction action on quotation which offers rates on all less than truckload quantities, as term is defined in governing Classification.

Matter of: Yellow Freight System, Inc., December 29, 1980:

Yellow Freight System, Inc. (Yellow Freight), initially requested review of settlement action taken by the General Services Administration (GSA) on 36 less than truckload (LTL) shipments of Government property which were transported between points listed in item 3860 of U.S. Government Quotation ICC RMB Q15–D (Quotation RMB 15). See 49 U.S.C. 6(b) (1976) and 4 CFR 53 (1979). By letter of November 3, 1980, the carrier amended its request by adding 88 bills.

In its audit of Yellow Freight's transportation bills the GSA determined that the carrier collected overcharges in the total amount of

$3,296.42 on the 36 LTL shipments. GSA's report, which recommends that its action be sustained, represents that the circumstances and issue involved in Government bill of lading K–4495333 are the same in all material respects as those in the other shipments.

The record shows that Yellow Freight collected $360.35 in August 1978 for the transportation of a shipment of books, NOI, from Seal Beach, California, to Indianapolis, Indiana. The shipment, which was received by the carrier on July 25, 1978, weighed 3,312 pounds. The GSA determined that the applicable charges were $341.80, and issued a Notice of Overcharge for $18.55. When the carrier declined to pay the overcharge, the GSA caused the deduction to be made. (The carrier states that $11,570.63 in overcharges were deducted on the 88 additional bills.)

The source of GSA's audit determination is item 3860 of Quotation RMB 15. Item 3860 provides for specific commodity rates on books, NOI, the article shipped (plus other printed matter, and paper articles, paper and boxes). The item does not contain the rates. Instead, for rates, it refers to Note 1 thereof which in turn refers to the currently applicable class 55 LTL rates published in specified Rocky Mountain Motor Tariff Bureau, Inc., tariffs, including Tariff ICC RMB 521-Series (Tariff 521). For shipments transported between Western and Eastern points, section 8 of Tariff 521 (item 3860) contains published rates, in cents per 100 pounds, arranged by columns, under the various commodity classes, and by lines, extending from various weight scales. Organization of the rate table, showing, to the extent necessary, the intersecting columns and lines, follows, as it appears on the 9th revised page 472 of the tariff:

	CLASSES			
SCALE*	100	85	70	55
LTL	2490	2117	1743	1370
5C				
1M				
2M	1745	1483	1222	960
5M				
10M				
20M				
(1)TL				
(2)TL				

* "C" means hundred pounds; "M" means thousand pounds, and "TL" means truckload.

The GSA applied the $9.60 rate (adjusted to $10.32 per 100 pounds to reflect a general increase in rates), which appears in the class 55

column and on the fourth line which extends from the 2,000-pound weight scale. That scale was selected because the shipment weighed 3,312 pounds.

There is apparent agreement that the rate would be selected from the class 55 column; the controversy is over the proper line. The parties urge different interpretations of the abbreviation, "LTL," as it appears in the pertinent clause of Note 1:

> the currently applicable class 55 LTL rate. . . .

Yellow Freight contends that "LTL" refers only to the first line under the "Scale" column inasmuch as it contains the same abbreviation, "LTL;" that line covers shipments weighing less than 500 pounds. That position would result in application of the $13.70 rate (before adjustment for the rate increase). The GSA contends that "LTL" means less than truckload, as generally understood, and that the class 55 rates on any line, except those marked "TL" (truckload) are available, depending on the weight of particular shipments.

In support of its position that only the higher rates on the "LTL" (first) line apply, Yellow Freight refers to the title page of section 8 of Tariff 521. On 2nd revised page 469 (the title page), the following appears:

> *APPLICATION OF SCALE LTL, 5C, 1M, 2M, 5M, 10M, 20M OR TL RATES SHOWN IN THIS SECTION* Scale LTL—Less than truckload, subject to LTL classes; or AQ classes.

* * * * * * *

The carrier argues that since the provision specifically ties "less than truckload" to the "Scale LTL" line, it follows that no other scale can be considered as "LTL" within the meaning of Note 1 of Item 3860. Yellow Freight states that the LTL scale was intended to provide an exception (lower than tariff) rate for small shipments, generally, 500 or 1,000 pounds, and some shipments weighing 2,000 pounds, but none greater.

We believe that well-established principles of tariff construction control disposition of this case. See 56 Comp. Gen. 529 (1977). Whatever may have been the intentions when tariff items are framed, tariffs must be construed according to their language, and the framer's intentions are not controlling. See B–174445, April 25, 1972. In the interpretation of a tariff, its terms must be taken in the sense in which they are generally used and accepted; and it must be construed in accordance with the meaning of the words used. See *Penn Central Co.* v. *General Mills, Inc.*, 439 F.2d 1338, 1340 (8th Cir. 1971).

We agree with Yellow Freight that "LTL" means less than truckload; however, the sense in which the term is generally used extends beyond the scope of 499-pound shipments. In its usual sense, "LTL"

is considered as a quantity that is below the carrying capacity of a vehicle. In other words, it covers all weights less than the truckload minimum. This is the meaning adopted by the National Motor Freight Classification, ICC NMFC 100. Section 6(c) thereof defines less than truckload (LTL) rates or classes as those applicable to a quantity of freight less than the volume or truckload minimum specified in the Classification for the same article. See *Merchandise, Southwest Freight Lines, Inc.*, 51 M.C.C. 112, 115 (1949).

The Classification governs Quotation RMB 15 through item 100-1 thereof which refers to U.S. Government Quotation ICC RMB 20 and the publications set forth in item 100 of that quotation. Item 100 specifically refers to the Classification as a governing publication. See B-197183, June 26, 1980.

Items 161560 and 161580 in the Classification, which provide class ratings on books, NOI, name minimum weights of 30,000 pounds for the truckload rating. With reference to the "scale" column of weights it is clear that all weight groups from the first line (LTL) to the "20M" (20,000 pounds) line are considered LTL within the meaning of that term in Note 1, item 3860 of Quotation RMB 15 because they represent quantities of less than 30,000 pounds, the truck load minimum for books, NOI, specified in the Classification.

We view the "LTL" scale simply as another weight group, as the 2,000 and 5,000 etc., groups. A notable difference, though not material here, is that the "LTL" scale has no stated minimum, as the other weight scales do, viz 2,000 pounds. See *General Increases, Less Than Truckload, Pacific Northwest*, 310 I.C.C. 307, 313 (1960).

It should be noted also that Item 3860 in Note 1 contains the statement. "Rates in this item apply only on shipments which weigh 500 pounds or more which are rated at 500 pounds." Thus the item is restricted to shipments covered by weight Scale 5C through weight Scale 20M. And weight Scale LTL is specifically exempted from application to shipments weighing in excess of 500 pounds.

Yellow Freight fails to distinguish between an "LTL" rate or class and an "LTL" quantity of freight. Note 1 speaks in terms of *rates*, whereas the scale column of the rate table in Tariff 521 pertains to quantities, and the "LTL" scale is only one. The title page of section 8, relied on by the claimant, defeats the carrier's argument. It expressly states that it is subject to LTL classes, or any quantity, which clearly points out the distinction between rates and quantities. Therefore, in its audit GSA properly applied the class 55 LTL rate corresponding to the 2,000-pound weight scale.

Accordingly, GSA's settlement action is sustained.

[B-186373]

Indian Affairs—Grazing Rights—Indian and Former Indian Lands Acquired for Garrison Dam—Public Law 87-695 Requirements

Public Law 87-695, 76 Stat. 595 (1962), permits the Three Affiliated Tribes of the Fort Berthold Reservation to graze livestock without charge on the former Indian lands acquired by the United States in connection with the Garrison Dam project. This privilege is limited to lands which were actually acquired from Indians and does not extend to lands that were acquired from non-Indians.

Matter of: Indian Grazing Privileges on the Garrison Dam Project, December 30, 1980:

The Chief Counsel of the Army's Office of the Chief of Engineers has requested our opinion on whether Indian grazing rights at the Garrison Dam project extend to lands which were acquired from non-Indians as well as to lands acquired from Indians.

The Flood Control Act of December 22, 1944, 58 Stat. 887, established a comprehensive plan for the improvement of the Missouri River Basin and authorized the Secretary of the Army to acquire all lands necessary for the project. Most of the needed land lay within Indian reservations, and these lands were acquired from a number of Indian tribes, under varying terms worked out in several different statutes. Generally, the tribes were granted permission to continue to graze stock on the land. However, grazing privileges were not granted to the Three Affiliated Tribes of the Fort Berthold Reservation when their land was acquired for the Garrison Dam project in 1949. Pub. L. No. 81-437, 63 Stat. 1026. This omission was corrected by Public Law 87-695 (September 25, 1962), 76 Stat. 594, which extended grazing privileges to the Three Affiliated Tribes.

Not all of the project land which lay within reservations was owned by Indians. Some of the land was owned by non-Indians, who had acquired it from Indians through direct purchase, tax sales, etc. A question has arisen in connection with Indian grazing privileges as to whether the privilege is limited to land actually acquired from Indians or whether it extends to project lands within a reservation that were acquired from non-Indians. We first considered this question in B-142250, May 2, 1961, where we held that the grazing provisions in Public Law 85-916, 72 Stat. 1766 (1958), and Public Law 85-923, 72 Stat. 1773 (1958), applied only to lands that had been acquired from Indians. In 1977, we reviewed the grazing provision in Public Law 83-776, § X, 68 Stat. 1191, 1193 (1954), and held that it applied to land that had been acquired from non-Indians as well as to land that had been acquired from Indians. 56 Comp. Gen. 655 (1977). We also overruled our earlier decision. B-142250, May 2, 1961.

The Army Corps of Engineers now asks us for an interpretation of the grazing provision in Public Law 87-695. In administering its

projects in the Missouri River Basin, the Corps wants to be able to treat all Indian tribes in the same fashion. Thus, it would like us to interpret the grazing provision in Public Law 87-695 as applicable to lands that were acquired from both Indians and non-Indians. However, because the law is explicit on this point, we cannot make such an interpretation.

As the Corps itself acknowledges, grazing privileges granted to the Three Affiliated Tribes "are somewhat different from those of other tribes." As first introduced, the bill which became Public Law 87-695 contained language similar to that which we interpreted in 56 Comp. Gen. 655:

> That the Three Affiliated Tribes of the Fort Berthold Reservation are hereby granted the exclusive right, without cost, to use all lands owned by the United States on the Fort Berthold Reservation *lying between the shoreline of the Garrison Dam Reservoir and the exterior boundaries of the Garrison Dam project* for grazing purposes for the benefit of the tribe and its members subject to the rights under existing grazing leases and permits. The tribe shall have the right to lease such land for grazing purposes to members or nonmembers of the tribe for such rental and on such terms and conditions as the Secretary of the Interior may prescribe. S. 1161, 87th Cong., 2d Sess., introduced March 2, 1961. [Italic supplied.]

However, the bill was amended by the Senate Committee on Interior and Insular Affairs, and the enacted version read as follows:

> Subject to the right of the United States to occupy, use, and control the lands acquired by the United States within the Fort Berthold Reservation for the construction, operation, and maintenance of the Garrison Dam and Reservoir project pursuant to the Flood Control Act of 1944, approved December 22, 1944, and amendatory laws, as determined necessary by the Secretary of the Army adequately to serve said purposes, the Three Affiliated Tribes of the Fort Berthold Reservation shall be permitted to graze stock without charge on such *former Indian land* as the Secretary of the Army determines is not devoted to other beneficial uses, and to lease such land for grazing purposes to members or nonmembers of the tribes on such terms and conditions as the Secretary of the Interior may prescribe. The foregoing grant of grazing privileges shall be subject to rights under existing grazing leases and permits. Pub. L. No. 87-695, 76 Stat. 594 (1962). [Italic supplied.]

The plain meaning of the words "former Indian land," plus the fact that this phrase was substituted for "all lands owned by the United States on the Fort Berthold Reservation lying between the shoreline of the Garrison Dam Reservoir and the exterior boundaries of the Garrison Dam project" make it clear that the grazing privilege is limited to land which was acquired from Indians. This interpretation is reinforced by the Department of Interior's comments on the final version of the bill:

> The one recommendation of the Department that is not included in the bill is language that makes the grazing privilege apply to all project lands within the reservation boundaries, regardless of who was the former owner. The bill limits the grazing privilege to project lands within the reservation boundaries that were formerly owned by Indians. Convincing arguments can be advanced in favor of both of these approaches. While we prefer to extend the privilege to all project lands within the reservation boundaries, regardless of the former owners, we do not object to the language of the bill if that is the considered judgment of the committee. H.R. Rep. No. 2348, 87th Cong., 2d Sess. 2 (1962).

To adopt the Army's suggested interpretation would be to revert to the language of the bill as introduced, language which was specifically changed in the legislative process.

In summary, we find that the grazing privilege granted by Public Law 87-695 is limited to lands which were acquired by the United States from Indians and does not extend to lands that were acquired from non-Indians. While we appreciated the Army's desire for consistency in the application of the Missouri River Basin statutes, the differences in statutory language make this consistency impossible. Should this impose an undue administrative burden upon the Army, its only recourse is to seek an amendment to Public Law 87-695.

[B-197781]

Officers and Employees—Transfers—Relocation Expenses—Real Estate Expenses—Title in Name of Trust

Employee of Interior Department who transferred from Reno, Nevada, to Anchorage, Alaska, seeks reimbursement of real estate expenses incurred in sale and purchase of residences at old and new duty stations. Title to both residences was held in name of a trust established by last will and testament of deceased mother of employee's spouse. Since title to residences was held in name of trust which paid all expenses of real estate transactions, title requirements of 5 U.S.C. 5724a(a)(4) (1976) and para. 2-6.1c of Federal Travel Regulations were not met. Therefore, no entitlement to reimbursement exists.

Matter of: Carl A. Gidlund—Real Estate Expenses—Title Requirements December 30, 1980:

This decision is in response to a request by Ms. Mary M. Rydquist, Authorized Certifying Officer, Bureau of Land Management, United States Department of the Interior, as to the propriety of reimbursing Mr. Carl A. Gidlund for real estate expenses incident to his change of official station from Reno, Nevada, to Anchorage, Alaska, in 1978.

The pertinent facts and circumstances involved in this claim are as follows: Mr. Gidlund is an employee of the Department of the Interior. His wife is employed by the United States Forest Service, Department of Agriculture. Both were selected to fill positions in Alaska and the two agencies agreed that the Interior Department would pay the transfer costs to their new duty station. The claimed expenses incurred in the sale of the residence in Reno totaled $8,307.50 and $202.75 was incurred incident to the purchase of a residence in Anchorage.

By her last will and testament, Ms. Hillis J. Schmidt, deceased mother of Ms. Joan Elna Boduroff, now the wife of Mr. Gidlund, established a trust which in Article IV thereof, directed her executor and trustee to provide her daughter and family with a residence, including the selling of one residence and replacing it by purchasing another residence. When the Gidlund family transferred to Anchorage, the trust paid all of the real estate expenses incurred in the sale and

purchase of the two residences. This is the first time the trust has sold a residence and purchased another in a transfer involving the Federal Government. The title to both residences in Reno and Anchorage was and is in the name of the Schmidt Trust. Mr. Gidlund states that he will reimburse the trust if he is paid the claimed real estate expenses by the Department of the Interior.

The statutory authority for reimbursing a Federal employee for expenses incurred in the sale and purchase of residences at his old and new duty stations is contained in 5 U.S.C. § 5724a(a)(4) (1976). The implementing regulations spell out the title requirements for such transactions. Paragraph 2–6.1c of the Federal Travel Regulations (FTR) (FPMR 101–7, May 1973) provides that, in order to reimburse real estate expenses, title to the residences at the old and new official stations "must be in the name of the employee alone, or in the joint names of the employee and one or more members of his immediate family, or solely in the name of one or more members of his immediate family." Paragraph 2–1.4d of the FTR (FPMR Temporary Regulation A–11, Supplement 4, April 29, 1977) defines "immediate family" only in terms of a spouse, children, dependent parents, and dependent brothers and sisters.

In the instant case, title to the residences involved was held by the trust and not by Mr. Gidlund, his wife, or any member of his immediate family, as required by the Federal Travel Regulations. We view the purpose of the statute and regulation as being to reimburse the transferred employee for real estate expenses incurred by him or a member of his immediate family, but not to reimburse a third party, such as a trust, that has borne such expenses. *Reverend Richard A. Houlahan*, B–192583, March 14, 1979. See also B–172244, June 3, 1971.

Accordingly, since the conditions precedent relating to the title to the property in question have not been met, Mr. Gidlund is not entitled to reimbursement of the claimed real estate expenses. The voucher submitted may not be certified for payment.

[B–197794]

Travel Expenses—Military Personnel—Release From Active Duty—"Place From Which Ordered to Active Duty" Determination—Service Academies, etc. Status

For the purpose of travel and transportation allowances under 37 U.S.C. 404, and implementing regulations, on separation the place from which ordered to active duty, in the case of a midshipman or cadet at a service academy or civilian college or university, is the place where he attains a military status or where he enters the service, and generally this would be at the academic institution and not his home of record, since up to the time he is appointed a cadet or midshipman he is a civilian.

Matter of: Place from which ordered to active duty—Cadets or midshipmen, December 31, 1980:

The question presented is whether a service academy or a civilian college or university where a cadet or midshipman accepts his commission should be considered the place from which ordered to active duty for the purposes of determining travel entitlements at the time of separation or retirement from the service under 37 U.S.C. 404 and implementing regulations. The answer is yes.

This request for advance decision was made by the Acting Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations) and was assigned Control Number 80–6 by the Per Diem, Travel and Transportation Allowance Committee.

The Acting Assistant Secretary points out that under 37 U.S.C. 404(a)(3), a member of the uniformed services is entitled to travel and transportation allowances on his separation from the service from his last duty station to his home of record or the place from which ordered to active duty. Under the definition of "Place from which ordered to active duty" contained in Appendix J of Volume 1 of the Joint Travel Regulations (1 JTR), implementing the statute, it would appear that the physical location where a member accepts his commission would be the place from which he was ordered to active duty. Notwithstanding this view, it has been a longstanding administrative practice of the Navy that a midshipman on commissioning should reflect his home of record as the place from which he was ordered to active duty. It is noted that this practice is based on the fact that a permit to attend the academy is mailed to his home. This practice is followed even though the individual remains a civilian until he accepts the appointment as a midshipman.

In view of the above, a decision is requested concerning the appropriateness of designating a service academy or a civilian college or university as the place from which ordered to active duty for a civilian entering into the armed forces by appointment as a midshipman or cadet and is subsequently commissioned as an officer.

Travel and transportation allowances for members of the uniformed services are governed in part by 37 U.S.C. 404, which provides in pertinent part as follows:

> (a) Under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed or to be performed under orders, without regard to the comparative costs of the various modes of transportation—
>
> * * * * * * *
>
> (3) upon separation from the service, placement on the temporary disability retired list, release from active duty, or retirement, from his last duty station to his home or the place from which he was called or ordered to active duty, whether or not he is or will be a member of a uniformed service at the time the travel is or will be performed; * * *

Paragraph M4157, 1 JTR provides that a member is entitled to travel and transportation allowances upon separation from his last duty station to his home or the place from which he was called or ordered to duty, as the member may elect. Appendix J, JTR, defines "place from which ordered to active duty" as:

> The place of acceptance in current enlistment, commission, or appointment of members of the regular services, or of members of the reserve components when enlisted, commissioned, or appointed for immediate active duty; * * *.

It has been the position of this Office that the purpose of the statutory provisions for the payment of travel allowances upon separation from the service or release from active duty is to return the member to his home or to the place from which he entered the service from civilian life. B-120297, September 8, 1954.

In this regard, it is apparently the position of the Navy that when an individual's status changes from that of midshipman at the Naval Academy on his receiving his commission that it has no significance in determining the place from which he was ordered to active duty. See B-120297, September 8, 1954, and 45 Comp. Gen, 661 (1966). The view is also expressed that service as a midshipman at the Naval Academy is at least tantamount to active duty, if not clearly such, and thus the place from which he is ordered to active duty would be the place to which his permit to travel to the academy was sent, his home.

Notwithstanding these views, it is our position that the place from which ordered to active duty as used in the statute and the regulations contemplates an individual having some military status and then being ordered to active duty. It has been customary to interchange in usage "the place from which ordered to active duty" and "the place where he enters the service." In this regard, a candidate for admission to the Naval Academy is a civilian until he arrives at the academy and accepts his appointment. We have been advised that prior to traveling to the academy all the individual normally receives is a permit for the travel. In these circumstances, it cannot be said a candidate for admission to the Naval Academy accepts appointment by actions prior to taking the required oath as in 21 Comp. Gen. 819 (1942).

On the basis of this reasoning, it is our view that the place from which a cadet or midshipman at the Naval Academy or a civilian college or university is ordered to active duty is the place where he attains a military status or the place where he enters the service, assuming of course that he has no prior military status.

Accordingly, it is our view that unless a candidate to be a cadet or midshipman has some military status prior to being appointed, his home of record should not be considered the place from which he is order to active duty, but rather the place from which ordered to military duty should be the place at which he attains a military status, e.g., the Naval Academy.

[B-198440]

Transportation—Household Effects—Military Personnel—"Do It Yourself" Movement—Benefits Entitlement—Non-Change-of-Station Moves

Properly directed moves without a change in duty station by military members under 37 U.S.C. 406(e) are not precluded from the do-it-yourself household goods movement program authorized by section 747, Department of Defense Authorization Act, 1976. Section 747 refers only to 37 U.S.C. 406(b) (change of station moves); however, transportation of household goods under section 406(e) is that authorized under section 406(b) and neither the legislative history nor implementing regulations show an intent to preclude section 406(e) moves from the program.

Transportation—Household Effects—Military Personnel—"Do It Yourself" Movement—Weight Evidence

The military services' requirement, that in order to qualify for an incentive payment under the do-it-yourself household goods moving program a member must have certified scale weight certificates establishing the weight of the goods, is in accordance with the law and implementing regulations. Therefore, although the move may have been only a short distance, was accomplished without a motor vehicle, and the use of a commercial scale was impractical and a Government scale was not available at the time of the move, the incentive payment may not be made without the weight certificates. In the absence of a change in regulations, the weight certificate requirement will be applied since this is a matter for administrative determination.

Matter of: Do-it-yourself household goods move incentive payment, December 31, 1980:

This case involves an Air Force member's entitlement to an incentive payment under the "do-it-yourself" household goods movement program where the member moved a short distance between quarters at the same base and did not procure weight certificates showing the weight of his goods. Two specific issues are involved: (1) whether the do-it-yourself household goods program may include moves made without a permanent or temporary change of station in emergency or unusual circumstances under 37 U.S.C. § 406(e); and (2) whether a constructive weight may be used in lieu of the certified weight certificates where it is shown that due to unusual circumstances it is impractical or impossible to produce certified weight certificates. On the first issue the answer is yes, and on the second the answer is no.

The case was submitted by the Accounting and Finance Officer, Headquarters 314 Technical Airlift Wing (MAC), Little Rock Air Force Base (AFB), Arkansas, requesting an advance decision on a claim by Sergeant James A. Horton, USAF, for incentive payment under the do-it-yourself program. The matter was forwarded here through the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 80-15).

Sergeant Horton, stationed at Little Rock AFB, was reassigned from one set of Government quarters into other Government quarters located at Little Rock AFB. The change in quarters was not incident

to a change in permanent duty station. Sergeant Horton elected to move his household goods himself under the do-it-yourself program. The quarters were located only 100 yards distance from each other and only a few items required movement by motor vehicle since most items could easily be moved by hand or by using a hand dolly. Using a small vehicle required approximately nine trips and the base scales were not accessible during the period of time he moved. To weigh the goods would have required that a portion of the weight tickets be obtained at a commercial scale located 16 miles distant, or 32 miles round trip. Also, had the shipment been tendered to a commercial carrier a much higher cost would have been incurred. The base traffic manager, considering the circumstances involved, instructed Sergeant Horton that cubic measurements in lieu of certified weight tickets could be used to determine the weight of his goods for the computation of the incentive payment.

The matter has been submitted to our Office for decision since applicable regulations require that the incentive payment be computed based on weight obtained from scale weight certificates. In addition, the Deputy Director, Plans and Systems, Headquarters Air Force, has raised the question as to whether the do-it-yourself program applies to moves such as this where no change in duty station is involved.

Moves Without Change in Duty Station

Concerning whether the do-it-yourself program may be used for moves where there is no duty station change, 37 U.S.C. § 406(b) provides the general authority for transportation, within certain limitations, of a member's household goods in connection with "a change of temporary or permanent station." The statute authorizing the do-it-yourself program is section 747 of the Department of Defense Appropriation Act, 1976, Public Law 94–212, 90 Stat. 153, 176 (37 U.S.C. § 406 note) which provides:

> Appropriations available to the Department of Defense for providing transportation of household effects of members of the armed forces pursuant to section 406(b) of title 37, United States Code, shall be available hereafter to pay a monetary allowance in place of such transportation, to a member who, under regulations prescribed by the Secretary of the military department concerned, participates in a program designed by the Secretaries in which his baggage and household effects are moved by privately owned or rental vehicle. Such allowance shall not be limited to reimbursement for actual expenses and may be paid in advance of the transportation of said baggage and household effects. However, the monetary allowance shall be in an amount which will provide savings to the government when the total cost of such movement is compared with the cost which otherwise would have been incurred under section 406(b).

Movement of household goods between quarters without a change in station is authorized under 37 U.S.C. § 406(e) in unusual or emergency circumstances when change-of-station orders have not been issued. 45 Comp. Gen. 569, 571 (1966). Section 406(e) specifically provides, however, that such transportation of household goods is that

authorized under section 406(b). Therefore, it is our view that although section 747 of the Defense Authorization Act only refers to transportation under section 406(b), it does not clearly preclude applying the do-it-yourself program to moves authorized by the exception provided in section 406(e) to the change of station required by section 406(b). We have also reviewed the legislative history of section 747 of the Authorization Act and have found nothing there which indicates an intent to preclude move without a change of duty station from the program. In addition we note that the governing regulations in Volume 1, Joint Travel Regulations (1 JTR), Part H, and Air Force Regulations 75–33, do not preclude such moves from the program. Therefore, it is our view that non-change-of-station moves are not currently precluded from the do-it-yourself program.

We question, however, whether the move in question could qualify as a move made in emergency or unusual circumstances in the first instance. The submission asserts that Sergeant Horton was given orders for a local move which involved moving from one set of Government quarters to another set of Government quarters 100 yards distance. However, no orders were submitted but rather a copy of a certificate dated June 27, 1979, which certifies that James A. Horton "will be assigned (relocated)" Government quarters. There is nothing to indicate that the certified relocation was the result of emergency or unusual circumstances.

Section 747 of Public Law 94–212 authorizes expenditure of appropriated funds available for expenditure pursuant to section 406(b) for reimbursement to members who move household goods by privately owned vehicle or rental vehicle and, as is indicated above, pursuant to section 406(e). However, if Sergeant Horton's move was not under an authority which would authorize movement of household effects under 37 U.S.C. § 406(b) or 406(e), then he could not, in any event, qualify for the incentive payment of the do-it-yourself program.

Certified Weight Certificate Requirement

Because of the method and time period which Sergeant Horton used to move his household goods, apparently it was impractical for him to obtain weight certificates to show the weight of his goods. However, under the detailed regulations (promulgated pursuant to statute) implementing the do-it-yourself program, to receive the incentive payment the weight of the goods must be established by use of weight certificates from a public weightmaster or Government scales. 1 JTR, paragraph M8401, and AFR 75–33, paragraph 3–2.

In decision B–191016, April 20, 1979, we specifically overruled a prior decision in which we had authorized payment on a do-it-yourself move based upon constructive weights in consideration of the unusual circumstances involved there. In seeking reconsideration of the prior

decision, the Air Force made a strong presentation in which it was asserted that the use of weight certificates is essential to the success of the program because there is no other means to accurately compute the cost of a move upon which the incentive payment is made.

In the April 20, 1979 decision we stated that it is our view that the regulations of the Air Force and the other services, issued pursuant to authority delegated by paragraph M8400, 1 JTR, legally may require that weight certificates from certified scales showing both the empty and loaded weight of the vehicle must be furnished, as a condition to a member's qualifying for an incentive payment. We found nothing in the law limiting the authority of the services in this regard and, accordingly, we stated we would apply that requirement in the future.

Therefore, until such time as the services determine that the use of weight certificates will no longer be considered as the only evidence acceptable in establishing weights under the do-it-yourself movement program, we will continue to apply the weight certificate as an exclusive requirement of the program. Accordingly, the voucher submitted may not be certified for payment and will be retained here.

[B-200377]

Transportation — Household Effects — Commutation — Documentation To Support Reimbursement Claim

Employee had his household goods transported by private independent trucker with 40-foot freight hauling trailer for which employee paid $1,610 in cash. Employee submitted notarized statement of trucker attesting to shipment and also trucker's receipt for cash payment. In accordance with applicable provisions of the Federal Travel Regulations evidence submitted is not sufficient to establish constructive weight of goods for reimbursement on commuted rate basis, nor does it establish estimated weight approximating actual weight for reimbursement of actual expenses incurred.

Matter of: Kalman Pater, Jr.—Shipment of household goods, December 31, 1980:

W. K. Dulin, an authorized certifying officer at the Morgantown Energy Technology Center (METC), Department of Energy, has requested an opinion on the claim of Mr. Kalman Pater, Jr., for expenses incurred in shipping his household goods. On the basis of the record before us, and pursuant to the following analysis, we are denying Mr. Pater's claim.

Briefly, Mr. Pater moved his family and household belongings from Wayne, Pennsylvania, to Morgantown, West Virginia, on Memorial Day, 1977, reporting for duty at METC on June 6, 1977. Mr. Pater was moved by a private independent trucker with a 40-foot freight hauling trailer who presented Mr. Pater with a written receipt for $1,610, after receiving a cash payment from him.

Mr. Pater's claim for reimbursement for transfer expenses was sub-

mitted to the Certifying Officer at the Oak Ridge Operations Office and partial payment was made for the employee and his family's move. However, payment for shipment of the household goods was denied pending the outcome of our decision in *Challis Broughton*, B–193133, April 24, 1979, which appeared to be similar in nature to Mr. Pater's move. Based on our final decision in the above mentioned case, Oak Ridge felt that it could not justifiably reimburse Mr. Pater for the shipment of his household goods. Therefore, the claim was returned to METC unpaid.

In our initial decision in the *Broughton* case, dated April 24, 1979, we determined that insufficient documentation had been presented concerning weights of the household goods transported by Mr. Broughton to support payment under the commuted-rate system. Further, no information had been presented which could be used to justify payment of the commuted rate based upon the constructive weight. In lieu of the commuted rate we authorized the payment of actual expenses to the extent that actual expenses had been shown by the claimant. In our reconsideration of the *Broughton* case, B–193133, August 13, 1979, we concluded in part that, pursuant to paragraph 2–8.2b(4) and 2–8.3(a) of the Federal Travel Regulations (FPMR 101–7) (FTR), where evidence to support a claim for shipping household effects does not establish the cubic feet of properly loaded van space, the employee is not entitled to reimbursement at the commuted rate but may be reimbursed actual expenses incurred if evidence submitted reasonably supports the shipment of the claimed weight of household goods. Thus, in affirming our initial decision, we held that although the evidence submitted was sufficient to permit reimbursement to Mr. Broughton of the actual expenses he incurred in moving his household goods himself, it did not support payment at the commuted rate.

The transportation of household goods is governed by the Federal Travel Regulations (FPMR 101–7) (FTR). Paragraph 2–8.3a(3), which sets out the requirements for the documentation relating to shipments of household goods, provides that:

(3) *Documentation.* Claims for reimbursement under the commuted rate system shall be supported by a receipted copy of the bill of lading (a reproduced copy may be accepted) including any attached weight certificate copies if such a bill was issued. If no bill of lading was involved, other evidence showing points of origin and destination and the weight of the goods must be submitted. Employees who transport their own household goods are cautioned to establish the weight of such goods by obtaining proper weight certificates showing gross weight (weight of vehicle and goods) and tare weight (weight of vehicle alone) because compliance with the requirements for payment at commuted rates on the basis of constructive weight (2–8.2b(4)) usually is not possible.

The constructive weight system described in paragraph 2–8.2b(4) provides that:

(4) *Constructive weight.* If no adequate scale is available at point of origin, at any point en route, or at destination, a constructive weight, based on 7 pounds

per cubic foot of properly loaded van space, may be used. Such constructive weight also may be used for a part-load when its weight could not be obtained at origin, en route, or at destination, without first unloading it or other part loads being carried in the same vehicle, or when the household goods are not weighed because the carrier's charges for a local or metropolitan area move are properly computed on a basis other than the weight or volume of the shipment (as when payment is based on an hourly rate and the distance involved). However, in such instances the employee should obtain a statement from the carrier showing the amount of properly loaded van space required for the shipment. (See also 2–8. 3a (3) with respect to proof of entitlement to a commuted rate payment when net weight cannot be shown.)

In accordance with this authority, and as we indicated in the *Broughton* case, where an employee has failed to obtain the actual weight of his household goods at the time of transportation, he may be paid at the commuted rate only if he is able to show the amount of space occupied by his goods and that the goods were properly loaded in the space available. In establishing the amount of space which would have been occupied by his effects if properly loaded, the employee may summit a list of items transported together with the volume occupied by each based on actual measurement or a uniform table, preferably prepared by a commercial carrier. 48 Comp. Gen. 115 (1968).

Further, if the employee is unable to establish his entitlement to a commuted payment by complying with the requirements listed above, he may be reimbursed the actual expenses incurred in the transportation of his household goods upon complying with the rule set forth in 38 Comp. Gen. 554, 555 (1959) as follows:

When, however, as here, the evidence available affords a basis for concluding that the actual weight of the goods shipped reasonably approximates the estimated weight, the employee may be reimbursed for his actual expenses to the extent they do not exceed the amount which would have been payable for such estimated weight at the applicable commuted rates.

However, the evidence available must afford a basis for concluding that the actual weight of the goods shipped reasonably approximates the estimated weight. See *James G. Bristol*, B–185626, July 1, 1976, and decisions cited therein. The clear distinction between the *Broughton* case and Mr. Pater's claim is that in the present case there is no sufficient evidence of estimated weight to apply to the legal formulation set out above. As a result, since reimbursement on a commuted rate basis may not be allowed absent proper evidence of the weight or volume of the goods transported such as will satisfy the law and regulations, the voucher may not be paid on a commuted rate basis. And, because the evidence which Mr. Pater has presented does not establish the estimated weight of his shipment, let alone substantiate the accuracy of such estimated weight, the voucher may not be paid on an actual expense basis.

Accordingly, based on the record before us the voucher may not be paid.

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Regulation change

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attendant services is significant issue within meaning of GAO Bid Protest Procedures. Issue is of widespread interest to procurement community because of prior GAO decision in *Palmetto Enterprises, Inc.*, B–193843, et al., which held prior DAR provision prohibited inclusion of option provision in food service contracts and thus any evaluation of option period. Modifies B–193843, et al., Aug. 2, 1979 1
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Employee, who was hired as new appointee to position in the area formerly known as the Canal Zone, was erroneously authorized reimbursement for temporary quarters subsistence expenses although such reimbursement is not permitted under 5 U.S.C. 5723 and para. 2–1.5g (2)(c) of the Federal Travel Regulations (FPMR 101–7) (May 1973). Employee is not entitled to payment for temporary quarters as Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations. Employee must repay amounts erro-

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Decision is affirmed upon reconsideration where protester has failed to show that decision was as matter of law incorrect in holding that descriptive literature may be required only in connection with products and not services since applicable regulations and General Accounting Office decisions are clear on this point 28

ENERGY
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FEDERAL LABOR RELATIONS AUTHORITY
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Unfair labor practices
Settlement
Union dues allotments
Wrongful termination by agency

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Federal Labor Relations Authority has issued complaint charging Department of Labor with unfair labor practice in wrongfully terminating 40 dues allotments for AFGE Local 12 from March to June 1979. The Department proposes to settle by reimbursing the union for the amount of dues it should have received. Federal Labor-Management Relations Statute, 5 U.S.C. chapter 71, provides for dues allotments to unions and authorizes Authority to remedy unfair labor practices, including failure to comply with statute. We have no objection to settlement, if appproved by the Regional Director of the Authority. Modifies B-180095. Oct. 2, 1975 93

FLEXIBLE HOURS
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Inequality of competition in procurement

Although responsibility for administration and enforcement of Service Contract Act rests with Department of Labor, not General Accounting Office, protest is sustained where protester is denied opportunity to prepare offer and have it evaluated on common basis because solicitation contained wage determination and required inclusion of budget breakdown by category of labor and rate of compensation, but agency in evaluating offer ignored inclusion by awardee of compensation rates which indicated failure to comply with wage determination 77

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Although responsibility for administration and enforcement of Service Contract Act rests with Department of Labor, not General Accounting Office, protest is sustained where protester is denied opportunity to prepare offer and have it evaluated on common basis because solicitation

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INDIAN AFFAIRS
Grazing rights
Indian and former Indian lands acquired for Garrison Dam
Public Law 87-695 requirements
Public Law 87-695, 76 Stat. 595 (1962), permits the Three Affiliated Tribes of the Fort Berthold Reservation to graze livestock without charge on the former Indian lands acquired by the United States in connection with the Garrison Dam project. This privilege is limited to lands which were actually acquired from Indians and does not extend to lands that were acquired from non-Indians 139

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Unfair labor practices
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Federal Labor Relations Authority's jurisdiction
Settlement of complaint
Failure to withhold union dues
Federal Labor Relations Authority has issued complaint charging Department of Labor with unfair labor practice in wrongfully terminating 40 dues allotments for AFGE Local 12 from March to June 1979. The Department proposes to settle by reimbursing the union for the amount of dues it should have received. Federal Labor-Management Relations Statute, 5 U.S.C. chapter 71, provides for dues allotments to unions and authorizes Authority to remedy unfair labor practices, including failure to comply with statute. We have no objection to settlement, if approved by the Regional Director of the Authority. Modifies B-180095, Oct. 2, 1975 93

LEAVES OF ABSENCE
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Advance leave
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Recoupment
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Collection for advance leave which becomes excess leave on discharge must be computed based on pay received by the member at the time the

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Household effects. (*See* TRANSPORTATION, Household effects, Military personnel)
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NORTH ATLANTIC TREATY ORGANIZATION
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OFFICE OF FEDERAL PROCUREMENT POLICY
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OFFICERS AND EMPLOYEES
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Travel expenses
Employee of General Services Administration died while on temporary duty for which he was authorized per diem allowance. Payment of per diem in these circumstances is subject to same rule which governs payment of compensation to deceased employee; namely, payment may be made to one legally entitled to payment of per diem allowance due deceased employee of United States up to and including entire date of

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Credit hours *v.* overtime hours
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Household effects
Transportation. (*See* **TRANSPORTATION, Household effects**)
New appointments
Relocation expense reimbursement and allowances
Non-entitlement
Position outside conterminous United States
Employee, who was hired as new appointee to position in the area formerly know as the Canal Zone, was erroneously authorized reimbursement for temporary quarters subsistence expenses although such reimbursement is not permitted under 5 U.S.C. 5723 and para. 2-1.5g(2)(c) of the Federal Travel Regulations (FPMR 101-7) (May 1973). Employee is not entitled to payment for temporary quarters as Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations. Employee must repay amounts erroneously paid as Government is not estopped from repudiating erroneous authorization of its agent. There is no authority for waiver under 5 U.S.C. 5584..... 71
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OFFICERS AND EMPLOYEES—Continued
Transfers
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Real estate expenses
Title in name of trust Page

Employee of Interior Department who transferred from Reno, Nevada, to Anchorage, Alaska, seeks reimbursement of real estate expenses incurred in sale and purchase of residences at old and new duty stations. Title to both residences was held in name of a trust established by last will and testament of deceased mother of employee's spouse. Since title to residences was held in name of trust which paid all expenses of real estate transactions, title requirements of 5 U.S.C. 5724a(a)(4)(1976) and para. 2-6.1c of Federal Travel Regulations were not met. Therefore, no entitlement to reimbursement exists 141

Travel by foreign air carriers. (*See* **TRAVEL EXPENSES, Air travel, Foreign air carriers, Prohibition, Availability of American carriers**)
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Traveltime
Status for overtime compensation. (*See* **COMPENSATION, Overtime, Fair Labor Standards Act**)
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Membership
Allotment for dues. (*See* **UNIONS, Federal service, Dues, Allotment for**)

PANAMA CANAL COMMISSION
Employees
Civil Service Reform Act of 1978
Senior Executive Service
Inapplicability

Panama Canal Act of 1979 expressly excepts the appointment and compensation of all Panama Canal Commission positions from the provisions of the civil service laws and regulations. Additionally, provisions of the Panama Canal Treaty of 1977 would be in conflict with the implementation of the Senior Executive Service. The Treaty must be given priority over a subsequently enacted statute applicable to Federal agencies generally. Hence, the provisions of the Civil Service Reform Act of 1978 establishing a Senior Executive Service do not apply to the employees of the Panama Canal Commission 83

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PAY
Retired
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Spouse
Social Security offset
Mother's benefit

A widow's Surviror Benefit Plan annuity payments were offset to the extent of the Social Security mother's benefit to which she would have been entitled based on the deceased service member's military Social Security coverage. However, she was actually receiving Social Security

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Spouse—Continued
Social Security offset—Continued
Mother's benefit—Continued Page

benefits based on her own work record and, therefore, received a reduced mother's benefit due to the benefits payable based on her own record. She is not entitled to reimbursement of the Survivor Benefit Plan annuity withheld for the difference between the mother's benefit to which she would have been entitled had the mother's benefit not been reduced in her case and the reduced mother's benefit which she actually received 129

Withholding
Member's consent requirement
Anticipated indebtedness
Early discharge
Advance leave, unearned bonuses, etc.

A service may withhold from pay due a member, with the member's consent, amounts expected to become due to the United States because of paid bonuses and advance leave which are expected to become unearned bonuses and excess leave due to the member receiving an early separation from the service. However, such amounts may not be withheld from current pay without the member's consent since no actual debt exists until the member is discharged 51

PERSONAL SERVICES
Private contract *v.* Government personnel
Authority
Appropriation act restriction
Defense Department

Protest against agency's determination to retain function in-house based on cost comparison with offers received in response to solicitation is sustained to extent that agency failed to follow prescribed guidelines in conducting comparison 44

PROCUREMENT
In-house *v.* commercial sources

Where decision to retain function in-house is based on comparison of estimated in-house costs with offers received in competitive procurement, integrity of process dictates that comparison be supported by complete and comprehensive data, and that elements of comparison are clearly identifiable and verifiable 44

QUARTERS ALLOWANCE,
Basic allowance for quarters (BAQ)
Confinement in guard house, etc.
Conviction not overturned

Basic allowance for quarters (BAQ) is not authorized when a member, without dependents, is convicted by court-martial, which does not direct forfeiture of allowances, and the member is sentenced to confinement in a guardhouse, brig, correctional barracks or Federal penal institution, regardless of whether the member was receiving BAQ prior to confinement or his assigned quarters were terminated, provided the sentence is not overturned or set aside. 40 Comp. Gen. 169 (1960) and 40 *id.* 715 (1961), distinguished 74

REGULATIONS
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Joint
Military personnel
Lodgings' expense reimbursement
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A claim by a member of the military for reimbursement of expenses incurred during temporary duty for lodging provided by a friend must be denied, even though the member paid his friend rent for the lodging, since Joint Travel Regulations para. M4205–1 provides that under such circumstances there may be no reimbursement for the cost of lodgings..... 57

Waivers
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Department of Energy regulations, which create mechanism for persons injured by violations of price and allocation regulations to claim refunds, are mandatory. Department lacks authority to waive regulations in individual cases..... 15

STORAGE
Household effects
Overseas employees
Nontemporary
Weight limitation
Renewal agreement at same post

When maximum weight allowance for transportation or nontemporary storage of household goods for transferred employees without immediate family is increased during overseas employee's tour of duty, employee who enters into renewal agreement at same post may be authorized increased weight allowance at time of renewal for nontemporary storage or shipment of household goods up to new maximum less initial shipment.. 30

SUBSISTENCE
Per diem
Actual expenses
Fractional days
Ten hours or less
High-rate area travel

Although Administrator of General Services (GSA) is authorized to promulgate Federal Travel Regulations (FTR), the General Accounting Office (GAO) must interpret the laws and regulations in settling claims. Guidance issued by Assistant Administrator of General Services interpreting FTR does not bind agencies as do the FTR but GAO will accord great deference to such guidance. Since GSA employee relied on GSA guidance interpreting FTR as precluding application of 10 hour rule in case of actual subsistence reimbursement, and since decision B–184489, April 16, 1976, was similarly interpreted by a number of agencies, the 10 hour rule shall not be applied to employee or in cases of actual subsistence reimbursement prior to issuance of 58 Comp. Gen. 810, but the rule shall apply after September 27, 1979, the date of issuance of our decision..... 132

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Prepaid expenses
Reimbursement basis Page

Where application of rule stated in this decision in regard to termination of deceased employee's per diem entitlement precludes reimbursement for authorized expenses actually incurred by employee and definitely intended for coverage by the per diem entitlement, agency may find that employee's death comes within the scope of our decision *Snodgrass and VanRonk*, 59 Comp. Gen. 609. Accordingly, prepaid expenses incurred by a deceased employee may be reimbursed by his agency to the same extent as if the temporary duty had been cancelled or curtailed. 59 Comp. Gen. 609, modified (extended)..... 53

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Employee of General Services Administration died while on temporary duty for which he was authorized per diem allowance. Payment of per diem in these circumstances is subject to same rule which governs payment of compensation to deceased employee; namely, payment may be be made to one legally entitled to payment of per diem allowance due deceased employee of United States up to and including entire date of death, regardless of time during day that death occurs, but such payment may not be made for any date later than that. 59 Comp. Gen. 609, modified (extended)..... 53

Military personnel
Temporary duty
"Lodgings-plus" system
Staying with friends, relatives, etc.

A claim by a member of the military for reimbursement of expenses incurred during temporary duty for lodging provided by a friend must be denied, even though the member paid his friend rent for the lodging, since Joint Travel Regulations para. M4205–1 provides that under such circumstances there may be no reimbursement for the cost of lodgings..... 57

SYNTHETIC FUELS
Procurement
National defense needs
Defense Production Act
Presidential authority
Appropriation sufficiency

Under section 305 of Defense Production Act of 1950, as amended, President or delegate may enter into contracts for purchase or commitment to purchase synthetic fuels as long as there are sufficient appropriations in advance to pay the amount by which the contract price exceeds the estimated market price for the fuel at the time for performance..... 86

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Foreign
American carrier availability
First-class travel restriction

With the limited exceptions defined at paragraph 1-3.3 of the Federal Travel Regulations, Government travelers are required to use less than first-class accommodations for air travel. In view of this policy, a U.S.

TRANSPORTATION—Continued
Air carriers—Continued
Foreign—Continued
American carrier availability—Continued
First-class travel restriction—Continued Page
air carrier able to furnish only first-class accommodations to Government travelers where less than first-class accommodations are available on a foreign air carrier will be considered "unavailable" since it cannot provide the "air transportation needed by the agency" within the meaning of paragraph 2 of the Comptroller General's guidelines implementing the Fly America Act 34
Reserve space voluntarily released
Compensation
Employee *v.* Government's entitlement
Travel before September 3, 1978
Employee, while traveling on official business on May 23, 1976, received $174.07 for voluntarily vacating his seat on an overbooked air flight. Our decisions which allow an employee to keep voluntary payments do not apply prior to September 3, 1978, the effective date of the Civil Aeronautics Board regulations encouraging payment for voluntarily vacating a seat on an overbooked flight. The payment, which was turned over to the Government, may not be returned to the employee 9
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Payment
Proper carrier to receive
"Last" carrier identification
Evidence in GBL
In determining whether billing carrier is last (delivering) carrier in privity with contract of carriage, and entitled to payment of transportation charges under 41 CFR 101-41.302-3(a)(1) and 101-41.310-4(a)(1), General Services Administration (GSA) regulations authorize Government agency to look to properly accomplished, covering Government bill of lading (GBL) 81
Bills of lading
Accomplishment
What constitutes
Transportation Payment Act, 1972
Billing carrier *v.* consignee's certification
Under Transportation Payment Act of 1972, 49 U.S.C. 66(c) (1976), and Government payment regulations, "Properly accomplished" GBL is one on which billing *carrier* certifies that it made delivery, there being no need for *consignee's* certificate 81
Freight
Charges
Payment. (*See* **TRANSPORTATION, Payment** *and* **TRANSPORTATION, Bills, Payment**)
Household effects
Commutation
Documentation to support reimbursement claim
Employee had his household goods transported by private independent trucker with 40-foot freight hauling trailer for which employee paid $1,610 in cash. Employee submitted notarized statement of trucker attesting to shipment and also trucker's receipt for cash payment. In

TRANSPORTATION—Continued
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Benefits entitlement
Non-change-of-station moves
Properly directed moves without a change in duty station by military members under 37 U.S.C. 406(e) are not precluded from the do-it-yourself household goods movement program authorized by section 747, Department of Defense Authorization Act, 1976. Section 747 refers only to 37 U.S.C. 406(b) (change of station moves); however, transportation of household goods under section 406(e) is that authorized under section 406(b) and neither the legislative history nor implementing regulations show an intent to preclude section 406(e) moves from the program .. 145
Weight evidence
The military services' requirement, that in order to qualify for an incentive payment under the do-it-yourself household goods moving program a member must have certified scale weight certificates establishing the weight of the goods, is in accordance with the law and implementing regulations. Therefore, although the move may have been only a short distance, was accomplished without a motor vehicle, and the use of a commercial scale was impractical and a Government scale was not available at the time of the move, the incentive payment may not be made without the weight certificates. In the absence of a change in regulations, the weight certificate requirement will be applied since this is a matter for administrative determination 145
Overseas employees
Multiple-location shipments
Reimbursement basis
Employee entitled to ship household goods to overseas duty post may ship goods from or to any locations he wishes but maximum expense borne by Government is limited to cost of a single shipment by the most economical route from employee's last official station to his new official station 30
Weight limitation
Increases
Renewal agreement at same post
When maximum weight allowance for transportation or nontemporary storage of household goods for transferred employees without immediate family is increased during overseas employee's tour of duty, employee who enters into renewal agreement at same post may be authorized increased weight allowance at time of renewal for nontemporary storage or shipment of household goods up to new maximum less initial shipment ... 30
Return travel for separation
Employee who fulfills period of service at overseas post or who is excused from this by agency is entitled to ship weight of household goods

TRANSPORTATION—Continued
Household goods—Continued
Overseas employees—Continued
Weight limitation—Continued
Increases—Continued
Return travel for separation—Continued
Page
up to maximum weight under laws and regulations at time he separates. Travel and transportation rights and liabilities vest at time it is necessary to perform directed travel and transporation; therefore, laws and regulations in effect at time employee reports for duty have no applicability to return travel and transportation at a later date 30
Storage. (*See* **STORAGE, Household effects**)
Payment
To other than destination carrier
Where billing carrier was issued GBL, it actually performed major part of transportation services, and presented properly accomplished GBL showing it as delivering carrier, Government agency correctly paid origin (billing) carrier, even though claimant actually performed delivery 81
Rates
Less than truckload (LTL)
Applicability to various LTL quantities
Abbreviation "LTL," under "scale" column of tariff's rate table, means quantity of freight of less than 500 pounds; "LTL," as well as other weight groups, expressly made subject to LTL classes 135
What constitutes
Governing Classification's definition
General Services Administration properly based deduction action on quotation which offers rates on all less than truckload quantities, as term is defined in governing Classification 135
Section 22 quotations
Construction
"LTL rate or class"
Quotation expressly subject to NMFC
Definition of less than truckload, "LTL," as published in National Motor Freight Classification, controls interpretation of "LTL rate or class" in quotation, since quotation is expressly governed by Classification 135
Less than truckload (LTL) quantities
Applicabiliy of LTL class rate to various LTL quantities
Applicability of quotation, referring to "currently applicable class 55 LTL rates" in tariff, is not limited to class 55 LTL rates on "LTL" weight line of rate table but extends to class 55 LTL rates corresponding to any weight scale of less than truckload quantity 135

TRAVEL EXPENSES
Actual expenses
Reimbursement basis
Death of employee on temporary duty
Where application of rule stated in this decision in regard to termination of deceased employee's per diem entitlement precludes reimbursement for authorized expenses actually incurred by employee and definitely intended for coverage by the per diem entitlement, agency may find that employee's death comes within the scope of our decision *Snod-*

TRAVEL EXPENSES—Continued
Actual expenses—Continued
Reimbursement basis—Continued
Death of employee on temporary duty—Continued Page
grass and VanRonk, 59 Comp. Gen. 609. Accordingly, prepaid expenses incurred by a deceased employee may be reimbursed by his agency to the same extent as if the temporary duty had been cancelled or curtailed. 59 Comp. Gen. 609, modified (extended)..... 53
Ten-hour rule
Applicability
High-rate area travel
Although Administrator of General Services (GSA) is authorized to promulgate Federal Travel Regulations (FTR), the General Accounting Office (GAO) must interpret the laws and regulations in settling claims. Guidance issued by Assistant Administrator of General Services interpreting FTR does not bind agencies as do the FTR but GAO will accord great deference to such guidance. Since GSA employee relied on GSA guidance interpreting FTR as precluding application of 10 hour rule in case of actual subsistence reimbursement, and since decision B-184489, April 16, 1976, was similarly interpreted by a number of agencies, the 10 hour rule shall not be applied to employee or in cases of actual subsistence reimbursement prior to issuance of 58 Comp. Gen. 810, but the rule shall apply after September 27, 1979, the date of issuance of our decision..... 132
Air travel
Foreign air carriers
Prohibition
Availability of American carriers
First-class travel restriction
With the limited exceptions defined at paragraph 1-3.3 of the Federal Travel Regulations, Government travelers are required to use less than first-class accommodations for air travel. In view of this policy, a U.S. air carrier able to furnish only first-class accommodations to Government travelers were less than first-class accommodations are available on a foreign air carrier will be considered "unavailable" since it cannot provide the "air transportation needed by the agency" within the meaning of paragraph 2 of the Comptroller General's guidelines implementing the Fly America Act..... 34
Reservation penalties *v.* voluntary space release
Compensation
Employee *v.* Government's entitlement
Travel before September 3, 1978
Employee, while traveling on official business on May 23, 1976, received $174.07 for voluntarily vacating his seat on an overbooked air flight. Our decisions which allow an employee to keep voluntary payments do not apply prior to September 3, 1978, the effective date of the Civil Aeronautics Board regulations encouraging payment for voluntarily vacating a seat on an overbooked flight. The payment, which was turned over to the Government, may not be returned to the employee..... 9
Constructive travel costs
Commercial rental vehicle use not authorized
Under travel orders authorizing travel by common carrier, employee performed portion of renewal agreement travel by rent-a-car. Employee

TRAVEL EXPENSES—Continued
Constructive travel costs—Continued
Commercial rental vehicle use not authorized—Continued Page
may be reimbursed expenses for unauthorized mode of travel limited to constructive cost of travel by common carrier. Since travel was not performed by privately owned vehicle (POV), reimbursement for rental car expenses is not limited to the lower cost of mileage for travel by POV even though Department of Defense regulation provides that, where less costly than common carrier, renewal agreement travel by POV will be considered advantageous to the Government---------- 38
First duty station
Reimbursement
Appointment to former Canal Zone
Employee, who was hired as new appointee to position in the area formerly know as the Canal Zone, was erroneously authorized reimbursement for temporary quarters subsistence expenses although such reimbursement is not permitted under 5 U.S.C. 5723 and para. 2–1.5g(2)(c) of the Federal Travel Regulations (FPMR 101–7) (May 1973). Employee is not entitled to payment for temporary quarters as Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations. Employee must repay amounts erroneously paid as Government is not estopped from repudiating erroneous authorization of its agent. There is no authority for waiver under 5 U.S.C. 5584---------- 71
Military personnel
Release from active duty
"Place from which ordered to active duty" determination
Service academies, etc. status
For the purpose of travel and transportation allowances under 37 U.S.C. 404, and implementing regulations, on separation the place from which ordered to active duty, in the case of a midshipman or cadet at a service academy or civilian college or university, is the place where he attains a military status or where he enters the service, and generally this would be at the academic institution and not his home of record, since up to the time he is appointed a cadet or midshipman he is a civilian----- 142
Temporary duty
Reimbursement
"Lodgings-plus" system. (*See* **SUBSISTENCE, Per diem, Military personnel, Temporary duty, "Lodgings-plus" system**)
Overseas employees
Renewal agreement travel
Unauthorized mode
Rented car
Constructive cost basis of reimbursement
Under travel orders authorizing travel by common carrier, employee performed portion of renewal agreement travel by rent-a-car. Employee may be reimbursed expenses for unauthorized mode of travel limited to constructive cost of travel by common carrier. Since travel was not performed by privately owned vehicle (POV), reimbursement for rental car expenses is not limited to the lower cost of mileage for travel by POV even though Department of Defense regulation provides that, where less costly than common carrier, renewal agreement travel by POV will be considered advantageous to the Government---------- 38

TRAVEL EXPENSES—Continued
Overseas employees—Continued
Return for other than leave
Separation
Laws and regulations applicable
Travel and transportation rights Page

Employee who fulfills period of service at overseas post or who is excused from this by agency is entitled to ship weight of household goods up to maximum weight under laws and regulations at time he separates. Travel and transportation rights and liabilities vest at time it is necessary to perform directed travel and transportation; therefore, laws and regulations in effect at time employee reports for duty have no applicability to return travel and transportation at a later date 30

UNIONS
Agreements
Wage increases
Supervisory employees' entitlements

Long-standing practice of paying double overtime to foremen whose pay is not negotiated but is fixed at 112.5 percent of negotiated journeyman base pay was discontinued because 57 Comp. Gen. 259 held that overtime is limited by 5 U.S.C. 5544 to time and a half, notwithstanding section 9(b) of Public Law 92–392 preserving previously negotiated benefits. Foremen claim restoration of double overtime because section 704(b) of Public Law 95–454 overturned holding and permitted double overtime for nonsupervisory employees who negotiate wages. While not directly covered by sections 9(b) or 704(b), foremen may continue to receive double overtime since broad purpose of these statutory provisions was to preserve prevailing rate practices existing before their enactment. Modifies (extends) 59 Comp. Gen. 583 (1980) 58
Federal service
Dues
Allotment for
Agency's wrongful discontinuance
Settlement of unfair labor practice complaint

If an employee authorizes the deduction of union dues from his pay, a Federal agency is obligated to withhold the amount from the employee and pay it over to the union. The payment of the dues is a personal obligation of the employee, and where the agency wrongfully fails to withhold the dues and later reimburses the union pursuant to the settlement of unfair labor practice charges, the agency must either collect the dues from the employee or waive collection of the debt. Modifies B–180095, Oct. 2, 1975 93

WORDS AND PHRASES
Benchmarking

When benchmark programs appear to represent system workload and, combined with functional demonstration, provide reasonable basis for identifying offeror with lowest life-cycle cost, use of benchmark as evaluation tool is within discretion of procuring agency 113
"Descriptive literature" definition

Decision is affirmed upon reconsideration where protester has failed to show that decision was as matter of law incorrect in holding that descriptive literature may be required only in connection with products and not services since applicable regulations and General Accounting Office decisions are clear on this point 28

WORDS AND PHRASES—Continued

"Less than truckload (LTL)" Page

Definition of less than truckload, "LTL" as published in National Motor Freight Classification, controls interpretation of "LTL, rate or class" in quotation, since quotation is expressly governed by Classification 135

Restitution: what constitutes

In distributing funds it has received under consent order with alleged violator of petroleum price and allocation regulations, Department of Energy must attempt to return funds to those actually injured by overcharges. Energy has no authority to implement plan to distribute funds to class of individuals not shown to have been likely victims of overcharges 15

"Workweek"

Three Navy employees completed temporary duty in Scotland on Friday, the last day of their "regularly scheduled administrative workweek," and returned to United States on Saturday, a nonworkday. Travel on nonworkday which is within 7-day workweek is compensable under Fair Labor Standards Act. "Regularly scheduled administrative workweek" is a concept under title 5, United States Code, and has no application to the FLSA 90