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[B-201527]

Bids—Evaluation—Savings to Government—Evaluation Requirement

Solicitation to maintain grounds maintenance equipment, which allowed bidders to offer special discounts for off-season work as well as prompt payment discounts, but provided for evaluation of only prompt payment discount in determining low bid, resulted in award that did not reflect most favorable cost to Government for total work to be performed, *i.e.*, seasonal and off-season work, and thus violated statute governing advertised procurements.

Matter of: Reppert Marine Sales and Service, June 1, 1981:

Reppert Marine Sales and Service protests the award of a contract to Bob's Small Engines (BSE), the low bidder under General Services Administration (GSA) invitation for bids GSD-6DPR-10017, a total small business set-aside for the repair and maintenance of grounds maintenance equipment and air cooled engines for the period January 1, 1981, to December 31, 1981. The protester complains that although two discounts were asked for in the solicitation—a prompt payment discount, and a special discount for work performed during the off-season of November, December, January and February—only the prompt payment discount was considered in determining the low bidder. Reppert also protests that BSE does not have the capacity to satisfactorily perform the contract, maintaining that the awardee has an insufficient amount of space and lacks the necessary welding facilities. Reppert suggests that the awardee therefore improperly intends to subcontract the welding even though it did not so indicate in its bid.

We do not agree that under the solicitation as issued the offered special discounts should have been evaluated in determining the low bidder. However, we believe that the solicitation was defective because the evaluation criteria did not provide for an award at the most favorable cost to the Government. Therefore, we recommend that the requirement be resolicited.

The Method of Award section of the solicitation, paragraph 26, provided that award would be made to the low responsive, responsible bidder offering the lowest hourly rate. The section included the following example:

Bidder A:		Bidder B:	
Hourly rate	$15.00	Hourly rate	$15.00
Less 2%/20 day prompt-payment discount	—.30	No prompt-payment discount offered	—0
Total	14.70	Total	15.00

Bidder A is the low bidder.

Paragraph 27, entitled Prompt Payment Discount, indicated that any offered prompt payment discount would be included in the calculation

of the low bid. The Bid Schedule, paragraph 29, listed eight locations where service would be needed and the volume reported at each for the period January 1979 to September 1979 and provided spaces for a bidder to enter an hourly rate for each location. Below the Bid Schedule, and just above the space for the bidder's signature, was the following provision:

> SPECIAL DISCOUNT: Bidder offers a special discount of —% on all repair work, performed during the months of November, December, January, and February.

Paragraphs 26–29 and the special discount provision were all on the same page of the IFB.

Both Reppert and BSE bid an hourly rate of $15 for one of the listed locations, Fort Leonard Wood, Missouri. The protester offered a 2 percent prompt payment discount for work paid for within 20 calendar days, and a 5 percent special discount for work performed during the off-season. BSE offered a 2.1 percent prompt payment discount, and a 1.5 percent special discount. Because of BSE's greater prompt payment discount, the firm's bid was evaluated as low ($14.68 per hour, as opposed to $14.70 per hour for the protester).

Reppert argues that the special discount should have been considered by GSA in evaluating bids, and that in view of Reppert's knowledge of the previous year's volume of off-season work, acceptance of Reppert's bid would result in the lowest cost to the Government.

In response, GSA contends that the Method of Award and Prompt Payment Discount paragraphs of the solicitation (26 and 27) clearly indicated that only the prompt payment discount would be considered in the evaluation of bids for award, not the special discount. GSA also advises that the purpose for soliciting a special discount for off-season work was to encourage using activities to send equipment in for maintenance and repair at that time so that the contractor would not be inundated with work during the otherwise busy months of the contract year.

We agree with GSA to the extent that Reppert should have realized that any special discount offered would not be considered in determining the low bidder. The invitation's Method of Award provision simply did not mention the special discount notwithstanding that a space for such discount was included on the same page. Further, in contrast to the Prompt Payment Discount paragraph which specified that any such discount would be applied to the bid for purposes of bid evaluation, the special discount provision included no such indication. Finally, there is no estimate in the invitation of the amount of equipment that would need to be serviced dur-

ing the off-season by which a special discount could be multiplied for evaluation purposes.

Nonetheless, we do not believe that the award under the IFB was proper because it was based on defective evaluation criteria. The advertising statute requires that award be made to the responsible bidder whose bid is most advantageous to the Government, price and other factors considered. 41 U.S.C. § 253(b) (1976). That language mandates award on the basis of the most favorable cost to the Government as measured by the total amount of work to be awarded. See *Crown Laundry and Cleaners*, B-196118, January 30, 1980, 80-1 CPD 82; *Square Deal Trucking Co., Inc.*, B-183695, October 2, 1975, 75-2 CPD 206.

As stated above, BSE's evaluated hourly labor rate was two cents less than Reppert's because of BSE's 2.1 percent prompt payment discount as opposed to Reppert's 2 percent prompt payment discount. However, Reppert's offered special discount was 5 percent, while BSE's was only 1.5 percent. It is evident that if even a minimal amount of off-season work is necessary the overall cost to the Government would be less under a contract with Reppert, because of the 5 percent special discount, than it would be under BSE's contract. In this regard, there is no suggestion in the record that GSA could not reasonably estimate the anticipated volume of off-season work so that any offered special discounts properly could be evaluated. The record shows that GSA has been contracting for these services at Fort Leonard Wood since 1970, and that special discounts have been solicited since 1973. We assume that this procurement history would provide sufficient information for the calculation of a reasonable estimate of off-season work under the 1981 contract.

Accordingly, the solicitation was defective because it did not provide for the evaluation of special discounts. Thus, the award did not result in a contract at the most favorable price disclosed in the competition for the work that could be expected to be performed, *i.e.*, the aggregate of both the seasonal and off-season work. To that extent, the protest is sustained.

We could not, of course, recommend that BSE's contract be terminated and a contract awarded to Reppert since an advertised contract must be awarded based on the terms under which the competition was conducted, which in this case did not include the evaluation of special discounts in determining the low bidder. See *Com-Tran of Michigan, Inc.*, B-200840, November 11, 1980, 80-2 CPD 407. However, in view of the solicitation defect, we recommend that GSA expeditiously solicit new bids for the requirement for the balance of BSE's contract term. GSA should include in the invitation an esti-

mate of the amount of off-season work to be expected (now only November and December), and advise that offered special discounts will be applied to that estimate and thus considered in calculating the bid that represents the lowest cost to the Government. If a firm other than BSE is low as evaluated, BSE's contract should be terminated for the convenience of the Government and a new contract awarded. If BSE is low as evaluated, BSE's current contract need only be modified to reflect any changes. See *Datapoint Corporation*, B–186979, May 18, 1977, 77–1 CPD 348.

We note here that GSA invited bids for work at seven locations other than Fort Leonard Wood. Since no protest involving any of those seven has been filed, we have no information regarding the bidding results for those locations. Therefore, we recommend that GSA review those results. Where the most advantageous special discount was offered by other than the awardee so that the award price does not reflect the most favorable price for all work to be performed, GSA should take corrective action consistent with the above.

The remaining issue involves whether BSE has the ability to meet the contract's requirements without subcontracting the welding work which Reppert argues would be improper, and thus whether BSE should have been awarded the contract in any case. This is not a matter which we consider. The ability to satisfactorily perform a contract is a matter of the prospective awardee's responsibility, *Aerosonic Corporation*, B–193469, January 19, 1979, 79–1 CPD 35, and GSA found BSE to be a responsible concern. Our Office does not review affirmative determinations of responsibility unless either fraud on the part of contracting officials is alleged or the solicitation contained definitive responsibility criteria which allegedly were not applied. *Oregon Wilbert Vault Corporation*, B–191000, January 18, 1978, 78–1 CPD 49. Neither exception applies here. We point out here that the specifications required only that the contractor "have available, or have access to" a welding capability, and that the invitation specifically allowed subcontracting, even if the intention to do so was not indicated in the bid submitted, as long as the contracting officer approved.

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

[B-201846]

Contracts—Protests—Interested Party Requirement—Bidder Refusing Bid Acceptance Time Extension—Unreasonable Award Delay Alleged—Resolicitation Requested

Where protester alleges unreasonable delay in making award, which required it to decline to extend bid acceptance period, it is interested party under General Accounting Office Bid Protest Procedures since nature of issue and requested remedy of cancellation and resolicitation are such that protester has established direct and substantial interest.

Contracts—Awards—Delayed Awards—After Bid Acceptance Period—Reasonableness of Delay

Protest that award was unreasonably delayed and bid acceptance period extensions were improperly requested is denied where delay was relatively short and resulted from administrative problems which agency reasonably believed required resolution in order to make award.

Matter of: Yardney Electric Division, June 2, 1981:

Yardney Electric Division (Yardney) protests the award of a contract under invitation for bids (IFB) No. DAAB07-80-B-1353, issued by the Department of the Army for certain silver-zinc battery units. Yardney asserts that it was the low bidder but, because the Government unreasonably delayed making award for 105 days after bid opening, Yardney was unable to grant a requested bid extension at its initial bid price. Therefore, Yardney asserts that the Army should cancel the award and resolicit the requirement. We do not find any merit in Yardney's contention.

Bids were opened on September 19, 1980. Yardney submitted the low bid of $2,297 per battery unit. Eagle Pitcher Industries, Inc. (Eagle Pitcher), the only other bidder, submitted a bid of $2,875 per unit. Yardney's bid properly limited its acceptance period to 60 calendar days from the receipt of bids. As the result of several problems concerning such items as the effect of the apparent illegibility of certain aperture cards which were part of the bid package, a question concerning the amount of Government-furnished silver to be supplied to the contractor, and the need for the contractor to supply an IFB-mandated subcontracting plan, award was delayed and the Government requested bid extensions.

The initial request, made on November 13, 1980, was granted by both bidders. Yardney subsequently granted two additional bid extensions, the last until January 2, 1981. On December 30, 1980, the Government again requested Yardney to extend its bid, in particular to allow Yardney, the anticipated awardee, enough time to submit a required subcontracting plan. Yardney declined to extend its bid acceptance period, indicating that it desired either to negotiate a new

price or participate in a resolicitation for the batteries. Eagle Pitcher granted an extension. Yardney protested to our Office on January 19, 1981. The Army subsequently awarded the contract to Eagle Pitcher.

As a threshold issue, the Army contends that, once it refused to extend its offer, Yardney was no longer an interested party under GAO Bid Protest Procedures. The Army cites *Don Greene Contractor, Inc.*, B-198612, July 28, 1980, 80-2 CPD 74, in support of its position. This case stands for the proposition that where a bidder refuses to extend a bid, it is no longer an interested party under our Bid Protest Procedures when, even if our Office were to sustain the protest, the protester has rendered itself ineligible for award under the solicitation being protested.

However, as a general rule, in determining whether a party is sufficiently "interested" under our Bid Protest Procedures, in order to have its protest considered by our Office, we will review the party's status in relation to the procurement and the nature of the issues involved. See generally, *American Satellite Corporation (Reconsideration)*, B-189551, April 17, 1978, 78-1 CPD 289; *Cobarc Services Inc.*, B-200360, March 2, 1981, 81-1 CPD 155. In this case, the issue being protested is the reasonableness of the requested bid extension. The requested remedy is not award under the solicitation, but rather cancellation and resolicitation. Thus, in view of the nature of the issue raised and the relief requested, we believe that Yardney is a sufficiently interested party under our Bid Protest Procedures.

Yardney cites a number of GAO decisions for the propositions that: an agency may not delay award of a contract without a justifiable reason; extension of bid acceptance periods are proper only when required by administrative necessities; and such extensions may properly be sought only as long as the integrity of the competitive procurement system is not compromised.

We have, in the cases cited, approved a panoply of actions as falling within the scope of "administrative delays" warranting extension requests, and we have afforded procuring agencies substantial leeway to request—but not to require—bid acceptance period extensions. See, for example, *Tennessee Apparel Corporation*, B-194461, April 9, 1979, 79-1 CPD 247. None of the cases cited have limited the appropriateness of such extension requests to narrowly circumscribed situations entailing administrative "necessities," as asserted by Yardney. The cited caveat against compromising the integrity of the procurement system as expressed in *R. H. Whelan Company*, B-194193, May 7, 1979, 79-1 CPD 313, was stated in relation to the fact that a bidder which extended its bid acceptance period and accrued expenses in anticipation of an award was not entitled to Government reimbursement for such expenses if it did not receive award. That case emphasized the

voluntary nature of bid extensions and cited a prior case for the general proposition that a contracting officer has the right to request—but not to insist upon—a bid acceptance period extension as long as the integrity of the competitive procurement system is not compromised. This language (in the prior case cited) was specifically used to clarify the permissibility of a bid extension request in the situation where an extension would revive an expired bid. *United Electric Motor Company, Inc.*, B–191996, September 18, 1978, 78–2 CPD 206. It is irrelevant to the fact situation in the case at hand.

The rule regarding the permissibility of an agency request for a bid acceptance period extension in a situation such as this one is simply that while the Government has no right to force a bidder to grant such an extension, it is appropriate to make such a request pursuant to Defense Acquisition Regulation § 2–404.1(c) (1976 ed.), where the bidder has offered the full acceptance period provided in the IFB and the agency experiences administrative delays. *Environmental Tectonics Corporation*, B–183616, October 31, 1975, 75–2 CPD 266. Accordingly, we see no reason to assess each specific incident contributing to the delay, which was only for a total of just over 45 days beyond the original bid acceptance period. Yardney argues that each of these factors was primarily attributable to, and essentially the fault of, the Army, while the Army contends otherwise. The record indicates that the delays were relatively brief and were not unreasonable under the circumstances since, regardless of the precise causes, they were occasioned by legitimate problems and associated concerns on the part of the agency. As such, they fall within the category of administrative delays which properly may occasion a delay in making award and a request for bid acceptance period extension. The bidders were free to elect not to grant such an extension, as did Yardney.

The protest is denied.

[B–201918]

Defense Acquisition Regulation—Deviations—Approval Authority—Transportation/Storage of Household Effects

Protest that solicitation provisions which deviate from standard Defense Acquisition Regulation (DAR) clauses are improper because DAR Council approved only a "service test," rather than a deviation, is without merit where record shows that, regardless of how modifications were characterized, DAR Council carefully reviewed request for change and, in approving service test, met all requirements for approving actual deviation.

Matter of: Crown Transfer Co., June 2, 1981:

Crown Transfer Company (Crown) protests the award of any contract under invitation for bids (IFB) DAHC30–81–B–0021 issued

by the Department of the Army. The IFB is for the movement and storage of household goods within certain designated areas.

Crown's primary basis of protest is that the solicitation contains clauses which deviate from those specified for use by the Defense Acquisition Regulation (DAR) and that proper authority for use of those deviating provisions has not been obtained from the DAR Council pursuant to DAR 1-109. We deny the protest.

The DAR provisions and clauses affected by the changes are contained in DAR section 22, part 6 ("Shipment or Storage of Personal Property") and in section 7. The revisions, according to the Army, were made to more accurately describe the scope of work and the contractor's responsibility for intra-city and intra-area movement of household goods and to distinguish the services required from containerization requirements. For example, DAR §§ 22-601.1 No. 29 and 7-1601.1 were modified to require that the contractor disassemble and reassemble furniture as necessary to insure a safe move, while certain contract clauses were deleted or words such as "approved storage facility" and "packing" were substituted for "contractor's facility" and "containerization." DAR § 22-601.1 No. 30 also was changed to provide for storage charges on a daily pro rata basis instead of allowing the contractor to charge the same rate for one day or 30 days of storage, as permitted by the DAR provision.

The Army reports that the procuring activity initially sought deviation approval under DAR §§ 1-109.1 and 1-109.3, but that the Army found it more suitable to have the DAR Council consider the proposed changes in connection with a "service test" under DAR § 1-108(a) (iv) and (v). The DAR Council approved a "service test" of the revised provisions for a two-year period.

The protester's complaint is that because the modifications involve deviations from, rather than implementations of, the DAR, the Army was required to obtain deviation approval under DAR § 1-109 rather than service test approval under DAR § 1-108. In this respect, the protester refers to DAR § 22-602, which states that modifications of schedule formats "will be processed as a request for deviation in accordance with 1-109." The protester's position is that a request for deviation "is more complicated and more thoroughly scrutinized" than is a request for approval of a service test and that had a request for deviation been processed it is possible that the DAR Council would not have granted the request. The protester further suggests that the Army never informed the DAR Council that the service test approval request involved deviations from the DAR.

The DAR does provide two distinct procedures for modifying the traditional procurement approaches. DAR § 1-109 provides for

deviations from the DAR, and DAR § 1-109.3 requires that deviations be unanimously approved in advance by the DAR Council when more than one contract is affected by the deviation. On the other hand, DAR § 1-108, which provides for implementation of the DAR by the military departments permits the use of contract forms and clauses when permitted by "interim instructions, including service test of new techniques or methods of procurement * * *." DAR § 1-108(a)(iv) envisions approval of such interim instructions.

It is not clear from the record why the Army viewed this matter as more appropriately involving a service test of "new techniques or methods of procurement" rather than a deviation from existing DAR provisions, since the changes generally involve modifications and clarifications of contractor duties specified in the DAR provisions. Nevertheless, regardless of how the approved changes are categorized it is clear that the body authorized to approve the changes did thoroughly consider the matter and did grant the requisite approval.

In this respect, the record shows that the DAR Council was informed that the service test request involved deviations from existing DAR provisions, that the Council did carefully consider the matter, that, through the Office of the Assistant Secretary of the Army, it requested the Military Traffic Management Command (MTMC), which has responsibility for establishing military standards for the preparation of household goods for movement, to review what were termed "extensive deviations," and, upon receipt of MTMC's response, approved a 2-year service test of the deviating provisions. We have also been informally advised by the Executive Secretary of the DAR Council that the Council normally gives the same substantive review to both deviation requests and requests for service test approval. We have been similarly advised that the approval in this case was unanimous.

Accordingly, we believe that the review and approval envisioned by the DAR for deviations were obtained here and that the characterization of what was approved as a service test rather than a deviation is of no legal consequence with respect to this protest.

The protester also raises one other objection to this procurement. In a memorandum by the Army representative who processed the "deviations," one of the goals of the service test is stated to be the promotion of competition "by use of smaller geographical contract areas of performance." Crown asserts, without explanation, that the IFB didn't reflect this goal. The record shows, however, that the IFB was amended after its issuance to increase the performance areas from 3 to 7. The areas of performance were redefined so that each new area generally was smaller in size and total workload than the three previous areas. This appears to satisfy the Army's objective to

promote competition by enabling smaller contractors, who otherwise may not have the ability to perform the contract for the larger geographic areas, to compete.

The protest is denied.

[B-199690]

Contracts — Specifications — Restrictive — Weight Limitation— Hazardous Materials

Protester's contention that Air Force 0.75-pound cylinder weight limitation is unduly restrictive of competition because Navy buys protester's 1.25-pound cylinder for similar use is denied. Navy determination that heavier cylinder meets its minimum needs does not preclude Air Force from considering particular use of equipment under operating procedures and conditions different from Navy.

Transportation Department—Regulations—Hazardous Materials— Compliance Determination—Military Procurements

Protest that solicitation item description eliminates cylinder safety test requirements and allows use of cylinders not designed, manufactured, marked, or shipped in accordance with Department of Transportation (DOT) regulations on hazardous material is denied. Contracting activity has provided for adequate testing, and DOT regulations provide that material consigned to Department of Defense (DOD) must be packaged either according to DOT regulations or in container (cylinder) of equal or greater strength and efficiency, as required by DOD regulations. Contracting agency has determined that cylinders meet or exceed DOT requirements and need not apply for DOT exemption.

Contracts—Protests—Award Approved—Prior to Resolution of Protest

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

Matter of: Sparklet Devices, Inc., June 4, 1981:

Sparklet Devices, Inc. (Sparklet), protests the contract awarded to American Safety Flight Systems, Inc. (American), for inflation assemblies to be used in survival kits for aircraft ejection systems, under invitation for bids (IFB) No. DLA700-80-B-0828, issued on behalf of the Department of the Air Force by the Defense Logistics Agency (DLA).

Sparklet's protest concerns the carbon dioxide cylinders used in the assemblies which inflate a life raft during pilot descent from an airplane. The protester contends that the IFB schedule item description of the assemblies is restrictive of competition, limits bidders to a single design which does not reflect the Government's minimum needs, and allows use of cylinders which are not designed, manufactured, marked, or shipped in accordance with the Department of Transportation (DOT) requirements on hazardous material—all in viola-

tion of Defense Acquisition Regulation (DAR) §§ 1-201(a), 2-101(i) and 2-102.1(a) (1976 ed.) and DOT regulations set forth in 49 CFR parts 100-199 (1979).

Sparklet did not bid, but filed its protests with DLA and our Office prior to bid opening. After review by the Air Force engineering support activity, DLA advised Sparklet that the item description would not be changed and that its protest was denied.

DLA received bids from American and The Bendix Corporation (Bendix). American was the low bidder at $143.32 per assembly, and DLA awarded the contract to American during the course of the protest. Sparklet also objects to the fact that the award was made prior to the resolution of its protest, notwithstanding Sparklet's offer to supply DLA's urgent requirements during the interim.

The protest is denied.

The IFB item description, as amended, requires inflation assemblies in accordance with Military Specification Nos. MIL-I-87108(USAF), June 1, 1977 (Air Force specification), and MIL-C-7905E, December 14, 1979 (cylinder specification). Paragraph 3.9 of the Air Force specification provides that:

> The weight of the inflation assembly, with the cylinder charged with 0.50 pound (plus or minus 0.01 pound) of carbon dioxide, shall not exceed 1.61 pounds.

Sparklet argues that the amended IFB item description precludes the furnishing of a suitable cylinder which DLA is currently buying from Sparklet for the Department of the Navy. The protester asserts that the cylinders differ only in weight and construction; the cylinder required by the IFB is welded and limited to 0.75 pound in weight, while the Sparklet cylinder is of seamless construction and has a maximum weight of 1.25 pounds. Sparklet insists that the prescribed 1.61-pound assembly weight limitation can only be met by using a 0.75-pound cylinder which requires welded construction. The protester contends that DOT regulations concerning carbon dioxide cylinders do not allow welded construction, except on nonreusable cylinders made to DOT Specification 39, 49 CFR § 178.65 (1979), unless an exemption has been obtained pursuant to 49 CFR part 107 (1979).

Sparklet further contends that the combined Air Force and cylinder specifications eliminate normal cylinder specification requirements for safety demonstrations, including endurance, flattening, macrostructure, fragmentation resistance, vibration and physical properties. Also, the amended item description, which eliminates the fragmentation resistance and product qualification requirements of the cylinder specification, obviated conformance with DOT requirements without DOT's approval.

The protester concludes that it cannot knowingly supply an item

which does not meet military specifications or standards and violates DOT regulations because contractors are liable for violation of DOT regulations. Sparklet argues that the IFB item description prevented it from bidding and that if DOT regulations can be ignored, the IFB should so state in order to permit all bidders to bid on an equal basis without fear of violating Federal regulations. The protester insists that if DLA and the Air Force persist in using the item description in question, the Government should hold the contractor harmless and assume liability.

DLA explains that prior to June 1977, the inflation assembly was purchased on a sole-source basis from Bendix. The Air Force purchased the data from Bendix and developed the Air Force specification for competitive procurement.

DLA takes the position that cylinders manufactured in accordance with the Air Force specification equal or exceed the strength and efficiency of cylinders conforming to DOT regulations and, therefore, qualify for shipment under the following DOT regulation:

> (a) Shipments of hazardous materials offered by or consigned to the Department of Defense (DOD) of the U.S. Government must be packaged, including limitations of weight, in accordance with the regulations in this subchapter or in containers of equal or greater strength and efficiency as required by DOD regulations. Hazardous materials shipped by DOD under this provision may be reshipped by any shipper to any consignee provided the original packaging has not been damaged or altered in any manner. 49 CFR § 173.7(a) (1979).

Contrary to Sparklet's contentions, DLA states that the cylinder specification requires cylinder testing for burst pressure comparable to the DOT specifications. DLA reports that the Air Force purchased more than 50,000 lightweight cylinders from Bendix between 1963 and 1977 and experienced no shattering or other problems, including during combat use. In eliminating the fragmentation resistance and product qualification requirements of the cylinder specification from the Air Force specification, DLA states that the Air Force determined that the first article testing and quality conformance inspection requirements of both specifications are sufficient to assure the quality of the assemblies, citing DAR § 1-1109(a)(2) (1976 ed.) and B-166570, June 16, 1969.

DLA notes that although the protester alleges that the 0.75-pound cylinder weight can only be met by using welded construction, Sparklet does not argue that it could not meet this requirement by using welded construction or that the requirement can only be met by a single manufacturer. DLA states that Sparklet did compete, albeit unsuccessfully, on a prior similar solicitation. The contracting agency emphasizes the fact that it did receive two responsive bids on the instant IFB.

DLA states that according to the Air Force engineering and design experts, the 0.75-pound cylinder weight limitation is necessary to de-

crease the overall weight of the survival kit, to help alleviate center-of-gravity problems in the ejection system, and to minimize the probability of injury to aircrew members during descent and entry into water. The agency further explains that because the cylinder is the largest single item on the life raft, an increase in its weight or size adversely affects the weight of the kit and increases its potential to inflict injury. DLA therefore concludes that there are valid reasons for the weight limitation and the fact that Sparklet is unable or unwilling to compete for the IFB requirements does not render the weight limitation unduly restrictive of competition. The agency cites our decisions in *Audiometer Corporation of America*, B–194557.2, January 4, 1980, 80–1 CPD 14; *D&S Word Processing Systems*, B–194247, June 25, 1979, 79–1 CPD 451; *J. S. Tool Co., Inc.*, B–193147, March 7, 1979, 79–1 CPD 159; and *Constantine N. Polites & Co.*, B–189214, December 27, 1978, 78–2 CPD 437.

Finally, DLA recognizes that the contracts under which Sparklet is furnishing its cylinder to the Navy permit a maximum weight of 1.25 pounds, and that the Army also uses Sparklet's cylinders. However, the Navy's typical ejection is a low-altitude ejection off the deck of a carrier and the raft is not inflated until it is in the water. Under the Air Force procedures, the raft is inflated at high altitudes during descent; therefore, Air Force concerns regarding the weight of the cylinder differ from those of the Navy because of different operating procedures.

Procuring agencies are required, pursuant to DAR § 1–1201(a) (1976 ed.), to state specifications in terms which will encourage maximum competition and still satisfy the agency's actual minimum needs. We have consistently stated that a procuring activity is to be accorded broad discretion in determining its needs because Government procurement officials, familiar with the particular conditions under which equipment has been and is to be used, are in the best position to know the Government's actual needs and to draft appropriate specifications. *D&S Word Processing Systems, supra; J. S. Tool Co., Inc., supra.* When a protester challenges a specification as unduly restrictive of competition, the agency must establish *prima facie* support for its contention that the restrictions imposed are reasonably related to its needs, but the protester retains the burden of showing that the requirements complained of are clearly unreasonable. *Oshkosh Truck Corporation*, B–198521, July 24, 1980, 80–2 CPD 161; *Constantine N. Polites & Co., supra.*

Sparklet has failed to meet its burden of proof. Initially, the fact that the protester's cylinder is used by the Navy or any other Federal department or agency is not sufficient to show that the Air Force

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requirement is unreasonable. We have recognized that agency technical judgments with respect to similar needs can reasonably differ. *Security Assistance Forces & Equipment International*, B-199757, November 19, 1980, 80-2 CPD 383; *Constantine N. Polites & Co.*, *supra*. The record shows that the operating procedures and conditions in which the Air Force uses the assemblies are different from those under which the equipment is used by the Navy.

Although the Air Force states that the 1.25-pound cylinder is acceptable for use as a substitute only when the preferred cylinder cannot be obtained because a heavier cylinder is better than no cylinder, we believe that the reasons stated by the Air Force adequately support its contention that the 0.75-pound cylinder weight limitation is reasonably related to the agency's needs. Where, as here, the sole purpose of the equipment is to save lives, we are not prepared to conclude that the specification exceeds the Government's needs for the procurement. *Oshkosh Truck Corporation*, *supra;* 52 Comp. Gen. 801, 806 (1973). Neither can we conclude that the cylinder weight restriction prejudices Sparklet to any degree, because all bidders were subject to the same requirement.

Contrary to Sparklet's interpretation of the IFB item description, the cylinder specification retained endurance, flattening, macrostructure, vibration and physical properties testing requirements. Only the provisions regarding product qualification and fragmentation resistance were eliminated from the cylinder specification. However, the Air Force specification for the inflation assembly contains testing requirements which are applicable to the contractor. We have held that the contracting agency's responsibility for determining its actual needs includes the determination of testing requirements requisite to assure that the product offered does in fact meet those needs. B-166570, June 16, 1969. The agency may, for example, choose to ascertain the acceptability of the equipment by requiring first article testing or product qualification. B-166570, June 16, 1969; see *Sparklet Devices*, Inc., B-182580, April 3, 1975, 75-1 CPD 197.

Bendix states that it produced 50,000 lightweight cylinders over a 17-year period with no report of accident or injury due to cylinder failure, that the endurance, flattening, vibration, and other test requirements were completed and reported for those cylinders and that Bendix obtained DOT approval for shipment of the lightweight design, charged cylinders and shipped 39,000 of them under DOT Special Permit No. 3888 which was renewed six times. We have informally ascertained from DOT that the permit, issued under 49 CFR § 173.22(a)(1) (1967), authorized Bendix to ship cylinders in compliance with an earlier version of the instant cylinder specifica-

tion (MIL–C–7905C). In 1974, when Bendix sought to renew the permit, however, DOT did not extend it on the basis that the agency had been advised by Headquarters, Military Traffic Management Service, Washington, D.C., that all future shipments of cylinders would be made under provisions similar to the above-quoted 49 CFR § 173.7(a) (1979).

Insofar as Sparklet is concerned with DLA and Air Force compliance with DOT regulations, we concur with DLA that the cylinders may be shipped pursuant to 49 CFR § 173.7(a) (1979). For purposes of the DOT regulations, the cylinders constitute shipping containers for the carbon dioxide. In terms of this procurement, the DOT regulation provides that carbon dioxide consigned to the Department of Defense (DOD) must either be packaged (1) according to DOT regulations or (2) in containers (here, cylinders) of equal or greater strength and efficiency, as required by DOD regulations. The DOD regulation referred to is a Tri-Service Regulation, "Policies and Procedures for Hazardous Materials Package Certification," November 2, 1979, identified within DLA as Defense Logistics Agency Regulation (DLAR) 4145.37. The regulation establishes, among other things, certificate of equivalency (COE) procedures pursuant to which an approval is issued by the responsible DOD command that the proposed packaging for shipment of hazardous material or item equals or exceeds the requirements of 49 CFR parts 100–199. DLAR 4145.37 §§ 3(b) and 5(b) (1979).

DLA states that it has determined that the lightweight cylinders in question do equal or exceed the strength and efficiency required by DOT. In so doing, DLA chose to comply with the latter of the alternative requirements of DOT regulation 49 C.F.R. § 173.7(a); therefore, there is no need to apply for an exemption under 49 C.F.R. § 107.103 (1979), contrary to Sparklet's view.

Finally, we find no basis to question DLA's decision to award the contract while the protest was pending. DLA has presented evidence to show that the determination to award based on the urgent need to replenish diminished stock was approved at an appropriate level above that of the contracting officer and our Office was so notified, as required by DAR § 2–407.8(b) (1976 ed.). We have held that where a contracting agency has taken the steps outlined above, the determination to proceed with an award prior to the resolution of the protest is not subject to question by our Office. *D&S Universal Mining, Inc.*, B–199441, November 19, 1980, 80–2 CPD 381; *SAI Comsystems Corporation*, B–196163, February 6, 1980, 80–1 CPD 100.

The protest is denied.

[B-201164]

Claims—Assignments—Contracts—Notice of Assignment—To Other Than Federal Agencies, etc. Involved

Assignment of claim to proceeds under Federal Government contract must be recognized by contracting agency and all other Federal Government components including Internal Revenue Service (IRS), if assignee complied with filing and other requirements of Assignment of Claims Act, 31 U.S.C. 203, even though assignee failed to perfect assignment under Uniform Commercial Code and similar State provisions. 56 Comp. Gen. 499, 37 *id.* 318, 20 *id.* 458, B-170454, Aug. 12, 1970, and similar cases are overruled in part.

Set-Off—Contract Payments—Assignments—Claim Accruing But Not Matured Prior to Assignment—Right to and Time for Set-Off

Where IRS (or other Federal entity) has claim against contractor-assignor which arose before assignment was completed under Assignment of Claims Act, amount of Federal claim may be set off against amounts otherwise due to assignee, assuming absence of no set-off clause in the contract. Assignee stands in shoes of assignor. Government's right to set off tax debts of assignor that were in existence, even if not yet mature, prior to date on which assignment became effective are not extinguished by assignment, although actual set-off cannot be made until tax debt matures.

Set-Off—Contract Payments—Assignments—"No Set-Off" Provision—Tax Debts—Set-Off Precluded

If Government contract contains a "no set-off" clause, Government cannot set off tax debt of assignor under any circumstances.

Matter of: Priority between a Federal Tax Lien and an Assignment under a Government Contract, June 8, 1981:

The former Administrator of General Services requested a decision on whether a Federal tax lien or an assignment of a Government contract pursuant to the Assignment of Claims Act (31 U.S.C. § 203 (1976)) has greater priority.

The Administrator's request arose as a result of a disagreement between the Administration (GSA) and the Internal Revenue Service (IRS) over the relative priority of a Federal tax lien against a Government contractor and the claim of the bank to which the contractor had assigned his rights under the contract. Specifically, on December 8, 1977, the contractor, PAL Industries Inc., assigned all of the proceeds due under a contract with GSA to the First Pennsylvania Bank. The bank notified GSA of the assignment on February 3, 1978, and otherwise complied with the requirements of 31 U.S.C. § 203, the Assignment of Claims Act of 1940, as amended. However, the bank did not file a financing statement with the appropriate State office in Pennsylvania. Pennsylvania law, modeled on the Uniform Commercial Code, requires that such a statement must be filed in order to protect an assignee's interest in accounts or contract rights. Pa. Stat. Ann. Tit. 12A, § 9-302(1) (Purdon 1970).

On January 10 and February 14, 1979 (after tax assessments were made against the contractor), IRS filed notices of tax lien for taxes owed by the contractor for three tax periods ending in 1978 and one tax period ending in December 1976. Although IRS sent GSA a notification of levy on the unpaid contract proceeds in February 1979, GSA paid the balance of the monies due on the contract to the assignor on October 2, 1979. GSA based its decision that the assignment took precedence over the levy on the fact that the assignment had been completed prior to the date of the first tax assessment.

It is the view of IRS that its tax lien had priority over the assignment and that GSA acted improperly in making any further payments to the assignee after being notified of the tax lien against the contractor-assignor. Although IRS is no longer asserting a claim against GSA in this specific situation, it anticipates that this issue will arise again. Both GSA and IRS are interested in having this issue resolved. Accordingly, in addition to addressing the specific facts of this case, our decision will also consider the priority of liens question under several different factual situations.

The IRS position may be summarized as follows. An assignment which is not perfected under local law at the time the IRS files a notice of Federal tax lien does not have priority over the Federal tax lien. The assignment falls within the definition of a security interest under Internal Revenue Code (I.R.C.) § 6323(h)(1), as an "interest in property acquired by contract for the purpose of securing payment or performance of an obligation * * *." Lien priority between a security interest and a Federal tax lien is determined by comparing the time the security interest arose with the date that the notice of Federal tax lien was filed. I.R.C. § 6323(a). A security interest is deemed to be in existence and is valid against the Federal tax lien only if the security interest is protected under local law against subsequent judgment lien creditors. I.R.C. § 6323(h)(1)(A). As previously noted, under Pennsylvania law, modeled on the Uniform Commercial Code, a financing statement must be filed in order to protect an assignee's interest in accounts or contract rights. The First Pennsylvania Bank did not file a financing statement and thus its security interest was not perfected. An unperfected security interest is subordinate to the rights of a person who becomes a lien creditor without knowledge of a security interest and before it is perfected. Pa. Stat. Ann. Tit. 12A § 9-301 (Purdon 1970). Failure to file a financing statement thus results in a security interest being subordinated to a Federal tax lien. *Sams* v. *Redevelopment Authority*, 435 Pa. 524, 261 A. 2d 566 (1970).

The IRS states that the only question remaining which could affect its analysis of the relative priority between a Federal tax lien and an assignment under Government contract is whether the provisions of 31

U.S.C. § 203 1976)[1] remove assignments of claims under Federal contracts from the application of the Uniform Commercial Code (UCC).

Implicit in the IRS position is the assumption that the contract in question did not contain what is generally referred to as a "no set-off clause". In this connection, 31 U.S.C. § 203 reads in pertinent part as follows:

> Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designed by the President, * * * may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) * * * provide or be amended without consideration to provide that payments to be made to the assignee of any monies due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any monies due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of * * * (4) taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

Having obtained a copy of the PAL Industries contract with GSA, we have determined that such a no set-off clause was included in the contract with the proviso (mirroring the statutory language) that the clause only applies if the contract is entered into in time of war or national emergency as defined in 31 U.S.C. § 203. Although the National Emergencies Act (Public Law No. 94–412, approved September 14, 1976, 90 Stat. 1255, 50 U.S.C. § 1601 *et seq.*) terminated (2 years thereafter) the national emergency then in effect, section 502 of the Act (50 U.S.C. § 1651) specifically provided that it did not apply to any of the powers and authorities conferred under 31 U.S.C. § 203 and 41 U.S.C. § 15. Accordingly, it is clear that the no set-off clause was a binding provision in the contract between PAL Industries and GSA.

It is well settled that the presence of a no set-off clause in a contract prohibits IRS or any other Government agency from making any claim to the monies due the assignee under the contract. For example, in 37 Comp. Gen. 318 (1957) we said that the no set-off provision of the Assignment of Claims Act, when part of a contract, "expressly nullifies the effect of section 6321 of the Internal Revenue Code of 1954 * * *."

Apparently IRS was unaware of the presence of the no set-off clause when it contested GSA's refusal to recognize the validity of the

[1] The question as posed by the IRS refers to the Anti-Assignment Act, at 31 U.S.C. § 203, and the Assignment of Claims Act at 41 U.S.C. § 15. We assume that in referring to the Anti-Assignment Act, the IRS means the first paragraph of 31 U.S.C. § 203, which prohibits assignments. The remainder of 31 U.S.C. § 203 is the Assignment of Claims Act of 1940, as amended. The latter Act is also classified to 41 U.S.C. § 15.

IRS tax lien, and is willing to concede that set-off is not permissible when such a clause is included in a contract. Therefore, although GSA's decision in this case to pay the balance of the contract proceeds to the assignee was correct, we must still consider the legal merits of the IRS position whenever a no set-off clause is not included in a contract.

As indicated above, the essence of the IRS position (assuming the absence of a no set-off clause) is that, since the assignment of the claim on a Government contract under 31 U.S.C. § 203 gives the assignee no more than a "security interests" in the assignor's rights under the contract, the assignment, until recorded and perfected under State law, will be subordinate to the claim of any other party that becomes a lien creditor, including the IRS, once it files a notice of Federal tax lien. For the reasons set forth hereafter, we disagree with the IRS position.

First, we think that the provisions of the UCC with respect to the perfecting of an assignment are preempted by the provisions of the Assignment of Claims Act as far as recognition by the Federal Government is concerned. The Assignment of Claims Act sets forth the filing and notice requirements that must be complied with by the assignee in order to complete a valid assignment. Once the assignee has satisfied these requirements and has notified the Federal contracting agency of the assignment, his rights, at least insofar as any other claims by the Federal Government are concerned, become fixed. Implicit in this statement is the recognition that the Federal Government is a unit. If the contracting agency is bound to acknowledge the assignment, a sister agency may not disavow it. (It is not our intention to express any position on whether the assignment of a claim under a Government contract should be viewed as perfected without filing in accordance with State law when the dispute only involves competing private claims. That is a matter for litigation between the assignee and the non-Government creditor, and in any case, is not at issue here.)

We turn now to the characterization of the assignee's interest in payments due on a Federal agency's contract with the assignor as a "security interest," as opposed to a more extensive property interest. In the numerous cases of this type that this Office has considered, involving conflicting claims by the assignee and a Government agency (generally the IRS), we have always treated the assignment of a claim on a Government contract as an outright and absolute sale of all of the assignor's rights and property interest under the contract, and not as a more limited transfer of a security interest. For example, in 37 Comp. Gen. at 320, *supra*, we said:

* * * [where the contract does not contain a no set-off clause] the assignee stands in the shoes of the assignor and the Government may set off against the

assignee any claims of the Government against the assignor which had matured prior to the assignment. *Southside Bank and Trust Company* v. *United States*, 221 F. 2d 813. However, under the common law applicable to assignments, debts of the assignor which mature after an assignment is made may not be set off against payments otherwise due the assignee. 30 Comp. Gen. 458, 459, and cases cited there.

These principles are applicable to a Federal tax indebtedness owed by a Government contractor, apart from any lien which may exist. Where the contract does not contain a no set-off provision it may well be that the lien created by section 6321 of the 1954 Internal Revenue Code would prevent the effective assignment of monies thereafter becoming due the taxpayer under a Government contract. If the assignment of the contract proceeds was made before the tax became due, there would be no property or right to property owned by the taxpayer to which the lien could attach, at least to the extent of the assignee's entitlement to such proceeds.

In a similar vein, see 56 Comp. Gen. 499 (1977); 30 Comp. Gen. 98 (1950); 29 Comp. Gen. 340 (1949); 20 Comp. Gen. 458 (1941); and other cases cited in those decisions. In other words, an assignor does not retain any property interest in the assigned contract which would be subject to attachment by any lien creditor, including the Federal Government. See *Monroe Banking and Trust Co.* v. *Allen*, 286 F. Supp. 201 (N.D. Miss. 1968); *United States* v. *Lester*, 235 F. Supp. 115 (S.D. N.Y. 1964); *United States* v. *Trigg*, 465 F. 2d 1264 (8th Cir. 1972); *Lyon* v. *Ty-wood Corp.*, 212 Pa. *Super.* 69, 239 A. 2d 819 (1968).

In all of our decisions in this area it has been our consistent position, whenever a conflict arises between the assignee and the Government, that the assignment of a claim under 31 U.S.C. § 203 becomes effective on the date the contracting agency receives notification of the assignment. See 56 Comp. Gen. 499, *supra;* 37 Comp. Gen. 808 (1958); 20 Comp. Gen. 458, *supra;* B–152008, September 10, 1963). Considering the long-standing position of our Office, we do not believe that a convincing legal case can be made for overruling our prior decisions and imposing a new requirement that assignees must file notice of the assignment within their States, as well as with the contracting agency, in order to be assured of priority over a subsequent Government claim.

Moreover, even if we accept the IRS contention that an assignment of a claim on a Government contract should be treated as the transfer of a security interest, a strong argument could still be made that as far as the Government is concerned, the assignment becomes effective as soon as the contracting agency is notified. Under the UCC provisions adopted by Pennsylvania, "an unperfected security interest is subordinate to the rights of * * * a person who becomes a lien creditor *without knowledge* of the security interest and before it is perfected * * *." [Italic supplied.] Pa. Stat. Ann. Tit. 12a, § 9–301(1) (Purdon 1970). Once the assignee notifies the contracting agency of the assignment, as is required by 31 U.S.C. § 203 in order for the

assignment to become effective, the Federal Government (again, viewed as a unit), has actual notice of the security interest. Therefore, a tax lien filed thereafter would not be entitled to priority. See *United States* v. *Hunt*, 513 F. 2d 129 (10th Cir. 1975); and *United States* v. *Ed Lusk Construction Co. Inc.*, 504 F. 2d 129 (10th Cir. 1974).

There is one final issue to resolve. While we have held that the assignment of a Federal contract becomes effective when the contracting agency receives notification of it and the assignee otherwise complies with the Assignment of Claims Act, it is not clear from our prior decisions precisely when the IRS tax lien "arises." This is important because under our theory of the assignment constituting a transfer of all the rights of the assignor at the time of the assignment, it is clear that he cannot transfer a greater right against the Government than he possessed at that time. If he owed taxes to IRS before he transferred his right to Government proceeds, the debt—and the Government's right to set it off—is not extinguished.

Our prior cases have been somewhat inconsistent on this question. For example, in 37 Comp. Gen. 318, *supra*, we said that the Government could set off those debts of the assignor which had "matured" prior to the date the assignment became effective. Also see 20 Comp. Gen. 458, *supra*, B–170454, August 12, 1970, and most recently 56 Comp. Gen. 499, *supra*. In determining the date on which the tax claim matured, this line of cases generally looks to the date of *assessment* pursuant to sections 6321 and 6322 of the Internal Revenue Code. In other words, in these cases the Government could set off a tax claim against the contract proceeds due the assignee, if the tax assessment against the contractor had been made prior to the contracting agency's receipt of notification of the assignment.

Another line of cases takes the position that as long as the tax *claim* was in existence prior to notification of the assignment to the contracting agency, even if it was not yet "matured" (i.e., was payable by the contractor), the Government's right of set-off was preserved, although the actual set-off could not be made until the tax debt had matured. For example, in 37 Comp. Gen. 808, at 809, we said the following:

> It is conceded that a judicial line of authority exists to support the contention that only those claims arising independently of the contract which had matured, i.e., were actionable prior to receipt of notice of assignment by the debtor, can be set off against the assignee. That line of authority was followed and cited in the dicta contained in our decisions at 20 Comp. Gen. 458; 37 Comp. Gen. 318. * * *
>
> While there is unquestionable authority with regard to * * * [the] position as to the necessity that the claim be matured prior to receipt of notice of assignment, there is valid and learned authority to the opposite effect. * * * Under [this] authority * * * the taxes, penalty and interest for the third quarter of 1953 were properly set off since the claim existed prior to notice of assignment and had matured at the time set-off was actually made.

Also, see B-157394, October 5, 1965; B-150865, March 20, 1963; and B-152008, September 10, 1963.

Thus, in all of these cases, we held that if the assignor's obligation to pay the taxes in question had already come into existence before the assignment was made and the agency notified, the tax claim would have priority over the assignment even though the taxes were not yet due when the assignment became effective. The relative merits of these two theories were thoroughly discussed in B-152008, September 10, 1963. In that decision we said the following:

> The rights of the Government in the instant situation may be viewed in two ways. Firstly, the Internal Revenue Service might attempt to assert a lien for unpaid taxes upon the accrued rentals under the Internal Revenue Code, 26 U.S.C. 6321, 6322. Secondly, the United States Government may exercise the common law right of any debtor to set off amounts due from it to a claimant toward the extinguishment of that claimant's indebtedness to the Government.
>
> If this matter were to be disposed of solely with reference to the first theory of the Government's position, the Bank might well prevail, since as between two conflicting liens upon the same property the first in time is first in right, and the assignment was perfected on January 16, 1963, whereas the tax lien does not arise until the time at which the assessment is made by 26 U.S.C. 6322 and the earliest assessment in this case was not effected until February 12, 1963.
>
> But the rights of the Government here may be determined under the second theory, that is, by the rules regarding the Government's right of set-off at common law.
>
> * * * * * * *
>
> Debts owed by the assignor to the Government which arise after perfection of the assignment may not be set off against payments due the assignee. 20 Comp. Gen. 458, 459. Debts owed the United States by the assignor which existed, whether matured or not, before notice of the assignment was given the obligor, may, at the time they mature, be set off against mature obligations owed by the Government to the assignor. 37 Comp. Gen. 808. An employer's obligation to pay the Government amounts withheld from his employee's salaries for tax or social security purposes comes into existence, irrespective of its inchoate character, at the time the employee has completed earning the salary to which the obligation applies, i.e., in general, on pay day, even though the actual payment to the Government need not be made until later. During the interim between the withholding and the satisfaction of the liability to the Government, an employer holds the amounts involved as a constructive trustee for the Government. Thus a notice of assignment received by the Government does not render the assignee immune from set-off of newly arising tax or social security withholding liabilities of the assignor until the beginning of the pay period next following the pay period of the particular employer during which notice of assignment is received.
>
> In this case both the withholding tax obligation for the fourth quarter of 1962 and the Federal Unemployment Tax obligation for the year 1962 were claims existing, even though not yet mature, at the time the Notice of Assignment was received by the Post Office Department. That part of the withholding tax liability for the first quarter of 1963 which came into being by virtue of the beginning of pay periods prior to January 16, 1968, is likewise available to the Government for purposes of set-off.

It is our view that the approach we followed in B-152008 is preferable. Accordingly, whenever this situation arises in the future (assuming the absence of a no set-off clause), the Government's common law right to set-off a tax debt of the assignor that was in existence, even if not yet due (mature), prior to the date on which the con-

tracting agency was notified of the assignment will not be extinguished by the assignment, although the actual set-off cannot be accomplished until the tax debt matures.

Although we recognize that the priority issue is moot with respect to the PAL Industries case, we will illustrate the above holding by reference to the facts in that case. (For purposes of the illustration, we will assume, contrary to fact, that the contract did not have a no set-off clause.)

The assignment to First Pennsylvania Bank became effective on December 2, 1977, when GSA received notification of it. Although the dates on which the tax assessments against the contractor were made, as well as the date on which the Federal tax lien was filed (and on which GSA received the notice of tax levy) occurred after the date of the assignment, it appears that a portion of the taxes involved was payable for the tax period ending December 1976. Accordingly, since the tax debt for the period ending December 1976 came into existence prior to the date on which GSA received notification of the assignment, application of the priority rules set forth above would have required GSA to setoff that amount against the contract proceeds otherwise payable to the assignee.

To the extent that anything we have said in any of our prior decisions is inconsistent with our conclusions herein, those decisions are modified accordingly.

[B–196853]

Transportation—Household Effects—Overseas Employees—Transfers—Advance Shipments—Incident to Completion of Service Agreement

An employee of Dept. of the Army serving in Korea returned 5,189 pounds of his household goods to his place of actual residence in New York prior to his transfer from Korea. Upon a subsequent permanent change of station he shipped 350 pounds of unaccompanied baggage from Korea to new duty station in Virginia and requested reimbursement for shipment of 10,860 pounds from New York to new duty station. His prior shipment of household goods from Korea to place of actual residence is authorized under 5 U.S.C. 5729(a) and Federal Travel Regs. but was in lieu of, not in addition to, his later entitlement upon his transfer to Virginia. Shipment of unaccompanied baggage from Korea and household goods from New York to new duty station on subsequent change of station is authorized by 5 U.S.C. 5724 and Federal Travel Regs. but may not exceed cost of direct shipment from Korea to new duty station less the amount previously paid for prior shipment from Korea to actual residence in New York State under 5 U.S.C. 5729.

Matter of: Bohdan P. Gregolynskyi, June 10, 1981:

The issue presented in this case is to what extent an employee may be reimbursed for shipment of household goods upon a permanent change of station from Korea to Virginia where there had been a prior shipment of the household goods from Korea to the employee's place

of actual residence in New York State almost 2 years before the change of station. At the time of the change of station, unaccompanied baggage of 350 pounds was shipped from Korea to Virginia on a Government Bill of Lading and the employee seeks reimbursement for 10,860 pounds of household goods shipped at his own expense from the place of actual residence in New York State to the new duty station in Virginia. The shipment upon the change of station may not exceed the cost of direct shipment from the old duty station to the new duty station less any amount previously paid for shipment from the old overseas duty station to the actual place of residence as a prior shipment under 5 U.S.C. § 5729.

The matter was submitted by the Finance and Accounting Officer, Fort Eustis, Virginia, for an advance decision on a voucher payable to Mr. Bohdan P. Gregolynskyi. It has been assigned Control Number 79–36 by the Per Diem, Travel and Transportation Allowance Committee.

Mr. Gregolynskyi, an employee of the Department of the Army with a permanent duty station in Korea, received orders dated June 7, 1976, for renewal agreement travel for himself and five dependents, and shipment of household goods not in excess of 1,000 pounds from Seoul, Korea, to Rochester, New York, and return. The travel orders, among other things, indicated that Mr. Gregolynskyi would complete the minimum period of service for the command in Korea on August 28, 1976, and that he had signed a new transportation eligibility agreement on April 5, 1976, for 24 months. The orders of June 7, 1976, were amended by orders dated August 23, 1976. The amended travel orders authorized the shipment of household goods not in excess of 4,000 pounds. Mr. Gregolynskyi made a shipment of 2,256 pounds of household goods in June 1976 and 2,933 pounds of household goods in October 1976 from Seoul, Korea, to Rochester, New York. It also appears that the dependents did not return to Korea after the renewal agreement travel but remained in the area of Rochester, New York.

By orders dated May 4, 1978, Mr. Gregolynskyi was ordered transferred from Seoul, Korea, to Fort Eustis, Virginia. Those orders authorized the travel of dependents from Rochester, New York, to Fort Eustis and shipment of household goods not in excess of 11,000 pounds from Seoul, Korea, and Rochester, New York, to Fort Eustis. Mr. Gregolynskyi shipped 350 pounds of unaccompanied baggage from Seoul to Fort Eustis. He shipped 10,860 pounds of household goods from Rochester to Fort Eustis at personal expense and has submitted a claim for reimbursement based on the commuted rate in the amount of $2,195.36, which included in addition to the 10,860 pounds of household goods at $20.10 per hundred pounds, an appliance service charge at origin of $7.50 and at destination of $5.

Transportation of household goods on renewal agreement travel is

specifically excluded in 5 U.S.C. § 5728(a). Therefore, to the extent that the orders of June 7 and August 23, 1976, authorized shipment of household goods, such orders were in error. However, Mr. Gregolynskyi's shipments from Seoul, Korea, to Rochester, New York, in June and October 1976, were possible under the authority of 5 U.S.C. § 5729(a) and FTR para. 2–1.5g(5)(a). Under that authority shipment of the maximum authorized weight of 11,000 pounds is permitted. There is no indication that the two shipments from Korea in 1976 exceeded the cost of shipping the total weight allowable in one lot. See FTR para. 2–8.2d.

In view of the prior 5,189-pound shipment from Korea to the place of actual residence almost 2 years before the change-of-station orders were issued and the shipment of 350 pounds of unaccompanied baggage from Seoul to Fort Eustis, a question arises as to what entitlement, if any, the employee has for reimbursement of the shipment of 10,860 pounds of household goods from Rochester, New York, to Fort Eustis, Virginia, upon the change of station from Seoul to Fort Eustis.

The act of August 31, 1954, 68 Stat. 1008, which amended Section 7 of the Administrative Expenses Act, presently codified in 5 U.S.C. § 5729 (1976), provides that the expenses of transportation of the immediate family and shipment of household effects from the post of duty of such employee outside the United States to place of actual residence shall be allowed prior to the return of such employee to the United States when the employee has acquired eligibility for such transportation. Implementing regulations are contained in Federal Travel Regulations (FPMR 101–7) para. 2–1.5g(5)(a) (May 1973). Such transportation of both dependents and household goods is authorized even though the employee does not return himself. See 36 Comp. Gen. 10 at 13 (1956).

Further, as was pointed out in 36 Comp. Gen. 10, the 1954 amendment was not intended to increase the allowances or benefits of employees stationed overseas. It was merely to provide authority for the Government to pay for transportation of the immediate family and household effects of the employee in humanitarian or other compelling personal circumstances even though the employee had not yet qualified for such transportation. The act also provided Government financed transportation when the employee was qualified for transportation by virtue of his length of service overseas, but was not eligible for issuance of return travel orders because he was not being separated or reassigned at that time.

Thus, the return of dependents and household effects under the authority of 5 U.S.C. § 5729 is not in addition to, but in lieu of, transportation which would otherwise be authorized upon the employee's transfer or separation.

The shipment by Mr. Gregolynskyi of his goods from Seoul, Korea, to Rochester, New York, in June and October 1976, even though it apparently coincided with renewal agreement home leave, was authorized under the provisions of 5 U.S.C. § 5729(a) and FTR para. 2–1.5g (5)(a). Although the transportation of household goods from Korea to New York State was in two shipments, the amount which may be paid by the Government cannot exceed the cost of transporting the property in one lot by the most economical route. FTR para. 2–8.2d; B–187904, November 29, 1977; B–187736, May 31, 1977; and B–173557, August 30, 1971. There is no indication that the two shipments exceeded either the total authorized weight limitations or the cost of shipping in one lot. When Mr. Gregolynskyi received change-of-station orders from Korea to Fort Eustis, entitlement under 5 U.S.C. § 5724 and FTR para. 2–8.1 was to move household goods to Fort Eustis, to the extent that his entitlement had not previously been used by the transportation of those goods to Rochester. Since he shipped 350 pounds of unaccompanied baggage from Korea and Fort Eustis, he would only be entitled to ship 10,650 pounds of household goods from Rochester to Fort Eustis. However, the total cost of the two shipments could not exceed the cost of transporting the property in one lot by the most economical route from Korea to Fort Eustis less the amount previously paid for the prior return shipment to the actual residence.

The voucher submitted is being returned for payment, if any, in accordance with the above.

[B–199921]

Appropriations—Deficiencies—Anti-Deficiency Act—Violations—General Services Administration—General Supply Fund

The inventory in the General Services Administration's (GSA) General Supply Fund does not constitute a budgetary resource against which obligations may be incurred. The Antideficiency Act, 31 U.S.C. 665, is violated when obligations are incurred in excess of budgetary resources.

General Services Administration—Services for Other Agencies, etc.—Procurement—Supplies, etc.—Requisitioning Agency Liability—Order Cancellations

General Services Administration is authorized to pass on to requisitioning agencies the costs of terminating contracts for the convenience of the Government which the General Supply Fund might incur as a result of order cancellations by those agencies.

Matter of: The General Services Administration's General Supply Fund, June 10, 1981:

The General Counsel of the General Services Administration (GSA) has requested our opinion on two questions concerning GSA's General

Supply Fund. First, how should the provision of the Antideficiency Act contained in 31 U.S.C. § 665(a) be applied to the General Supply Fund? Second, is it proper for GSA to pass on the costs of terminating contracts for the purchase of furniture to the agencies which cancelled their furniture orders with the General Supply Fund?

GSA has a statutory duty to procure personal property and nonpersonal services for the use of Federal agencies. 40 U.S.C. § 481 (1976). Congress established the General Supply Fund to assist GSA in carrying out this duty. 40 U.S.C. § 756 (1976). Through the Fund, GSA makes consolidated and bulk purchases of goods and services that are commonly used by the agencies.

Apparently, GSA's normal procurement procedure is as follows: First, GSA accepts orders, sometimes accompanied by advances, from its customer agencies. Second, it makes contracts with suppliers to fill those orders. Third, it receives the goods from the supplier and makes payment for them. Fourth, it delivers the goods to the customer agencies and seeks reimbursement from them to the extent that previously received advances are not sufficient to pay for them.

Because GSA maintains substantial inventories and because suppliers are paid before customers make reimbursement, the General Supply Fund frequently has cash flow problems. GSA reports that these problems have recently become acute for a number of reasons. First, an extraordinary demand was placed on the General Supply Fund to provide funds for disaster and refugee relief in advance of reimbursement. Second, there has been a general decrease in customer orders for items already in inventory. Third, Congress rescinded $220 million which had been available for the purchase of furniture by Federal agencies in fiscal year 1980. This appropriation rescission means that agencies that ordered furniture through the General Supply Fund will be unable to pay for their orders or will be required to seek the return of the advances they made to the Fund.

In the context of the General Supply Fund's current cash flow problems, GSA asks our opinion on the applicability of the Antideficiency Act to the Fund. The relevant provision of the Antideficiency Act reads as follows:

> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law. 31 U.S.C. § 665(a) (1976).

GSA wants to know if a violation of this provision occurs at the moment when the cash assets, including advances, of the General Supply Fund are exceeded by the amount of obligations which the Fund has to its suppliers. It is GSA's position that no violation would

occur at this time because the General Supply Fund would not have been obligated "in excess of the amount available therein." GSA believes that the amount available for obligation in the Fund includes inventory as well as cash, accounts receivable, and unfilled agency orders. GSA states that when the value of the inventory is treated as an asset, the total value of the Fund's assets easily exceeds the obligations at any given time.

We cannot agree with GSA that it can obligate against the value of inventory in the General Supply Fund. Office of Management and Budget Circular No. A–34 specifically states that the inventory of a revolving fund is not an asset which is available for obligation. The relevant provision of that circular reads as follows:

66.3 Distinction between types of assets.

For purposes of budgetary accounting, a distinction is made between those assets that constitute a budgetary resource (i.e., are available for obligation) and those that do not. Budgetary resources include cash, balances on deposit with the Treasury, accounts receivable, and unfilled customers' orders, including advances received from others (to the extent described elsewhere in this Circular). Other assets, whether of a working capital nature such as inventories of stock or of a fixed asset nature, are not considered a budgetary resource. Such assets, therefore, do not enter into the determination of the unobligated balances. * * *

In addition, this Office has held that obligations cannot be charged against anticipated proceeds from the sale of property. 35 Comp. Gen. 356 (1955).

Therefore, it seems clear that a violation of 31 U.S.C. § 665 occurs at the moment that obligations are incurred which exceed available budgetary resources as defined by the OMB Circular. Of course, if ordering agencies cancel existing orders, no violation for previously recorded obligations occurs. GSA in that case may terminate contracts entered on the strength of ordering agency orders. As discussed below, such termination costs may be passed on to the ordering agency.

GSA's second question concerns the consequences of congressional rescission of funds for the purchase of furniture. GSA believes that the appropriation rescission may cause agencies to cancel furniture orders placed with GSA but not yet filled. GSA states that in this event it would have to terminate contracts for the convenience of the Government. If this happens, GSA plans to apportion the termination costs among the agencies that cancelled orders.

GSA cites as its authority for passing on termination costs the following provision of the Federal Property and Administrative Services Act.

Payment by requisitioning agencies shall be at prices fixed by the Administrator. Such prices shall be fixed at levels so as to recover so far as practicable the applicable purchase price, the transportation cost, inventory losses, the cost of personal services employed directly in the repair, rehabilitation, and conversion of personal property, and the cost of amortization and repair of equipment utilized for lease or rent to executive agencies. * * * 40 U.S.C. § 756(b) (1976).

For the reasons that follow, we believe that GSA is authorized to pass on its termination costs.

The General Supply Fund is intended, for the most part, to be a self-sustaining revolving fund for the purchase of items for the Government. Further, unfilled customer orders are classified by Circular No. A-34 as "budgetary resources" which may be relied upon to support General Supply Fund obligations and presumably such orders have been recorded as obligations by the requisitioning agency. We believe therefore, that the requisitioning agency, and not the Fund, should bear the loss (i.e., the termination costs) when it cancels an order for items for which the Fund has entered into a procurement contract or has placed an order under an existing contract on behalf of the requisitioning agency. On the other hand, the Fund should bear the termination costs when it cancels orders entered into in anticipation of agency needs, such as to build up the Fund's furniture inventory. In other words, when an agency causes the contract termination costs by placing a specific order and then cancelling it, that agency's appropriations should bear the expense. This procedure maintains the integrity of the General Supply Fund.

[B-199673]

Compensation—Overtime—Early Reporting and Delayed Departure—*De Minimis* Rule

Guards at Rocky Mountain Arsenal claim overtime compensation for time spent in drawing out weapons and equipment. Where record does not establish that duties required more than 10 minutes to perform, the claim may not be allowed under 5 U.S.C. 5542. Preshift duties that take 10 minutes or less to perform may be disregarded as being *de minimis*.

Compensation—Overtime—Fair Labor Standards Act—Fractional Hours—*De Minimis* Doctrine—Not Applicable

Guards claim they daily performed 15 minutes of preshift duties incident to drawing out weapons and equipment. Where agency has failed to record overtime hours as required by Fair Labor Standards Act, part of claim may be allowed on basis that the record creates a just and reasonable inference that security guards reported to work an average of 7½ minutes prior to guard mount.

Matter of: Guards at Rocky Mountain Arsenal—Overtime, June 15, 1981:

This matter is in response to a request for an advance decision by Mr. S. Brink, Finance and Accounting Officer of the Department of the Army, Rocky Mountain Arsenal (Arsenal), as to whether 74 former and present security guards at the Arsenal, are entitled to overtime compensation for their preshift activities.

The guards in question claim entitlement to overtime compensation

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incident to their alleged performance of 15 minutes of preshift duties for which they have not been compensated. The claims of 65 guards were first received by our Claims Division on April 16, 1979, the claims of 7 others on June 20, 1979, and the claims of 2 others on November 14, 1979, and February 12, 1980. Section 71a of title 31, United States Code, provides that every claim or demand cognizable by the General Accounting Office shall be forever barred unless received in this Office within 6 years after the date the claim accrued. We have held that the date of accrual of a claim for the purpose of the above-cited statute is to be regarded as the date the services were rendered and that the claim accrues on a daily basis. 29 Comp. Gen. 517 (1950). Thus, those portions of the individual claims which accrued prior to 6 years from the date the claims were first received in this Office are barred from consideration.

The administrative report states that workshifts for guards commenced at 2400, 0800, and 1600 hours each day and that the guards were required to assemble for "guard mount" 15 minutes prior to the beginning of their workshift at which time roll call was taken and daily orders and assignments were published. The guards were paid overtime compensation for the 15-minute period spent at guard mount as well as for the 15-minute period at the end of the workshift during which they were required to turn in their weapons and equipment. The guards claim compensation for an additional 15 minutes overtime based upon their allegations that they were required to report to work 15 minutes prior to guard mount in order to check out weapons, ammunition, and equipment from the arms room. The agency report states that the arms room was open for weapons issuance at least 15 minutes prior to guard mount.

The Army advises that prior to August 7, 1977, there was no regulation, special order, or other written instruction which set forth any required reporting time for guards prior to guard mount. However, section 2–3 of the Security Police Handbook for the Rocky Mountain Arsenal provided in pertinent part that each guard would be in formation and ready for duty at the beginning of guard mount and that at that time each guard would have in his possession his weapon, ammunition and all other prescribed items of equipment. Effective August 7, 1977, the Chief, Security Office, established a new policy where guard personnel would report for duty 15 minutes prior to the beginning of each workshift to draw weapons and equipment and stand guard mount. This new written policy stated that no one would be required to report prior to this 15-minute period for which they continued to receive overtime compensation. Thus, the claims for overtime pay end on August 7, 1977.

Section 4 of the Security Police Handbook at the Arsenal provided

in part that side arms were to be drawn from and returned to the arms room and that at no time would the weapon be removed from the arsenal when a guard was not on official duty.

An agency investigating officer found that for the period prior to August 7, 1977, some of the guard personnel arrived at the arms room 15 minutes prior to the beginning of guard mount but that the majority of guards arrived within the 10-minute period immediately prior to guard mount. This officer found that the guards were not issued equipment in any established order and that the Arsenal did not keep any log or record as to when each guard reported to the arms room. Based on its investigation the agency reports that it took up to 2 minutes for each guard to be issued his arms and equipment and that it took 10 to 15 minutes for the entire shift of 15 to 20 guards to be issued weapons and equipment.

Overtime for Federal employees is authorized by title 5, United States Code, and also by the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* for employees who are not exempt from the FLSA. An employee's entitlement to overtime compensation may be based on title 5, the FLSA, or both.

Section 5542 of title 5, United States Code (1976) provides in pertinent part as follows:

> (a) * * * hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for * * *

Only that overtime which is ordered or approved in writing or affirmatively induced by an official having authority to order or approve overtime is compensable overtime. See *Winton Lee Slade* B–186013, September 13, 1976, and *Baylor* v. *United States*, 198 Ct. Cl. 331 at 359, 360 (1972).

The controlling definition of what constitutes "officially ordered or approved" overtime is found in *Baylor* v. *United States*, *supra*, where the court states at 359:

> * * * This case is imporant in that it illustrates the two extremes; that is, if there is a regulation specifically requiring overtime promulgated by a responsible official, then this constitutes "officially ordered or approved" but, at the other extreme, if there is only a "tacit expectation" that overtime is to be performed, this does not constitute official order or approval.
>
> In between "tacit expectation" and a specific regulation requiring a certain number of minutes of overtime there exists a broad range of actual possibilities, which is best characterized as "more than a tacit expectation." Where the facts show that there is more than only a "tacit expectation" that overtime be performed, such overtime has been found to be compensable as having been "officially ordered or approved," even in the absence of a regulation specifically requiring a certain number of minutes of overtime. Where employees have been "induced" by their superiors to perform overtime in order to effectively complete their assignments and due to the nature of their employment, this overtime has been held to have been "officially ordered or approved," and therefore compensable. * * *

The agency report states that the preliminary duties performed by the guards occurred with the knowledge, if not the inducement, of either or both the Provost Marshall and the Chief of Security, who were the agency officials with the authority to order or approve overtime. In view of the administrative finding regarding the extent of the knowledge of agency officials who were authorized to order or approve overtime and since the Security Police Handbook expressly provided that each guard would be in formation and ready for duty with his weapons and equipment at the beginning of guard mount, we find that the guards' performance of the preshift duties was induced by proper authority and thus "ordered or approved" within the meaning of 5 U.S.C. § 5542. We note that the agency did not find that the guards were induced to report 15 minutes prior to guard mount, or otherwise in accordance with any particular schedule.

Pursuant to the provisions of 4 CFR § 31.7 we decide claims on the basis of the written record and the claimant must bear the burden of establishing the liability of the Government. Although the claimants state that they daily reported for duty 15 minutes prior to guard mount in order to receive their weapons and equipment, the record does not establish that they regularly reported or were required to report 15 minutes early or that the duties they were expected to perform prior to guard mount took more than a few minutes per day. In view of the agency's finding that it took at most 2 minutes for each guard to draw his arms and equipment and in the absence of evidence showing the daily reporting time for each guard, we can only conclude that it has been established that each guard spent 2 minutes per day performing his preshift duties. The fact that it took 10 to 15 minutes to issue weapons and equipment for each shift does not establish the reporting time of each guard. The mere assertion that particular amounts of overtime were worked is not sufficient evidence to support a claim for compensation under title 5, United States Code. See *Lawrence J. McCarren*, B–181632, February 12, 1975.

The Court in *Baylor* held that preshift "hours of work" had to exceed 10 minutes per day or such work could be disregarded as being *de minimis*, *Baylor* at 365. This *de minimis* rule has been uniformly applied in decisions of this Office. See 53 Comp. Gen. 489 (1974). Accordingly, the claim for overtime compensation may not be allowed pursuant to 5 U.S.C. § 5542 as the claimants have not established that they performed more than 10 minutes of uncompensated preshift duties per day.

The Fair Labor Standards Amendments of 1974, Public Law 93–259, approved April 8, 1974, extended FLSA coverage to certain Federal employees effective May 1, 1974. Under 29 U.S.C. § 204(f) the Office

of Personnel Management (OPM) is authorized to administer the provisions of the FLSA. Under the FLSA a nonexempt employee becomes entitled to overtime compensation for hours worked in excess of 40 hours a week which management "suffers or permits" to be performed. See para. 3c of Federal Personnel Manual (FPM) Letter No. 551–1, May 15, 1974.

In view of OPM's authority to administer the FLSA with respect to Federal employees we requested and received OPM's views on these claims.

In its report dated February 10, 1981, the Rocky Mountain Region of the OPM advised that from the record it appears that the Arsenal guards were required to at least be on the Arsenal's premises prior to guard mount in order to check out weapons and equipment and that such time is considered "hours worked" under the FLSA. In support of this determination the OPM cites para. B of Attachment 4 to FPM letter 551–1, *supra*, which provides in pertinent part that in general "hours worked" includes all time that an employee is required to be on duty or on the agency's premises or at a prescribed workplace.

The OPM has also advised that under the FLSA it is the employer's responsibility to keep accurate records as to the hours worked by an employee. The OPM states that since the Arsenal did not keep records of the time spent by the guards in performing preshift duties, the burden of proof is on the agency to show why the claims are not warranted. With the following qualification, we concur with this determination.

The FLSA requires employers to "make, keep and preserve such records of persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him." See 29 U.S.C. § 211(c). The courts have consistently applied a special standard of proof for FLSA cases in which the employer has failed to meet his statutory duty to keep accurate records. Under such circumstances, it is sufficient for the employee to prove that he has in fact performed overtime work for which he was not compensated and to produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–688 (1946), and *Hodgson* v. *Humphries*, 454 F. 2d 1279, 1283 (1972).

We are unable to find that the plaintiffs have supported their claims

for overtime for preshift work in the amount of 15 minutes. There has been no showing made that any or all of the claimants reported 15 minutes early or otherwise in accordance with any consistent schedule. The record does not otherwise establish a just and reasonable inference that any or all guards reported for duty 15 minutes prior to guard mount on a daily basis. However, the agency found that it took up to 15 minutes for each entire shift of guards to be issued their weapons and equipment. Based on this and the agency's additional finding that most guards reported within the 10-minute period immediately prior to guard mount we believe that the record creates a just and reasonable inference that the average reporting time of each guard was 7½ minutes prior to the beginning of guard mount. This inference has not been negated by the agency.

Unlike overtime entitlement under title 5, United States Code, the *de minimis* doctrine is not applicable to compensation under the FLSA for regularly scheduled overtime work. See paragraph A.2, Attachment 2, to FPM Letter 551–6, June 12, 1975. Accordingly, those guards who occupied positions designated as nonexempt under the FLSA are entitled to additional compensation based on preshift work of an additional 7½ minutes from May 1, 1974, to August 6, 1977. As stated above, under FLSA, only those hours in excess of a 40-hour workweek, rather than an 8-hour workday, are compensable as overtime. 45 Fed. Reg. 85,665 (1980) (to be codified in 5 CFR § 551.501(a)). Additionally, for FLSA purposes, paid absences, such as leave or holiday, are not considered hours worked in determining whether the employee has worked more than 40 hours in a workweek. 45 Fed. Reg. 85,664 (1980) (to be codified in 5 CFR § 551.401(b)).

The employees may be allowed payment for overtime compensation for 37½ minutes for each workweek they actually worked a full 5 days to the extent set forth above.

[B-201598]

Officers and Employees—Transfers—Relocation Expenses—Leases—Unexpired Lease Expense—Nonreimbursable if Avoidable

Employee who enters into 1-year lease when on notice that he will be transferred in 4 to 6 months may not be reimbursed lease termination expenses payable under penalty clause of lease. Authority to reimburse lease termination expenses is intended to compensate costs employee did not intend to incur at time he executed lease and which he would not have incurred but for his transfer, not costs employee could have avoided or costs incurred knowingly after being advised that transfer would occur.

Matter of: John M. Taylor—Leases settlement costs, June 15, 1981:

The Chief Finance and Budget Officer of the Federal Highway Administration, U.S. Department of Transportation, has asked us to

determine whether Mr. John M. Taylor may be reimbursed lease settlement costs at his old duty station which arose incident to a permanent change of duty station. Although Mr. Taylor initially provided no documentation showing that the lease settlement costs had actually been incurred, the documentation has now been provided so that the only issue remaining is whether Mr. Taylor may be reimbursed expenses associated with breaking a 1-year lease which was entered into at a time when he had knowledge that he would be reassigned in 4 to 6 months. The Finance and Budget Officer suggests that, in order to avoid unnecessary expenses, Mr. Taylor should have entered into a short-term occupancy agreement with no penalty for departure. We find that the penalty expenses associated with early departure in this case may not be reimbursed.

Mr. Taylor began his first permanent duty assignment under Federal Highway Administration's Highway Engineer Training Program in the spring of 1980 in St. Paul, Minnesota. From the outset he was advised that the first phase of the training under the career development program would last only about 4 months and that he would thereafter be transferred to a different location to begin the second phase of training and development. Even though Mr. Taylor knew he would be reassigned from St. Paul well before 1981, he entered into a lease of a townhouse for a year beginning in April 1980 and running through March 1981. The lease contained provisions that a deposit of $175 would be forfeited upon any non-performance of the lease (such as early departure) and that early departure would, at the lessor's option, obligate Mr. Taylor for any difference between the rent that would have been payable under the lease and the net rent recovered by lessor by means of rerenting the premises. Mr. Taylor was transferred early in August 1980, and the lease settlement costs questioned consist of the forfeited $175 security deposit and an additional $583 representing rent for one and two thirds months the townhouse was vacant before being rerented.

The authority for payment of residence transaction expenses incurred in connection with relocations is contained in Chapter 2, Part 6 of the Federal Travel Regulations (FTR) (FPMR 101–7) (May 1973). Paragraph 2–6.1 provides as follows:

Conditions and requirements under which allowances are payable. To the extent allowable under this provision, the Government shall reimburse an employee for expenses required to be paid by him * * * for the settlement of an unexpired lease involving his residence * * *.

The conditions under which lease settlement costs are reimbursed are further defined in paragraph 2–6.2h, which states:

h. *Settlement of an unexpired lease.* Expenses incurred for settling an unexpired lease (including month-to-month rental) on residence quarters occupied by the employee at the old official station may include broker's fees for obtaining a sublease or charges for advertising an unexpired lease. Such expenses are reim-

bursable when (1) applicable laws or the terms of the lease provide for payment of settlement expenses, (2) such expenses cannot be avoided by sublease or other arrangement, (3) the employee has not contributed to the expense by failing to give appropriate lease termination notice promptly after he has definite knowledge of the transfer, and (4) the broker's fees or advertising charges are not in excess of those customarily charged for comparable services in that locality. * * *

In early July of 1980, Mr. Taylor gave the lessor notice of his August departure. The Finance and Budget Officer states that this notice was given promptly after Mr. Taylor had definite knowledge of the date of his transfer and there is no indication that his best efforts were not extended to mitigate damages. In fact the Federal Highway Administration has indicated that Mr. Taylor complied with all the provisions of paragraph 2–6.2h. Nevertheless, they question whether Mr. Taylor may be reimbursed termination expenses under the provisions of a 1-year lease that he executed with the knowledge that he would be transferred within a few months and, thus, with the certainty that he would incur the lease termination costs claimed.

Under the particular circumstances, we agree with the agency's view that the lease termination costs claimed should have been avoided in the first instance and may not be reimbursed even though Mr. Taylor may have complied, in a technical sense, with the obligation to minimize those costs once incurred. The authority of 5 U.S.C. 5724a(a)(4) to reimburse expenses of settling an unexpired lease is intended to compensate the employee for costs he did not intend to incur at the time he executed the lease and he would not have incurred had he not been transferred within the period of his intended occupancy. Thus, an employee may not be reimbursed for expenses chargeable at the expiration of a lease. 48 Comp. Gen. 469 (1960). Where an employee executes a 1-year lease with the knowledge that his occupancy will terminate within a few months and that he will be subject by the terms of that lease to a penalty for early termination, those anticipated termination expenses are not the type that are intended to be reimbursed under FTR paragraph 2–6.2. Because they are costs he knew would be incurred they are akin to expenses chargeable at the expiration of a lease and may not be reimbursed.

This case is not to be regarded as a departure from our holding in *Juan R. Rodriguez*, B–190677, July 6, 1978. In that case we held that an agency may not adopt a policy restricting its employees' right to recover lease termination costs by requiring them to obtain leases that provide no penalty when the employees have given 30 days notice of departure. The *Rodriguez* case involved an agency-wide policy that affected all transferred employees. It did not involve an employee who entered into a lease for a term after having received definite notice that he would be transferred before the expiration of that lease. To the extent that the costs claimed by Mr. Taylor could and should have been

avoided in view of the facts known to him at the time he executed the lease, they are similar to the real estate expenses for which reimbursement was denied in *Warren L. Shipp*, 59 Comp. Gen. 502 (B–196908, May 28, 1980). In *Shipp* we held that an employee who had not contracted to sell his former residence at the time he received notice of retransfer to the former duty station where that residence was located was under an obligation to avoid unnecessary expenses and could not be reimbursed for real estate sale expenses subsequently incurred.

For the reasons stated above, the lease termination costs claimed by Mr. Taylor may not be reimbursed.

[B–201061]

Officers and Employees—Transfers—Relocation Expenses—Real Estate Expenses—Lump-Sum Payments—Third-Party Lending Institution

Employee may not be reimbursed for lump-sum payment to third-party lending institution which prepared financial documents ultimately used by loan originating institution for conditioned purpose of extending credit to finance employee's purchase of home. Since fee paid to third-party lending institution was stated as lump-sum payment for expenses and overhead and is finance charge within the meaning of Regulation Z (12 C.F.R. Part 226), reimbursement is precluded absent itemization to show items excluded by 12 C.F.R. 226.4(e) from the definition of finance charge.

Matter of: Ronald S. Taylor—Real Estate Expenses—Finance Charges, June 16, 1981:

This action is in response to a request from Mr. John Gregg, an authorized certifying officer with the General Services Administration (GSA), regarding the propriety of certifying for payment an item on a travel voucher for real estate expenses in the amount of $926.50 in favor of Mr. Ronald S. Taylor, a GSA employee who was officially transferred from Atlanta, Georgia, to Washington, D.C., effective October 21, 1979. Pursuant to the analysis which follows, we conclude that the $926.50 amount in question may not be certified for payment since it is a finance charge, and does not qualify as a incidental expense as contended by Mr. Taylor.

BACKGROUND

Briefly, the agency reports that Mr. Taylor sought mortgage financing from the Metropolitan Mortgage Fund on or about March 12, 1980, in connection with the purchase of his residence at the new official duty station. Around April 21, 1980, he was notified that this loan had been approved. During the interval, the VA mortgage rate ceiling was raised to 12% and then 14%. Due to the high interest rate, Mr. Taylor

contacted Guild Mortgage Company which offered him a VA loan with a guaranteed 13% interest rate. Guild Mortgage Company pointed out that they could not meet the agreed upon closing date of April 28, 1980, unless Metropolitan Mortgage would release the documents they had acquired to Guild Mortgage. Metropolitan Mortgage agreed to release the documents to Guild only if Mr. Taylor paid them for their expenses and overhead for assembling the documents, in an amount equivalent to the loan origination fee which would have been charged had the loan been made by Metropolitan Mortgage. In this regard the record contains a photostated copy of Mr. Taylor's personal check in the amount of $926.50 payable to the Metropolitan Mortgage Fund, and showing the memo notation "1% origination fee" on the face of the check.

Mr. Taylor's voucher for real estate expenses totaled $2,239.87, of which amount, $1,013.20 was reimbursed by the agency. The charge for $926.50—representing the payment to Metropolitan Mortgage Fund—is apparently the only unresolved issue and is the subject of our decision here.

The agency's doubt concerning the $926.50 payment is expressed in the record before us as follows:

> Existing regulations (paragraph 2-6.2d, Part 6, FPMR 101-7) do not allow for reimbursement of charges or expenses determined to be a part of a finance charge under the Truth and Lending Act or Regulation Z issued thereunder. The loan origination fee of $926.50 shown as a part of Item 6, GSA Form 2494 covers the lender's overhead expenses in preparation of documents and considered part of the finance charge. Although, Metropolitan Mortgage Fund, Inc. prepared the documents and received the $926.50 for that service the documents were transferred to the ultimate lender, Guild Mortgage Company in order to grant the mortgage. The origination fee of $926.50 may not be reimbursed since the lender's overhead expenses are costs incident to the extension of credit and are part of the finance charges under Regulation Z.

In support of his claim Mr. Taylor counters the agency's reasoning contending as follows:

> At no time during these proceedings was there ever a direct connection between Guild Mortgage Company and Metropolitan Mortgage Fund. Since no loan was obtained from Metropolitan Mortgage Fund, the amount paid to them cannot be considered a finance charge or any form of interest by any legal or other definition of the term. While it is true that Guild Mortgage Company found the file prepared by Metropolitan to be adequate to approve the loan and therefore did not charge me a loan origination fee, that fact cannot have any bearing on the characterization of the payment made to Metropolitan Mortgage Fund. Furthermore, if the payment could be considered a finance charge it would have to be itemized on the truth-in-lending statement provided at closing. An examination of that statement shows no such charge.

ANALYSIS AND DECISION

Paragraph 2-6.2d of the Federal Travel Regulations (FPMR 101-7, May 1973) (FTR), defining which miscellaneous expenses are reim-

bursable in connection with the purchase and sale of residences provides, in pertinent part, that:

> * * * no fee, cost, charge, or expense is reimbursable which is determined to be a part of the finance charge under the Truth in Lending Act, Title I, Public Law 90-321, and Regulation Z issued pursuant thereto by the Board of Governors of the Federal Reserve System. * * *

The pertinent part of Regulation Z, 12 CFR Part 226, states:

> 226.4 *Determination of finance charge.*
>
> (a) *General rule.* Except as otherwise provided in this section, *the amount of the finance charge* in connection with any transaction *shall be determined as the sum of all charges, payable* directly or indirectly by the customer as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer *to the creditor or to a third party, including any of the following types of charges:*
>
> * * * * * * *
>
> (2) Service, transaction, activity, or carrying charge.
> (3) Loan fee, points, finder's fee, or similar charge. [Italic supplied.]

As a result, in determining whether or not a particular payment is a finance charge, the statements of creditor-lending institutions just like those of borrower-home buyers cannot simply be accepted as a final legal characterization of the payment. Rather, agency reviewing officials must examine the item in light of Regulation Z, 12 CFR § 226.4 (1980), and decisions of this Office. See *Kenneth De Fazio*, B-191038, November 28, 1978.

Regulation Z makes it clear that payments to third-parties—such as Metropolitan Mortgage Fund in this case—for services and charges incident to the extension of credit for a specific real estate transaction are to be included in determining the total of all finance charges for that transaction. We believe it is correspondingly clear in the present case that Guild Mortgage would not have extended credit—within the meaning of Regulation Z—without the documents compiled in Mr. Taylor's case by Metropolitan Mortgage Fund. This follows from the fact that the documents assembled and prepared by Metropolitan Mortgage Fund were ultimately delivered to and used by Guild Mortgage as a condition of and incident to extending credit to Mr. Taylor. Thus, in the circumstances presented and in view of the fact that Guild Mortgage did not charge for a loan origination fee because they were able to utilize Metropolitan Mortgage Funds documents, we conclude that Mr. Taylor's payment in the amount of $926.50 to Metropolitan Mortgage Fund represents a finance charge within the meaning of Regulation Z and therefore may not be reimbursed.

One additional observation attaches to this part of the analysis of Mr. Taylor's claim. We have stated that a finance charge—within the meaning of Regulation Z—is defined so as to distinguish between

charges imposed as part of the cost of obtaining credit and charges imposed for services rendered in connection with a purchase or sale regardless of whether credit is sought or obtained. Only the latter may be reimbursed under the governing law, 5 U.S.C. § 5724a(a)(4), and the aforementioned implementing regulation, FTR 2–6.2d. Accordingly, we have held that there may be no reimbursement of a lump-sum loan origination fee. However, if the lump sum fee includes specific charges which would otherwise be reimbursable there must be a specific list of the services and an allocation of the charges that comprise the lump sum amount, and only those items that are specifically excluded from the definition of a finance charge by 12 CFR § 226.4(a) (1980), may be reimbursed. *Anthony J. Vrana*, B–189639, March 24, 1978.

In the instant case, the record does not contain any listings or other explanation of the services or charges that comprise the lump-sum amount of $926.50. Although Metropolitan Mortgage Fund stated that the charge is to cover various expenses and overhead, those costs are not listed and it cannot be determined whether or not they are excluded from the definition of a finance charge. In that connection it is noted that many of the items listed in subsection 226.4(e), as not comprising finance charges, were paid by Mr. Taylor in addition to the lump-sum payment to Metropolitan Mortgage Fund and where appropriate have been reimbursed to him.

Thus we believe that it is clear that the lump-sum payment to Metropolitan Mortgage fund represents a finance charge within the meaning of Regulation Z (12 CFR § 226.4(a)), no part of which is reimbursable absent itemization to show items excluded by 12 CFR § 226.4(e) from the definition of finance charge.

Finally, although we believe that Mr. Taylor's claim has been dispositively precluded by our analysis in regard to paragraph 2–6.2d of the Federal Travel Regulations, in order to completely address Mr. Taylor's contentions we would also point out that the $926.50 payment in question does not qualify as an "incidental expense" reimbursable under the following provision of paragraph 2–6.2 of the Federal Travel Regulations:

> f. *Other expenses of sale and purchase of residences.* Incidental charges made for *required services* in selling and purchasing residences may be reimbursable if they are customarily paid by * * * the purchaser of a residence at the new official station, to the extent they do not exceed amounts *customarily charged* in the locality of the residence. [Italic supplied.]

As distinguished from finance charges imposed as part of the cost of obtaining credit, incidental residence transaction expenses are generally charges imposed for services rendered in connection with a purchase or sale. Thus for example, we have held that where a termite inspection or a roof inspection was required as a condition for ob-

taining financing on the purchase of a residence, such inspection fees are reimbursable as a required service customarily paid by the purchaser as contemplated by paragraph 2–6.2f of the Federal Travel Regulations. See *Robert E. Grant*, B–194887, August 17, 1979. However, in the present case Mr. Taylor seeks reimbursement for unitemized expenses incurred by a third-party lending institution in preparing documents which we find were clearly related to and which all available evidence tends to show were instrumental in his obtaining financing for his new home. As a result, we are unable to conclude that the $926.50 payment to Metropolitan Mortgage Fund was for a "required service" which was "customary" in the locality of the new residence. Therefore, the payment in question is not reimbursable as an "incidental expense" under paragraph 2–6.2f of the Federal Travel Regulations.

In accordance with our decision here, Mr. Taylor's reclaim voucher in the amount of $926.50 may not be certified for payment.

[B–203098]

Contracts — Protests — Timeliness — Solicitation Improprieties— Grant Procurements

Contention that grantee's solicitation provisions are improper will not be considered on merits since basis of complaint was not filed within reasonable time. To be considered by General Accounting Office, complaint should have been filed prior to bid opening.

Contracts—Awards—Federal Aid, Grants, etc.—By or For Grantee—Minority Business Utilization—Price Reasonableness

Solicitation provided that, if any bidder offered reasonable price and met female-owned business utilization goal of one-tenth of 1 percent, grantee would presume conclusively that any bidder requesting waiver of goal would be ineligible for waiver and award. Grantee, with concurrence of grantor, arbitrarily rejected low bid ($243,000) and accepted second low bid ($343.875) solely on reasonableness of second low bid without any consideration of reasonableness of low bid and insignificant impact that goal had on overall cost of work.

Matter of: ABC Demolition Corporation, June 16, 1981:

ABC Demolition Corporation (ABC) complains against the rejection of its low bid in response to invitation for bids (IFB) No. CA–428 issued by the Port Authority of Allegheny County, Pennsylvania (Port Authority), for demolition of a parking garage. The project is 80 percent funded by the Urban Mass Transportation Administration, Department of Transportation (UMTA).

UMTA concurred in the Port Authority's determination to reject ABC's bid on the grounds that ABC failed to exert sufficient reasonable efforts to meet minority business goals. ABC contends that the

minority business goals are unconstitutional and unenforceable and that the Port Authority should have permitted ABC to change its bid after bid opening to comply with the goals.

We find that the grantee's rejection of the low bid was arbitrary. The IFB established a one-tenth of 1 percent goal for female-owned business utilization and provided that, if after diligent and conscientious effort the bidder could not reach the goal, the bidder must submit a request for waiver with its bid. The IFB provided that if any bidder offering a reasonable price met the goals, the Port Authority would presume conclusively that all bidders failing to meet the goals did not exert sufficient reasonable efforts and, consequently, would be ineligible both for a waiver and for award of the contract.

ABC submitted the low bid at $243,000, but ABC requested a waiver from the female-owned business utilization goal. The second low bid was submitted by Crown Wrecking Company, Inc. (Crown), at $343,875, and the Port Authority determined that Crown's bid was responsive and that the price was reasonable. UMTA concurred with the Port Authority's determination that Crown's price is reasonable. An estimate for the work in the amount of $325,000, which is within 6 percent of Crown's bid price was prepared by consulting engineers prior to bid opening. The record also shows that two other bids were received in the amounts of $385,000 and $363,700, which are within 13 percent of Crown's bid price and the other two bids. The Port Authority determined that, under the IFB's provisions, ABC's bid was not eligible for consideration. After bid opening, ABC advised the Port Authority that its request for waiver was no longer necessary since ABC was now able to meet the goal. The Port Authority determined that ABC's effort to withdraw its waiver request was too late to be considered. Subsequently, with UMTA's concurrence, award was made to Crown.

ABC initially contends that the IFB's provisions regarding goals, waivers, and conclusive presumptions are improper for several reasons. However, ABC's complaint concerns alleged improprieties in the grantee's solicitation which was not, but should have been, filed prior to the bid opening. Accordingly, we conclude that this complaint was not filed within a reasonable time and it will not be considered on the merits. *Caravelle Industries, Inc.*, 60 Comp. Gen. 414 (1981), 81-1 CPD 317.

ABC contends that the conclusive presumption provision was arbitrarily and capriciously applied by the Port Authority because Crown's bid was not reasonably priced, since Crown's bid was 41.5 percent higher than ABC. We agree.

Both UMTA and the Port Authority apparently applied the con-

clusive presumption and rejected ABC's bid solely on the reasonableness of Crown's bid based on the close proximity of the Crown bid with the Government estimate and the other two bids without any consideration to ABC's bid price and the insignificant impact that the goal had on the overall cost of the work. The goal was one-tenth of 1 percent, whereas the difference between ABC's $243,000 bid and Crown's $343,875 bid was just over $100,000. This means that Crown's commitment to a goal of only $343 in terms of its bid price resulted in an award in excess of $100,000 over the low bid. We fail to see any rationale for UMTA's and the Port Authority's determination that Crown's bid was reasonable as required by the terms of the IFB. Further, neither UMTA nor the Port Authority present any evidence to show that ABC's bid price was unreasonable. In contrast, ABC states that its price is correct and contains a reasonable profit for performing the work. Therefore, we find that UMTA and the Port Authority arbitrarily rejected ABC's bid under the conclusive presumption provision.

When this complaint was filed with our Office on April 29, 1981, the complaint represented that if a decision were issued by the middle of June any corrective action we found necessary would be possible. Based upon this representation, we required expedited filings of arguments by all parties. The record was closed after the last filing on May 26, 1981. We have now learned that as of June 12, 1981, approximately 50 percent of the work is completed. Therefore, we are unable to recommend any corrective action, since it would not be in the Government's best interest to do so.

However, by letter of today, we are bringing this matter to the attention of the Secretary of Transportation so that appropriate corrective action may be taken to prevent this impropriety in the future.

[B-201634]

Pay—Service Credits—Reserves—Inactive Time—Service Points Earned in Year of Active Duty—Proration Status

Navy officer retired under 10 U.S.C. 6323 may receive credit in the multiplier used in computing his retired pay for the full 57 inactive service points he earned in a year in which he also served on active duty. While on active duty he was in an active status, not an inactive status, and regulations governing the maximum number of points which may be earned require prorating of maximum allowable only on the basis of excluding periods of inactive status.

Military Personnel—Record Correction—Service Credits

Discrepancies in a Navy officer's service records which make it unclear as to whether he is entitled to retirement credit for 11 days' additional active service is a matter for consideration by the Chief of Naval Personnel or the Board for the Correction of Naval Records.

Matter of: Captain James A. Zimmerman, USNR, Retired, June 18, 1981:

Captain James A. Zimmerman, USNR, Retired, requests review of our Claims Group's settlement, dated September 23, 1980, which disallowed his claim for additional retired pay.

By memorandum of May 20, 1975, Captain Zimmerman was informed by the Office of the Chief of Naval Personnel that on November 1, 1976, he would have completed 27 years and 7 months (28 years) of service creditable for retired pay multiplier purposes. On the basis of this statement, he concluded that he would complete 28 years and 6 months (29 years) of creditable service on October 1, 1977. Therefore, he selected September 30, 1977, as his retirement date and was retired on October 1, 1977, pursuant to the provisions of 10 U.S.C. 6323 (1976).

After receiving his first retirement check, the amount of which was less than he anticipated, Captain Zimmerman consulted the Navy Finance Center. He was informed that his service creditable for retirement multiplier purposes, computed in accordance with 10 U.S.C. 1405, pursuant to 10 U.S.C. 6323, totaled 28 years, 4 months, and 14 days, which under section 1405 is counted as only 28 years' service since it did not equal at least 28 years and 6 months.

Captain Zimmerman claims that his total creditable service is 28 years, 6 months, and 9 days, which under 10 U.S.C. 1405 would be counted as 29 years. In reaching this result, he initially points out the following discrepancies in the computation of the Navy Finance Center:

(1) the exclusion of credit for active service on January 4, 1960, and

(2) the exclusion of credit for active service from January 7 through January 17, 1961.

With regard to these claims of error, we note that the service records, specifically the computation of Retirement Eligibility and Credit and the NAVPERS Computation of Service for Retirement (Worksheet) are in conflict with respect to these dates. However, even if Captain Zimmerman is given credit for those additional 11 days' service, that alone would not be enough additional credit to increase his service to 28 years and 6 months or more which could be counted as 29 years. If he wishes to have the record clarified in that regard, he should submit the matter to the Chief of Naval Personnel. If he is not satisfied with that officer's determination he may request a correction of his records by the Board for the Correction of Naval Records which, pursuant to 10 U.S.C. 1552, has the authority to correct errors in service records.

Captain Zimmerman also claims, on the basis of our decision in 34 Comp. Gen. 520 (1955), that he was not given sufficient credit for inactive service as a member of the Naval Reserve during his anniversary year ending June 30, 1961. During this year the record shows that he earned 57 inactive duty points each one of which is to be counted as a day's service credit. Captain Zimmerman claims credit for the full 57 points credit for this year; however, on the basis that he was in an active duty status for about 8 months during this year, the Navy has prorated the point credit for this year giving him credit for only 17 points. If he is given credit for the other 40 points and the conflicting statements of active service in his service records mentioned above are resolved in his favor, he will have over 28 years and 6 months of service credit which will be counted as 29 years.

Captain Zimmerman was retired pursuant to 10 U.S.C. 6323 under which retired pay is based on 2½ percent of his basic pay multiplied by the number of years of service that may be credited to him under 10 U.S.C. 1405. As is relevant here, section 1405 provides that the member's years of service are computed by adding—

(1) his years of active service;

* * * * * * *

(4) the years of service, not included in clause (1), (2), or (3), with which he would be entitled to be credited under section 1333 of this title, if he were entitled to retired pay under section 1331 of this title.

Except for the two disputed periods mentioned earlier, Captain Zimmerman has been given credit for his active service. As to inactive service credit, under the provisions of 10 U.S.C. 1333(3), a member of the Reserve is entitled to 1 day for each point credited to him under clause (B) or (C) of 10 U.S.C. 1332(a)(2). Clause (B) of 10 U.S.C. 1332(a)(2) provides for crediting one point for each attendance at a drill or period of equivalent training during a year, and clause (C) provides for the inclusion of 15 points per year for membership in a Reserve component of an Armed Forces. As is indicated above, in Captain Zimmerman's June 30, 1961 anniversary year he earned a total of 57 such points which the Navy credited only on a partial (prorated) basis.

The Navy is apparently applying the regulations found in article 3860520 of the Bureau of Naval Personnel Manual (BUPERSMAN) to require prorating of the service concerned. Under paragraph 4a of that article officers transferred to the Inactive Status List during an anniversary year are to have their retirement points computed on a prorated basis. This regulation appears to be based on 10 U.S.C. 1334(a) which provides that service in an inactive status may not be counted in the computations under 10 U.S.C. 1332 and 1333.

366-967 O - 82 - 4 : QL 3

While "inactive status" is not specifically defined in the law, "active status" is defined in 10 U.S.C. 101(25) as:

> * * * the status of a reserve commissioned officer, other than a commissioned warrant officer, who is not in the inactive Army National Guard or inactive Air National Guard, on an inactive status list, or in the Retired Reserve.

See also 10 U.S.C. 1335 which describes the inactive status list.

Rather than being in an inactive status during the period excluded by the prorating, Captain Zimmerman was a Reserve officer on active duty and, thus, was clearly in an active status. See BUPERSMAN, article 1880140-2 and 5, which indicates that members of the Naval Reserve on active duty are members of the Ready Reserve which is an active status. Therefore, Captain Zimmerman should be given full credit (without prorating) for the 57 points he earned in the anniversary year ending June 30, 1961. See 34 Comp. Gen. 520, 521 (1955) (answer to question 2c) and 36 Comp. Gen. 498 (1957).

If Captain Zimmerman's service records are corrected to give him credit for the additional active service he claims in 1960 and 1961, his retired pay may then be computed based on 29 years of service rather than 28 years. However, without a determination in his favor on that matter, he still would not have sufficient service to entitle him to additional retired pay.

[B-200778]

Appropriations — Interior Department — Availability — Grants— Surface Mining Control—Program Authority

Under section 502(e)(4) of Surface Mining Control Act of 1977, 30 U.S.C. 1252(e)(4), Secretary of the Interior is authorized to reimburse States for interim enforcement program costs not covered in prior grant award so long as payments are from currently available appropriations. Budget change to allow grant costs questioned solely because they exceed condition on budget flexibility may be allowed under existing obligation where change does not affect purpose or scope of grant award.

Matter of: Department of Interior—Office of Surface Mining— Authority to Pay for Costs Not Part of Original Award, June 19, 1981:

A certifying officer for the Office of Surface Mining (OSM), Department of the Interior, has requested our decision concerning payment of certain costs incurred by the Ohio Department of Natural Resources (the State) in carrying out provisions of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 4, approved August 3, 1977, 30 U.S.C. 1201 *et. seq.* (Supp. III, 1979) (the Act). As explained below, we conclude that the Secretary of the Interior has authority to reimburse the State for costs incurred in conducting inspections enforcing the Act under an interim enforce-

ment program. He may do so out of current appropriations and is not limited to the amounts previously obligated or budgeted under grant documents covering the period in which the costs were incurred.

According to the certifying officer, in July 26, 1978, the Office of Surface Mining issued the State, under section 502(e)(4) of the Act, 30 U.S.C. § 1252(e)(4), an interim regulatory grant of $370,541.75 for a budget period, as subsequently amended, of August 3, 1977 to February 28, 1979. In June 1979, after the grant period had ended, an audit disclosed that the State had incurred $490,640 in grant costs. The auditors found that all of these costs were eligible for reimbursement under the program, but questioned costs in excess of the award ($120,098) and costs ($62,404) where the grantee had exceeded its approved budget flexibility without prior OSM approval. The State has since submitted an amended application covering the original budget period with an enlarged budget request of $487,317 or $116,775 in excess of the original grant amounts. (We do not know why the State did not request the total $490,640.) In November 1979, OSM approved the budget changes that exceeded the budget flexibility previously given the State.

The certifying officer has asked the following specific questions:

1. Was it proper to approve the amended grant budget and is payment to the State of Ohio proper for the additional $116,775?
2. If not, would it be proper for the State of Ohio to apply for a new grant for $116,775 of additional costs incurred during the period August 3, 1977, through February 28, 1979?
3. If the after-fact approval of Ohio's grant budget is not allowable, should OSM pursue collection of $62,404 from the State of Ohio for the difference between the audit report's eligible costs of $308,138 and the grant payments of $370,542?

The certifying officer summarizes the issue in this case as—

> * * * whether or not a State can be reimbursed for incurred interim program allowable costs which are in excess of the total funds specified in the grant agreement.

He goes on to note that his concern about payments in excess of the original grant award stems from several of our decisions including 39 Comp. Gen. 296, 298 (1959).

The Addition of $116,775 to the Grant

Normally grant programs are designed to provide grantees with advance funding rather than reimbursements. The award under such grants creates a fixed obligation against which the grantee is able to keep from the advanced funds the allowable costs it incurs under the grant. When the grantee's costs exceed the amount of the grant award, the grantee may only be paid for such costs if there is a supplemental or new award that creates an obligation sufficient to cover the excess costs. If such a supplemental award is made from an appropriation that became available only after the original grant appropriation had

ceased to be available, the supplemental award must meet the needs of the appropriation available for obligation at the time the supplemental award is made. The guiding principle in deciding whether an obligation is proper in such situations is the extent to which Congress gave the Government authority to pay costs incurred during the period in question. *See* 56 Comp. Gen. 31 (1976); B-197699, June 3, 1979.

In the instant case, the grant to the State was made under Section 502(e)(4) of the Act, 30 U.S.C. § 1252(e)(4) which provides:

> (e) Within six months after the date of enactment of this Act, the Secretary shall implement a Federal enforcement program which shall remain in effect in each State as surface coal mining operations are required to comply with the provisions of this Act, until the State program has been approved pursuant to this Act or until a Federal program has been implemented pursuant to this Act. The enforcement program shall—
>
> * * * * * * *
>
> (4) provide that moneys authorized by section 712 shall be available to the Secretary *prior to the approval* of a State program pursuant to this Act *to reimburse the State for conducting those inspections in which the standards of this Act are enforced and for the administration of this section.* [Italic supplied.]

This section clearly authorizes the Secretary to reimburse States even for interim program costs not covered by a grant agreement when they were incurred. While it may be administratively sound for OSM and financially prudent for the State to agree upon the program before the project is implemented, section 502(e)(4) permits the Secretary to look back at the project and determine what costs he will allow even without a prior commitment. Accordingly, in the case presented, OSM may reimburse the State for any allowable costs attributable to the interim enforcement program since the language of section 502(e)(4) provides a clear statutory basis for such payments. On the other hand, since section 502(e)(4) only makes money available to the Secretary to reimburse the States, this section does not create a right in the States to reimbursement. Accordingly, the Secretary also has discretion under section 502(e)(4) not to reimburse the State for those costs that exceed the existing project award.

The issue that remains concerning the funds to be added to the program is not whether the Government is authorized to take the contemplated action, but which appropriation will be charged with the additional obligation resulting from the new award of funds to the State. The appropriation under which the original grant award in this case was made is no longer available for obligation. The fiscal year 1979 appropriation to carry out programs under the Act, 92 Stat. 1286, expired on September 30, 1979. Section 308, Pub. L. 95-465, 92 Stat. 1303, October 17, 1978. Any additional obligations for the State's interim program will have to come from currently available appropriations.

The decisions that cause the certifying officer concern, such as 39 Comp. Gen. 296, *supra*, involve cases where changes in grants occurred after the appropriation under which they were made had ceased to be available for obligation. *See also*, 58 Comp. Gen. 676 (1979); 57 *id.* 459 (1978); 57 *id.* 205 (1978). As we said at 57 *id.* 460 *supra:*

> It is well established that agencies have no authority to amend grants so as to change their scope after the appropriations under which they have been made have ceased to be available for obligation.

By extension, agencies with program authority can change the scope of grants if current appropriations are used.

The Changes in the Grant Budget

These decisions also have relevance to the certifying officer's question concerning the post-audit approval of changes in grant budgets that do not involve the addition of funds after the period in which the original obligation was made, and which the Government could have approved if prior approval had been sought. However, under normal circumstances this is not the kind of change that affects the scope or purpose of a grant so that the cited decisions would not preclude its approval. On the basis of the facts in this case we see no reason to conclude that the changed budget affects the scope or purpose of the original award. Consequently, the original obligation can be applied to the $62,404 of questioned costs that were approved in the amended grant budget.

Conclusion

We conclude with respect to the two aspects of the certifying officer's first question that (1) the $62,404 budget change approved after the grant budget period had ended may be allowed under the existing obligation and (2) payments to the State of the additional $116,775 of allowable costs requested and not already the subject of an award are within the discretion of the Secretary of Interior or those to whom he has given his authority to act so long as they are made from currently available appropriations. Such payments may be made under amendments to the original grant documents or under a new application so long as the payments conform to the regulations adopted by the Department of Interior for this program.

[B-200277.2]

Bids—Competitive System—Oral Advice Erroneous—Invitation for Bids—Interpretation

Contracting officer erroneously advised potential bidders that they were limited to offering individual prices for six items of laundry equipment, and could not submit alternative bids based on award of more than one item, unless specifically

requested to do so by invitation for bids and unless alternative bid was based on award of no less than all six items. However, bidder relied on erroneous oral advice at its own risk.

Bids—Responsiveness—Responsiveness *v.* Bidder Responsibility—Commercial Usage of Equipment Requirement

Invitation for bids' "Successful Commercial Operation" clause providing that no item of equipment would be acceptable unless equipment of approximately same type and class had operated successfully for at least one year appears to involve bid responsiveness and should have been satisfied by material submitted with bid. Even if clause is construed as relating to bidder's responsibility, it was not satisfied when preaward inquiry of equipment users disclosed that item would not be in use for one year until 2 months after award was made.

Matter of: Jensen Corporation, June 24, 1981:

Jensen Corporation protests the award to G. A. Braun, Inc. of a contract for two items of laundry machinery for the Veterans Administration Medical Center in Huntington, West Virginia, under invitation for bids (IFB) M2–43–80, issued by the Veterans Administration Marketing Center (VA). Jensen protests on the grounds that it was deprived of the opportunity to bid competitively due to oral advice it received from the contracting officer and that one item offered by G. A. Braun was not in successful commercial operation for one year as required by the IFB.

The IFB was issued on August 15, 1980, and bids were due September 15. On September 8, the contracting officer telephoned Jensen, among other potential bidders, and "informed them that in my interpretation of the Regulations and guidelines that I felt if a summary bid was called for then they had to bid on all items to be considered for the summary. I closed the conversation by adding that the bottom line was that the solicitation had to be bid as it was issued, unless amended."

We understand that in some procurements of laundry equipment the VA requires bidders not only to submit a price for each line item but a "summary bid" for all items. This "summary bid" may total the amount of the individual item prices or it may reflect a discount offered by the bidder if considered for award of all items. The VA then awards the contract, or contracts, on an individual item or "summary bid" basis depending upon which results in the lowest cost to the Government.

The instant IFB called for bids on six different items of laundry equipment and did not specifically request "summary" bids. Six bidders competed: one bid on all six items, one bid on one item, three bid on two items, and one bid on four items. Braun bid only on items 2 and 3, upon which it bid $27,320 and $11,600, respectively, for a total of $38,920. Alternatively, Braun offered a price of $32,000 if awarded both items. Jensen bid on items 2 through 5 and was subsequently

awarded a contract for items 4 and 5, for which it was the low bidder. For item 2, it bid $21,393 and for item 3 it bid $11,413, a total of $32,806. Braun was awarded the contract for items 2 and 3 based upon its alternative bid of $32,000. Jensen protested, stating that it would have offered a price reduction based upon an award of items 2 and 3 but for the contracting officer's oral advice.

The contracting officer apparently was under the impression that bidders were limited to offering a price for each line item only, and prohibited from offering alternative bids based upon the award of a combination of items unless such alternative bids were (1) specifically requested by the IFB and (2) were based on the award of no less than all six items sought by the IFB.

The VA now concedes that the contracting officer's pre-bid oral advice was in error, and that bidders such as Jensen were free to offer alternate bids extending discounts based upon the award of any combination of items.

The present IFB included Standard Form 33A, paragraph 3 of which warns bidders that oral explanations or instructions given before the award of a contract are not binding. The general rule in these situations is that the bidder must suffer the consequences of its reliance upon such advice. See, *e.g.*, *Mor-Flo Industries, Inc.*, B-192687, June 5, 1979, 79-1 CPD 390. We will sustain a protest, however, if it can be shown that as a result of the erroneous oral advice effective competition was not achieved. Here, there were three bids on Items 2 and 3: only Braun offered a discount if it was awarded both items. Jensen asserts that it would have offered such a discount but for the oral advice of the contracting officer. In this regard, the contracting officer has provided us with a copy of a prior bid by Jensen for three items of laundry equipment in which both individual item prices and a price "summary" were solicited. Jensen's "summary" price was simply the total of its individual item prices: no discount was offered. Jensen, on the other hand, has referred to other past procurements where it did offer a reduced price on a "summary" basis. We can only speculate, at this point, as to whether Jensen would have offered a discount in excess of $806, which would have made it the low bidder, but for the advice of the contracting officer. Under these circumstances we do not believe it has been shown that effective competition was precluded to such an extent as to warrant sustaining the protest.

Jensen further argues that Braun should not have been awarded item 3 because the firm's Model SPF small piece folder offered under that item did not meet the "Successful Commercial Operation" clause of the solicitation, which provides in part:

> No item of equipment will be acceptable unless the manufacturer has had equipment of approximately the same type, and class as that offered which shall

have operated successfully in a commercial or institutional laundry in the United States for at least one year. * * *

Offeror to indicate Model Numbers and 3 sites where models are in operation for each item bid:

ITEM #	MODEL #	INSTALLATION SITES

The record shows that two days prior to award, a VA employee called three users of Braun's SPF folder and asked how long it had been in operation and whether any problems had been experienced with it. All those called responded that no problems had been encountered. However, the one-year period would not be met until November 1980, approximately two months after the expected date of award. Nevertheless, the contracting officer determined that the one-year requirement would be satisfied since it would have elapsed by the time the equipment was scheduled to be delivered in late January or early February 1981. The contract was awarded on September 25, 1980 and we understand the equipment was in fact delivered in November 1980.

We have long recognized a distinction between solicitation requirements related to a bidder's capability and experience and those which are concerned with the history of a product's performance and its reliability. See 52 Comp. Gen. 647, 649 (1973). The experience of a bidder has been treated as a matter of responsibility and, consonant with the general rules governing responsibility determinations, information bearing on that subject may be furnished after bid opening and prior to award. On the other hand, information bearing on the performance history of a product to be furnished involves a matter or responsiveness and that information therefore must be submitted with the bid. See 48 Comp. Gen. 291 (1968), where we regarded as a matter of responsiveness a requirement in an IFB for diesel engine generator sets that the bidder show that the engines it proposed to furnish "shall have performed satisfactorily in an installation independent of the contractor's facilities for a minimum of 8,000 hours of actual operation." That requirement, we stated, was directed to the past operating experience and reliability of the engines offered rather than to the experience and capability of the manufacturer.

The wording of experience clauses in solicitations varies enormously and may include elements which pertain both to the bidder's responsibility and to the responsiveness of its bid. See, e.g., B-175493(1), April 20, 1972, in which the IFB required that "manufacturers bidding on the equipment must have at least five (5) years experience" and "must have a quantity of the type offered in this bid in satisfactory

general public use for at least one year." In our decision, we accepted the procuring agency's position that the 5-year requirement addressed itself to the responsibility of the manufacturer and the 1-year requirement was addressed to the reliability of the item.

Turning to the experience requirement in the present IFB, we note that it pertains to "equipment of *approximately* the same type, and class as that offered." [Italic supplied.] When an experience requirement does not pretain exclusively to the item being procured, but includes *generally* similar equipment previously produced by the bidder, we have tended to regard it as bearing on the bidder's responsibility. See, e.g., *Carco Electronics*, B–186747, March 9, 1977, 77–1 CPD 172, where we so interpreted a provision which read:

> Bids will be accepted only from bidders who have built similar simulators. Information submitted with bids must include a list of simulators delivered, with organizations, addresses and the names of individuals that may be contacted. * * *

See also United Power & Control Systems, Inc., B–184662, May 25, 1976, 76–1 CPD 340, at p. 6. Therefore, the use of the word "approximately" lends at least arguable support for the conclusion that the VA's experience clause concerned the bidder's responsibility.

In other respects, however, the provision appears to be concerned with the reliability of the specific equipment to be supplied under the contract—a matter of responsiveness. We note the title of the clause, "Successful Commercial Operation", refers to the equipment, not the bidder. The clause then says that "No *item of equipment* shall be acceptable * * *" unless the experience requirement has been met and requires bidders to supply model numbers and three sites "where models are in operation for each item bid." [Italic supplied.] We realize the wording of the latter provision does not necessarily require the bidder to list the identical model as that offered in the bid: otherwise, it would read "where models are in operation *of* each item bid." Nevertheless, it seems to us that through this experience provision the VA was seeking to assure itself that the equipment offered by the bidder had been proven reliable through a year's successful operation in a commercial or institutional environment, either in the identical configuration offered by the bidder or one so similar that the reliability of the basic components would be established.

Thus, it appears that the Braun model SPF folder should have had one year's successful commercial operation as of the date of bid opening, and as it did not, Braun's bid was nonresponsive as to that item and should not have been accepted. Even if one regards the experience clause as going to Braun's responsibility, however, and therefore could be satisfied by information furnished after bid opening, we believe the required experience would have to be accumulated prior to award.

That was not the case here : the contracting officer awarded the contract based upon a *projection* that the equipment would continue to operate successfully for the balance of the one-year period.

Although Jensen's protest is sustained as to this issue, corrective action with regard to this procurement is not practicable since the contract has been performed. We are bringing the deficiencies which we have observed to the attention of the Administrator of Veterans Affairs.

[B-196722]

Contracts—Negotiation—Late Proposals and Quotations—Modifications of Proposal—Expanded Best and Final Offer—Acceptability

Agency could consider all-or-none best and final offer notwithstanding that three of five line items were not included in offeror's initial proposal since initial proposal was included in competitive range, offerors may alter their proposals in best and final offer and agency found that proposal with respect to additional items was technically acceptable.

Contracts—Negotiation—Requests for Proposals—"All or None" Proposals—Acceptance on Alternative Basis—Effect on Competition

Protest that request for proposals (RFP) for automatic data processing peripheral equipment was deficient because agency permitted all-or-none proposals knowing there was little prospect of competition for several line items is denied. Offeror would not have been prejudiced by submitting proposal to furnish only some line items since agency limited all-or-none pricing to alternate proposal and included RFP requirement for cost and pricing data to insure that firm which offered to furnish items in question did not unbalance all-or-none bid.

Equipment—Automatic Data Processing Systems—Benchmarking—Postclosing—Propriety

Request for proposals provision allowing benchmark of tentatively selected equipment after closing date for best and final proposals is not in itself objectionable.

Matter of: Control Data Corporation and KET, Incorporated, June 26, 1981:

This decision responds to two protests concerning a procurement conducted by the Internal Revenue Service (IRS) under request for proposals (RFP) 79-57 for peripheral equipment to support the IRS Integrated Data Retrieval System (IDRS). The procurement was for various quantities of disk, tape, and card reader, card punch and line printer equipment to replace leased Control Data Corporation peripheral equipment presently supporting IDRS Control Data 3500 series computers. A contract has been awarded to Centennial Systems, Inc. (CSI) for all items.

KET, Incorporated, which did not submit a proposal, complains that the RFP was unduly restrictive of competition in that except

for the disk equipment the RFP specified essentially outmoded Control Data or equal equipment preventing consideration of equipment of current manufacture. KET says it was not possible to locate sufficient quantities of some of the equipment even on the used market. Thus, KET expected Control Data, which as the incumbent could offer to continue to furnish equipment (other than disk equipment) then in place, to enjoy a significant competitive advantage. Because the RFP permitted Control Data to submit an all-or-none price if it also priced all items individually, KET complains that a firm in a position such as Control Data enjoys could prevent meaningful competition on individual line items by submitting unbalanced prices, *i.e.*. by setting arbitrarily high prices for scarce items, by submitting below cost prices for items likely to be offered by firms such as KET, and by offering a somewhat lower aggregate price, thus assuring that its aggregate price would be lower than the total cost of any combination of multiple awards.

On the other hand, Control Data protests that it should have received award on an all-or-none basis but did not because CSI was improperly permitted to propose an all-or-none price in its best and final offer by adding prices for three line items which it had not included in its initial proposal. Moreover, Control Data says the IRS permitted CSI to offer equipment which was not "formally announced" as required by the RFP, and relaxed its delivery schedule for CSI shortly after award, thereby materially changing the basis on which proposals had been submitted. Further, Control Data says the IRS in evaluating cost should have considered the cost of continuing to use existing equipment while new equipment was being installed.

KET also complains that the RFP benchmark requirement was improper in several respects and that the IRS improperly refused to make its Control Data 3500 equipment available to support such a test.

KET's protest is dismissed in part and denied as to the remainder; Control Data's protest is denied.

1. Timeliness

At the outset, the IRS and Control Data join in insisting that KET's protest should be dismissed as untimely. KET's protest, which involves alleged improprieties apparent from the solicitation, was filed in our Office before the closing date set for proposal receipt, as required in section 20.2(b)(1) of our Bid Protest Procedures, 4 CFR part 20(b)(1) (1980). However, the IRS and Control Data point out that the contracting officer did not receive notice of the protest until after the closing date for receipt of proposals had passed. This, they

say, was contrary to the purpose of § 20.1(c) of our Bid Protest Procedures, which states that a copy of a protest to the General Accounting Office shall be filed with the contracting officer.

KET's protest is timely. The filing of a protest for purposes of § 20.2(b) is defined in § 20.2(b)(3) to mean filing in the General Accounting Office or contracting activity "as the case may be," which means that timely delivery of a protest must occur at the place where the protest is lodged. See *National Designers, Inc.*, B-195353, B-195354, August 6, 1979, 79-2 CPD 86. Since KET's protest was directed to our Office and was received here before proposals were due, it was timely filed in accordance with our Bid Protest Procedures.

Control Data argues, however, that it was prejudiced by KET's failure to advise the IRS of the protest at the time it was filed with our Office, because Control Data had made special arrangements with the contracting officer to return Control Data's proposal unopened if a protest were filed before the time and date for closing passed.

We see no basis for Control Data's concern. Control Data could at any time before award have withdrawn its proposal if it did not wish to have it considered. *United Electric Motor Company, Inc.*, B-191996, September 18, 1978, 78-2 CPD 206.

Therefore, we will decide both protests on their merits.

2. Sufficiency of RFP

We consider first KET's complaint that by specifying equipment as the IRS did—on a brand name (Control Data) or equal basis—the IRS imposed an undue restriction on competition. According to KET, only Control Data 3500 compatible disk equipment remains in current production. The remainder of the IRS's equipment needs (tape, card reader, card punch and line printer equipment), KET says, could be met only by furnishing obsolete and outmoded equipment which was readily available only to Control Data which as the incumbent, could continue to furnish existing leased equipment (other than disk equipment).

KET questions IRS' insistence on the continued use of card reader and card punch equipment as its primary means of entering data. It sees no reason why a 4000 card tray is specified for card readers, or a 1200 card hopper and 1500 card stacker for card punches, and says the IRS should have permitted offerors to propose 1200 card trays and 1000 card hoppers and stackers typical of other comparable equipment. KET also challenges IRS's continued reliance on 200/556/800 bpi (the density with which data is packed) for seven track tape drives, arguing that 1600 bpi is now the established industry baseline, and questions why all three densities (200, 556, and 800 bpi) must be available in each unit. Further, in KET's view the IRS's need for equip-

ment capable of handling large numbers of cards to support headquarters programming operations does not justify including large card tray requirements for equipment to be used at IRS regional facilities. Nor, allegedly, has the IRS shown that all tape densities and other required specific capabilities will be used at each of its installations.

This portion of KET's complaint is without merit. The IRS explains that it is not seeking to upgrade IDRS or to alter in any way how equipment would be used; rather, it is acquiring equipment which it needs to continue operating IDRS until that system can be replaced. We believe it is sufficient that in defining its interim requirements the IRS has attempted simply to acquire equipment based on the types of equipment it has in place. Determination of an agency's needs is a matter falling within the sound discretion of the contracting activity which will not be disturbed unless shown to have no rational basis. *Science Spectrum*, B–189886, January 9, 1978, 78–1 CPD 15. Because the IRS is attempting to meet only a short term need, we believe it may reasonably base its requirements on equipment which is in place. In this respect, in our decision in *Information International, Inc.*, 59 Comp. Gen. 640 (1980), 80–2 CPD 100, *aff'd.* B–191013, October 7, 1980, 80–2 CPD 246, we stated that the Government is under no obligation to acquire technologically advanced equipment if less sophisticated equipment will meet its actual needs at lower cost or risk.

KET further contends that by allowing offerors to submit proposals for all five types of equipment on an all-on-none basis the IRS permitted a firm which was able to offer all items to prevent others able to offer only some of them from being considered. KET anticipated that this would favor Control Data because the IRS permitted Control Data to offer equipment (other than disk equipment) which was already in place. Control Data did not receive the award. However, KET was unable to locate sufficient quantities of the required equipment (other than disk equipment) notwithstanding diligent effort and believes that the disk equipment (which is still manufactured) is distinctly different from the IRS's other needs and should have been the subject of a second procurement. (It is the IRS' position that any economy which the Government might gain through a multi-item award can be achieved only if offerors are permitted to offer lower prices on a combination of items.)

In this connection, KET argues that in requesting a Delegation of Procurement Authority (DPA) from GSA the IRS indicated that it would not permit all-or-none bids, and thus implicitly admitted that to allow an all-or-none bid which included the disk equipment would limit competition.

We do not believe the IRS acted improperly in this regard. The IRS included the following language in the RFP:

> * * * All offerors must propose each subsystem as an individual pricing proposal. Only an alternate proposal may be qualified as "all or none;" vendors who submit a single or primary proposal which is qualified as "all or none" will be considered [unacceptable].

Additionally, the IRS required offers to furnish certifications of cost and pricing data pursuant to Federal Procurement Regulations (FPR) § 1-3.807-4 (1964 ed.).

We do not see how KET was injured. The IRS, by allowing proposals to furnish any of the five required systems, assumed no duty to prevent a disk equipment buy-in. Had IRS adopted KET's view and procured the disk system separately, Control Data would not have been precluded from offering disk equipment at less than cost. The most that the IRS could have done would have been to prevent an offeror from making up losses by overpricing other items, which the IRS did by requiring that items be separately priced and supported, thus placing the Government in a position to determine that it was paying a fair and reasonable price. Breaking out some items or prohibiting an offeror from submitting an alternate all-or-none proposal would not have further enchanced competition, but only would have prevented the Government from obtaining a better total price if it could do so on a package basis.

On a related point, KET complains that Control Data was permitted to offer currently-installed disk equipment by warranting that the equipment was remanufactured. KET insists that this violates a prior understanding resulting from a controversy which extended from 1976 through 1978 regarding a past IRS attempt to acquire disk equipment on a sole-source basis from Control Data. See *KET, Inc.*, B-189482, February 10, 1978, 78-1 CPD 115. At that time, KET says, the General Services Administration granted the IRS authority to procure disk subsystems for the IDRS on an interim basis on condition that the IRS would competitively replace all peripheral subsystems, including the disk subsystem, and that Control Data Corporation was not to be permitted to propose installed equipment. Even though the RFP stated that "currently-installed" disk equipment could not be offered, however, IRS explained in response to a preproposal inquiry that this did not prevent Control Data from offering such equipment if it were first removed, remanufactured and warranted as the same as new.

Since the apparent purpose of the understanding KET refers to was to prevent Control Data from gaining a competitive advantage as a result of the sole-source procurement mentioned, and since KET was permitted to offer remanufactured equipment also, if it wished, we cannot see how KET suffered any legal prejudice by the procedure

which the IRS adopted. KET's complaint in this regard is therefore rejected.

3. Propriety of Award

We consider next Control Data's protest against the award made to CSI.

Control Data argues that CSI was permitted to submit a late proposal in that award was based on an all-or-none best and final offer in which CSI for the first time added prices for three of the five types of equipment covered in separate line items. In its initial proposal CSI only offered to furnish the tape and disk equipment. Prices to furnish used card punch, card reader and card printer equipment (all originally manufactured by Control Data) were added in CSI's best and final offer. If the expanded CSI best and final offer, and alternate all-or-none price, is considered to be a distinct proposal, Control Data's argument continues, it is clearly not for consideration under any of the exceptions to the rule against making award on a late proposal.

In this regard, Control Data insists that the IRS, by evaluating and making award based on the CSI best and final offer, essentially allowed CSI to avoid a technical evaluation of its entire proposal because the best and final proposal offered to furnish three types of equipment which were never included in a competitive range determination. Control Data further asserts in this regard that the CSI best and final offer did not include adequate information and did not indicate how CSI would maintain the additional equipment. As a result, Control Data charges, the IRS was forced to continue discussions with CSI after making award to it in order to deal with problems which were ultimately resolved only when Control Data agreed to service any CSI-furnished Control Data equipment.

The IRS argues that the CSI proposal was not late. Regarding the relationship between the late proposal rule and modifications to proposals after discussions, the IRS points out that FPR § 1–3.802–1(d) states:

> The normal revisions of proposals by offerors selected for discussion during the usual conduct of negotiations with such offerors are not to be considered as late proposals or later modifications to proposals but shall be handled in accordance with § 1–3.805.

(FPR § 1–3.805 deals generally with the selection of an awardee in a negotiated procurement.) In the IRS's view, CSI simply expanded its original proposal to include card reader, card punch and line printer equipment thus enabling it to submit an all-or-none proposal. The IRS says it had no choice but to make award to CSI since CSI agreed to meet all of the RFP requirements and explained in pricing the additional items that it would provide Control Data on-call maintenance on a 24-hour per day, seven day per week basis. The IRS says a technical evaluation of the proposed equipment was not necessary because the equipment added was identical to that being replaced.

Further, the IRS cites our decision in *Jones & Guerrero Co., Incorporated*, B-192328, October 23, 1978, 78-2 CPD 296, as supporting its view that offerors are permitted to amend their proposals as CSI did. There, we considered a complaint that the Air Force improperly amended a solicitation to require award based on the lowest aggregate proposal to furnish all items listed on the schedule. We noted that the protester was not prejudiced by the amendment because although its initial proposal did not price all line items, it had revised its proposal and priced all items in its best and final offer. Thus, the IRS argues, our decision approved what CSI did in adding prices for the line items it chose initially to omit.

Finally, the IRS says that its view that an offeror's general right to submit an amended best and final proposal in circumstances similar to this case is supported by our decision in *Northrop Services, Inc.*, B-184560, January 28, 1977, 77-1 CPD 71, where we approved award based on an alternate proposal which differed from the awardee's original proposal in regard to the use of in-house rather than subcontracted labor.

We find Control Data's argument that the IRS's consideration of the CSI best and final offer must be limited to two line items unconvincing. The existence of the late proposal clause in the RFP establishes a cutoff date for the receipt of initial proposals, defining the field of competitors who may participate further in the procurement. *E-Systems, Inc.*, B-188084, March 22, 1977, 77-1 CPD 201. Thus, in *LaBarge, Inc.*, B-190051, January 5, 1978, 78-1 CPD 7, we concurred with the Army's rejection of LaBarge's entire proposal as late because LaBarge failed to respond timely to a solicitation amendment which added a line item to the schedule when only one aggregate award was to be made. We viewed LaBarge as having failed to submit a timely offer for the minimum of what could be awarded. CSI's initial proposal, however, did respond to what was minimally acceptable and its proposal was considered by the IRS to be within the competitive range; CSI survived the initial round and was free in our view to make or to submit an alternate best and final offer which it believed would enhance its competitive position. We are aware of nothing which precluded CSI from doing so, provided it was willing to take the risk that the changes might result in rejection of its proposal. See *Northrop Services, Inc., supra; Electronics Communications, Inc.*, 55 Comp. Gen. 636 (1976), 76-1 CPD 15, where the changes made rendered a theretofore acceptable proposal unacceptable.

Moreover, Control Data has not shown that it suffered any legal prejudice as a result of CSI's action. Control Data should not have known before the closing date for receipt of best and final offers, and presumably did not know, who its competition was, or whether its competitors had offered all five or only some of the RFP line items. Control Data was afforded an opportunity to submit a best and final

offer and could have made any changes to its proposal which it believed necessary. Thus, it was placed at no disadvantage.

Finally, Control Data believes that IRS's review of the CSI best and final offer, which proposed to furnish Control Data equipment with Control Data maintenance, was inadequate. By accepting at face value CSI's agreement in its best and final offer to meet the IRS's requirements, Control Data says the IRS accepted proposals for the three additional systems which did not include, as required in the words of the RFP:

> A detailed statement of the offeror's ability to meet each of the mandatory support requirements [covering maintenance] and reference(s) to the technical documentation which substantiate the claim must be provided * * *.

Moreover, Control Data believes that the IRS's failure to require CSI to explain its maintenance proposal led to discussions after award since it was only then that the IRS learned that CSI had no maintenance agreement with Control Data. Evidently, CSI assumed that the IRS could order maintenance from Control Data under its Federal Supply Schedule (FSS) Contract, although there was no guarantee that Control Data would continue to service the types of equipment involved under the FSS for the duration of CSI's contract. (Control Data has since agreed to provide maintenance.)

CSI offered the same type of printers, card punches, and card printers which Control Data offered, and indeed, had been furnishing for a number of years. CSI bound itself to furnish Control Data maintenance. There is no apparent reason why the IRS should have questioned CSI's proposal in this regard. While the RFP required technical documentation to substantiate CSI's proposal, it is well settled that an agency may not reject a proposal which fails to furnish required information if that information is not actually needed to evaluate its offer. In the circumstances, we view Control Data's complaint as principally questioning CSI's ability to meet its agreement to furnish Control Data maintenance, thus disputing the IRS's affirmative determination of CSI's responsibility. However, it is well settled that this Office will not review such determinations except in circumstances which are not present in this case. *Central Metal Products, Inc.*, 54 Comp. Gen. 66 (1974), 74–2 CPD 64.

4. Acceptability of CSI Disk and Tape Equipment

Further, Control Data asserts that the CSI disk and tape equipment (offered in CSI's initial proposal) did not meet an RFP requirement for "formally announced" equipment which was "fully proved and tested."

The requirement for "formally announced" equipment is contained in paragraph E.10 of the RFP, which provided:

> The equipment proposed in response to this solicitation * * * must have been formally announced for marketing purposes on or before the closing date [for receipt of proposals] and be capable of a demonstration * * *.

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Paragraph E.10 addresses the prospect that the IRS otherwise might receive offers proposing to furnish equipment which was not yet fully developed. That the IRS would not accept such an offer is confirmed by its answer to a written question submitted before the closing date for receipt of initial proposals. Offerors were advised that:

> Formally announced means announced by the offeror to the "market place" or public with notice that equipment is in production, has been fully tested and that orders are being accepted. Proposals submitted to other Government Agencies do not necessarily constitute "formally announced."

Control Data complains that the CSI-proposed disk and tape systems were not formally announced. In fact, Control Data indicates that it (a) had never heard of a CSI disk system compatible with the Control Data 3500, which is to be supported, before this procurement, and (b) has been unable to find any formal announcement of the CSI-proposed Telex 6803-1 tape controller for use with 3500 series computers. As Control Data points out, there is no evidence in the record that the IRS considered whether the CSI equipment was formally announced until after Control Data had filed its protest. As further support for its assertion, Control Data says in effect that the systems could not have been formally announced because the delivery requirements were relaxed after award, evidencing in Control Data's view that the systems had not yet been fully tested.

However, the IRS insists that in fact the CSI equipment was announced. Regarding the two items of equipment in question, the IRS says the CSI 5000 Disk Controller (which CSI offered with its disk system) was announced as available for use with Control Data 3000 series equipment in a press release dated one day before the closing date for receipt of proposals. The IRS treats the other item—the CSI tape controller—as similar to a related "formally announced" Telex controller. Moreover, the IRS argues, the disk and tape controllers were only components of the disk and tape systems, and it was not the IRS's intention that paragraph E.7.1.1 should require that a vendor have announced each piece of equipment which made up a system.

In our decision in *Intermem Corporation*, B-188910, December 15, 1977, 77-2 CPD 464, we considered the meaning of the phrase "announced, commercially available" in a similar context and concluded such language did not require a published announcement (*e.g.*, through trade journals) if in fact the equipment was available and was being offered for sale. The IRS could have but did not use that phrase in this RFP. Instead, it required "formally announced" equipment capable of demonstration, a choice of language which in contrast with the phrase "announced, commercially available" required some kind of specific, *i.e.*, "formal," announcement.

The IRS has produced a copy of the CSI press release which is on a CSI letterhead, and which purports to announce the availability of both systems for use with Control Data 3000 series equipment. As stated, the document is dated one day before the closing date for receipt of initial proposals. We cannot conclude, therefore, that this equipment was not formally announced as required by the RFP.

5. Benchmark-Related Issues

KET complains that the IRS improperly reserved to itself the right after best and final offers to benchmark equipment without defining the nature of the benchmark in advance and without allowing IRS Control Data 3500 series equipment to be used to support the test. In KET's view, any such test should be conducted *before* best and final offers so that offerors may take the results of their tests into consideration in their final proposals and correct deficiencies if there are any.

The provision complained of was set out as paragraph E.7.1.1 of the RFP, which states:

> At the Government's option, those responsive and responsible vendors may be required to demonstrate in a pre-contract award operational test that any equipment offered is indeed plug-to-plug compatible with the [Control Data] equipment and operates so as to meet the requirements called for in Section F of this document. The test will be conducted at other than an IRS site. After contract award and upon installation, the thirty day acceptance test defined in E.7.2. below shall be conducted.

We do not share KET's view that post-closing benchmarking should be forbidden altogether. Benchmarking may impose a significant cost burden on offerors, as noted in our decision in *ADP Network Services Inc.*, 59 Comp. Gen. 444 (1980), 80-1 CPD 339. To the extent that agencies by limiting testing to firms tentatively selected for award, can reduce the cost other vendors would otherwise incur, we see no basis for objection to such a procedure. *Cf. CompuServe Data Systems, Inc.*, B-195982.2, May 14, 1981, 60 Comp. Gen. 468, 81-1 CPD 374, indicating that postclosing benchmarking is likely to prove inappropriate in the majority of cases. In this regard, we view RFP paragraph E.7.1.1 as limited in scope—as permitting testing to determine whether the equipment offered by a tentatively selected awardee would function when connected to a Control Data 3500 computer and whether while connected it would perform the specific functions described in the specification. Also, we do not find objectionable the fact that there may have been some difficulty encountered during the test in connecting CSI's equipment to the 3500 computer since CSI was able to satisfactorily connect the equipment, which was the purpose of the test.

Regarding KET's view that the benchmark requirement was not

adequately defined, we know of no legal basis for requiring that the specific content of a benchmark be published in advance for the benefit of offerors who may not participate in it. Further, and contrary to KET's fears, we do not believe the IRS could have rejected equipment because it did not successfully accomplish a task requested during the benchmark, unless the ability to do that task was identified as a salient characteristic in the RFP or unless the IRS first reopened negotiations with all offerors and amended the RFP to require the capability to perform that task. Likewise, contrary to KET's belief, the IRS could not reject an offeror's equipment if it failed to perform a test because of some peculiarity of the 3500 computer used to support the test since the IRS permitted offerors to select any Control Data 3500 to support the test.

Finally, KET argues that the IRS unreasonably refused to permit the acceptability of proposed equipment to be shown through simulation, or alternatively, to make IRS Control Data 3500 equipment available to support such a test. Instead, the IRS required in the solicitation that vendors make their own arrangements.

In a prior decision involving these parties, we sustained similar complaints by KET regarding an IRS-required benchmark. *KET, Incorporated*, 58 Comp. Gen. 38 (1978), 78-2 CPD 305. Although the IRS professes to see no reason why it should accede to KET's view and make its equipment available, we concluded in our prior decision that the IRS's insistence that KET furnish CDC 3500 equipment to support the test was inconsistent with the Government's statutory duty to seek maximum competition. We note, in this regard, that KET is only saying that the IRS is requiring that a test be performed using specific supporting test apparatus (*i.e.*, a Control Data 3500 system) which due to limited availability is readily available only at the IRS.

We do not believe, however, that KET can complain without showing that it was in fact unable to perform the benchmark as provided in the solicitation. CSI apparently used facilities at Walter Reed Medical Center to run its benchmark. KET has not shown that it could not have made similar arrangements, as it eventually did in connection with the cited earlier case.

6. Other Issues

Control Data complains that the delivery schedule was relaxed for CSI's benefit and that the IRS improperly failed to take into account overlapping equipment rental in computing expected costs for CSI's all-or-none alternative proposal.

Regarding overlapping costs, we have indicated generally that costs relating to conversion from an incumbent contractor's system to a new contractor's system must be identified in the RFP evaluation criteria if they are to be considered. *Informatics, Inc.*, B-194734, August 22, 1979, 79-2 CPD 144; *Computer Data System, Inc.*,

B-187892, June 2, 1977, 77-1 CPD 384. Since such costs were not identified here, this portion of Control Data's protest is denied.

With respect to the relaxed delivery scheduled, Control Data says that had it known that the schedule would be relaxed, it could have offered significantly lower pricing.

The IRS responds by stating that apart from an inadvertent error in preparing the original CSI contract documents—which the IRS says would have been corrected had it not been overtaken by events after award—the changes made arose as matters of contract administration which should not be considered by our Office. The IRS attributes slippage in the delivery schedule to the need for site preparation (such as installation of electrical wiring) and to a need to accommodate post-award changes by CSI in the physical (including electrical) configuration of its equipment.

Our examination of the record indicates that the problem of schedule slippage concerns primarily the disk and tape equipment. In this respect, however, the record fails to support Control Data's contention that the IRS actually knew or should have known before making award to CSI that the schedule for installation of the tape and disk equipment would slip. It has not been shown, therefore, that the IRS relaxed its schedule requirement in making award to CSI or made award with the intention of altering the schedule. *A & J Manufacturing Company*, 53 Comp. Gen. 838 (1974), 74-1 CPD 40.

As stated earlier, the protests are denied in part and dismissed in part.

[B-201530]

Compensation—Premium Pay—Sunday Work Regularly Scheduled—Any Period of Work Performance on Sunday—Effect on Entitlement

Midnight shift employees at US Army Communications Command, Detroit, whose tour of duty is from 2345 Sunday to 0745 Monday are entitled to Sunday premium pay for entire 8-hour period since there is no requirement in 5 U.S.C. 5546(a) (1976) for performance of minimum period of Sunday work as condition entitlement to premium pay benefits.

Matter of: Sunday premium pay—Employees at US Army Communications Command, Detroit, June 30, 1981:

The Chief, Accounting and Finance Division, US Army Tank-Automotive Command, Warren, Michigan, has requested an advance decision whether seven general schedule civilian employees at the US Army Communications Command, Detroit, whose regularly scheduled tours of duty include duty from 2345 Sunday to 0745 Monday, are entitled to Sunday premium pay for that entire 8-hour period. The answer is yes.

The facts are as follows. The tour of duty of the midnight shift

at the US Army Communications Command, Detroit, is from 2400 to 0800 6 days a week, and 2345 Sunday to 0745 Monday. The Sunday schedule was adjusted to ensure continuity of operations between the afternoon and midnight shifts. The midnight shift employees now are claiming entitlement to premium pay for the entire 8-hour period of duty beginning at 2345 Sunday. No Sunday premium pay has been paid to any of the employees.

Entitlement to Sunday premium pay is based on 5 U.S.C. § 5546(a) (1976), which provides:

> An employee who performs work during a regularly scheduled 8-hour period of service which is not overtime work as defined by section 5542(a) of this title a part of which is performed on Sunday is entitled to pay for the entire period of service at the rate of his basic pay, plus premium pay at a rate equal to 25 percent of his rate of basic pay.

The position of the Command has been that the regulation implementing the statute, 5 CFR § 550.171 (1980), and the Standard Army Civilian Payroll System, Chapter 3, paragraph 3–6(f), authorize premium pay only for each complete hour of Sunday work. Section 550.171 of title 5 of the Code of Federal Regulations provides:

> An employee is entitled to pay at his rate of basic pay plus premium pay at a rate equal to 25 percent of his rate of basic pay for each hour of Sunday work which is not overtime work and which is not in excess of eight hours for each regularly scheduled tour of duty which begins or ends on Sunday.

In 46 Comp. Gen. 158 (1966), we considered the entitlement to Sunday premium pay of wage board employees who began their weekly tour of duty with an 8-hour shift from 11:30 p.m. Sunday through Monday morning, and ended it with a shift beginning at 11:30 p.m. Saturday through Sunday morning. In concluding that they were entitled to Sunday premium pay for both 8-hour periods under the similar authority for wage board employees now contained at 5 U.S.C. § 5544(a) (1980) we stated that there was no requirement for performance of a minimum period of Sunday work as a condition of entitlement to the premium pay benefits provided by that section. See 46 Comp. Gen. at 161, *supra.*

The regulation, 5 CFR § 550.171, does not conflict with this interpretation of the statute. "Sunday work" is defined in 5 CFR § 550.103(o) (1980) as:

> * * * *all work* during a regularly scheduled tour of duty within a basic workweek when any part of that work is performed on Sunday. [Italic supplied.]

Thus, by using the phrase, "for each hour of Sunday work," 5 CFR § 550.171, in accordance with the statute, authorizes payment for the entire tour of duty if any part occurs on Sunday.

Accordingly, the seven employees on the midnight shift at the US Army Communications Command, Detroit, are entitled to Sunday premium pay for their entire 8-hour tour of duty from 2345 Sunday to 0745 Monday.

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An employee seeks reimbursement of $129 in check overdraft charges which resulted from the inadvertent failure of the Federal Aviation Administration to deposit the employee's paycheck with the employee's bank. The failure was due to the processing of the employee's address change one pay period earlier than requested. The employee may not recover the $129 since, absent statutory authority to the contrary, the Government is not liable for the unauthorized acts of its officers and employees even though committed in the performance of their official duties. *German Bank* v. *United States*, 148 U.S. 573 (1893) ---------- 450

CIVIL SERVICE REFORM ACT OF 1978
Volunteer services
Acceptance. (*See* **VOLUNTARY SERVICES, Prohibition against accepting, Statutory exceptions**)

CLAIMS
Assignments
Contracts
Notice of assignment
To other than Federal agencies, etc. involved
Assignment of claim to proceeds under Federal Government contract must be recognized by contracting agency and all other Federal Government components including Internal Revenue Service (IRS), if assignee complied with filing and other requirements of Assignment of Claims Act, 31 U.S.C. 203, even though assignee failed to perfect assignment under Uniform Commercial Code and similar State provisions. 56 Comp. Gen. 499, 37 *id.* 318, 20 *id.* 458, B–170454, Aug. 12, 1970, and similar cases are overruled in part ---------- 510
Set-off. (*See* **SET-OFF, Contract payments, Assignments**)
False. (*See* **FRAUD, False claims**)
Statutes of limitation. (*See* **STATUTES OF LIMITATION, Claims**)

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COMMERCE DEPARTMENT
Economic Development Administration
Business loans
Two notes representing one loan
Guaranteed and unguaranteed
Different interest rates Page

Economic Development Administration (EDA) has authority to allow guaranteed loans to be represented by two notes, with fully guaranteed note—representing 90 percent of loan amount, having a lower interest rate than unguaranteed note—representing remaining 10 percent of loan. Notwithstanding statements to contrary in B-194153, Sept. 6, 1979, in which we said two-note procedure could be used only if substantive terms of notes, including maturity dates and interest rates, were same, EDA is not prohibited from using split interest rates provided other substantive terms remain same 464

COMPENSATION
Backpay. (*See* **COMPENSATION, Removals, suspensions, etc., Backpay**)
Checks
Delivery to banks, etc. for deposit. (*See* **CHECKS, Delivery, Banks, Salary payments**)
Downgrading
Saved compensation
Increases in saved salary

Civil Service Reform Act repealed some salary protection benefits for downgraded employees and enacted new ones. FAA Air Traffic Controller, downgraded after effective date of changes but erroneously advised he was entitled to more liberal repealed benefits, claims unjustified personnel action and backpay. Claim must be denied. Government is not bound by erroneous advice and it does not constitute unjustified personnel action. FAA had no authority to grant repealed benefits and no alternative but to apply law in effect at time of downgrading 417

Overtime
Early reporting and delayed departure
De minimis rule

Guards at Rocky Mountain Arsenal claim overtime compensation for time spent in drawing out weapons and equipment. Where record does not establish that duties required more than 10 minutes to perform, the claim may not be allowed under 5 U.S.C. 5542. Preshift duties that take 10 minutes or less to perform may be disregarded as being *de minimis* 523

Fair Labor Standards Act
Claims
Settlement authority

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

COMPENSATION—Continued
Overtime—Continued
Fair Labor Standards Act—Continued
Claims—Continued
Settlement authority—Continued Page

and hours. Once employee has provided sufficient evidence of hours worked, burden shifts to employing agency to come forward with evidence to contrary 354

Fair Labor Standards Act *v.* other pay laws

An interpretation of 5 U.S.C. 5542(b)(2)(B)(iv) that travel to a training course which is scheduled by employee's agency does not qualify as compensable travel under that section has no relation to whether such traveltime is hours worked under the FLSA 434

Fractional hours
De minimis doctrine
Not applicable

Guards claim they daily performed 15 minutes of preshift duties incident to drawing out weapons and equipment. Where agency has failed to record overtime hours as required by Fair Labor Standards Act, part of claim may be allowed on basis that the record creates a just and reasonable inference that security guards reported to work an average of 7½ minutes prior to guard mount 523

Statute of limitations

This Office has previously held that 6-year limitations period contained in 31 U.S.C. 71a and 237 applies to claims arising under section 204(f) of the FLSA, 29 U.S.C. 201, 204(f) (1976). Thus, where agency appeals OPM/FLSA compliance order to this Office, the 6-year limitations period continues to run until claim is received in this Office. Therefore, any portion of award under OPM compliance order which accrued more than 6 years prior to filing of claim in this Office may not be paid 354

Time spent for acquiring required uniforms
Not compensable overtime

Security police employees of the United States Government Printing Office who, as a result of their work schedule, must acquire their uniforms during their off-duty hours are not entitled to overtime compensation for the time spent in acquiring their uniforms. The time involved does not constitute "overtime work" for the purposes of 5 U.S.C. 5544 (1976). In addition, the time spent by the employees is not compensable as overtime hours worked under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq* 431

Traveltime
Nonworkday travel
Employee *v.* agency scheduling

If an agency allows an employee to schedule travel and the employee travels during corresponding hours on a nonworkday, the agency may not subsequently defeat the employee's entitlement to overtime compensation by stating that the travel should not have been scheduled in the manner the employee chose. If, however, the employee travels by a route or at a time other than that directed by the agency, or if she travels by privately owned vehicle as a matter of personal preference, then a constructive traveltime of the agency preferred schedule or mode of travel must be used to determine the amount of hours worked under FLSA 434

COMPENSATION—Continued
Overtime—Continued
Fair Labor Standards Act—Continued
Traveltime—Continued
Nonworkday travel—Continued
Training courses Page

Army civilian intern who traveled to training on nonworkday at time and via route selected by agency is entitled credit for hours worked under the Fair Labor Standards Act (FLSA) for travel time during hours corresponding to regular work hours. Where intern, for personal reasons, traveled at time or via route other than time or route selected by agency, she will be credited with lesser of (1) that portion of *actual* travel time which is considered to be working time, or (2) that portion of *estimated* travel time which would have been considered working time had she traveled at time and by route selected by Army 434

Government Printing Office employees. (*See* **GOVERNMENT PRINTING OFFICE, Employees, Overtime compensation**)

Preliminary and postliminary duties. (*See* **COMPENSATION, Overtime, Early reporting and delayed departure**)

Premium pay
Sunday work regularly scheduled
Any period of work performance on Sunday
Effect on entitlement

Midnight shift employees at US Army Communications Command, Detroit, whose tour of duty is from 2345 Sunday to 0745 Monday are entitled to Sunday premium pay for entire 8-hour period since there is no requirement in 5 U.S.C. 5546(a) (1976) for performance of minimum period of Sunday work as condition of entitlement to premium pay benefits 559

Removals, suspensions, etc.
Backpay
Appointment delay

Individual's appointment as Deputy U.S. Marshal was delayed after agency sought to remove his name from list of eligibles on grounds he was over agency age limitation for appointment. Although Civil Service Commission ruled individual must be considered for appointment, agency retained discretion to appoint. Since individual has no vested right to appointment, he is not entitled to retroactive appointment, backpay, or other benefits under the Back Pay Act 442

Traveltime
Hours of work under FLSA

Employee, nonexempt under Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* (1976), travelled for 6 hours on a nonworkday during his corresponding duty hours. Although such time is hours of work under FLSA, since he had a holiday off and he only worked 38 hours under FLSA during that workweek and he has already been compensated for 40 hours under title 5, U.S. Code, he is not entitled under FLSA to 6 hours pay at his regular rate in addition to the 40 hours basic pay he has received 493

CONTRACTS
Awards
Advantage to Government
Requirement Page

Solicitation to maintain grounds maintenance equipment, which allowed bidders to offer special discounts for off-season work as well as prompt payment discounts, but provided for evaluation of only prompt payment discount in determining low bid, resulted in award that did not reflect most favorable cost to Government for total work to be performed, *i.e.*, seasonal and off-season work, and thus violated statute governing advertised procurements 495

Delayed awards
After bid acceptance period
Reasonableness of delay

Protest that award was unreasonably delayed and bid acceptance period extensions were improperly requested is denied where delay was relatively short and resulted from administrative problems which agency reasonably believed required resolution in order to make award 499

Federal aid, grants, etc.
By or for grantee
Minority business utilization
Price reasonableness

Solicitation provided that, if any bidder offered reasonable price and met female-owned business utilization goal of one-tenth of 1 percent, grantee would presume conclusively that any bidder requesting waiver of goal would be ineligible for waiver and award. Grantee, with concurrence of grantor, arbitrarily rejected low bid ($243,000) and accepted second low bid ($343,875) solely on reasonableness of second low bid without any consideration of reasonableness of low bid and insignificant impact that goal had on overall cost of work 535

Review
Timeliness of complaints

General Accounting Office (GAO) will no longer review complaints regarding procurements by Federal grantees which are not filed within reasonable time. Prompt filing is required so that issues can be decided while it is still practicable to take action if warranted. B–188488, Aug. 3, 1977, and B–194168, Nov. 28, 1979, overruled in part. This decision was later extended by 61 Comp. Gen. —— (B–201613, Oct. 6, 1981) 414

Contention that grantee's solicitation provisions are improper will not be considered on merits since basis of complaint was not filed within reasonable time. To be considered by General Accounting Office, complaint should have been filed prior to bid opening 535

Multiple *v.* single procurements
Single procurement
Justification

Protest that request for proposals (RFP) for automatic data processing peripheral equipment was deficient because agency permitted all-or-none proposals knowing there was little prospect of competition for several line items is denied. Offeror would not have been prejudiced by submitting proposal to furnish only some line items since agency limited all-or-none pricing to alternate proposal and included RFP requirement for cost and pricing data to insure that firm which offered to furnish items in question did not unbalance all-or-none bid 548

CONTRACTS—Continued
Awards—Continued
Notice
To unsuccessful bidders
Grant procurements Page

GAO is not aware of any regulation requiring notice to unsuccessful bidders in procurements by Federal grantees; even in direct Federal procurement, lack of notice constitutes mere procedural irregularity which, in absence of prejudice, does not affect otherwise proper award. B-188488, Aug. 3, 1977, and B-194168, Nov. 28, 1979, overruled in part. This decision was later extended by 61 Comp. Gen. —— (B-201613, Oct. 6, 1981) 414

Protest pending

General Accounting Office will not question agency decision to make award prior to resolution of protest where decision was made in accordance with applicable regulations 504

Small business concerns
Size
Appeal
Contract termination pending awardee's appeal

Awardee's filing of request for reconsideration with Small Business Administration Size Appeals Board provides no basis to withdraw recommendation that improperly awarded contract be terminated since for purposes of determining propriety of award, reliance on Size Appeals Board's initial determination is appropriate 373

Foreign-made component use

Challenge to status of small business furnishing either item with foreign components or foreign end product must be resolved by Small Business Administration, rather than General Accounting Office, so protest on basis that firm does not qualify for set-aside will be dismissed 397

To other than lowest bidder
Minority business goals

Solicitation provided that, if any bidder offered reasonable price and met female-owned business utilization goal of one-tenth of 1 percent, grantee would presume conclusively that any bidder requesting waiver of goal would be ineligible for waiver and award. Grantee, with concurrence of grantor, arbitrarily rejected low bid ($243,000) and accepted second low bid ($343,875) solely on reasonableness of second low bid without any consideration of reasonableness of low bid and insignificant impact that goal had on overall cost of work 535

"Benchmarks". (*See* **CONTRACTS, Specifications, Tests, Benchmark**)

Buy American Act
Foreign products
End product *v.* components
Small business set-asides

Furnishing of foreign product by small business does not automatically negate its status as small business concern; firm may qualify as small even though item is not completely of domestic origin if it makes significant contribution to manufacture or production of contract end item 397

CONTRACTS—Continued

Competitive system

Restrictions on competition

Prequalification of offerors, etc.

Propriety Page

Failure of procuring agency to institute formal qualification procedure for known potential supplier, or to act in conjunction with Air Force in its qualification process of same supplier for similar parts for Air Force, contravened Defense Acquisition Regulation 3–101(d), which requires contracting officers to take action to avoid noncompetitive procurements 361

Hazardous materials' procurements

Compliance with Department of Transportation regulations. (*See* **TRANSPORTATION DEPARTMENT, Regulations, Hazardous materials**)

In-house performance *v.* contracting out

Cost comparison

Protest against propriety of cost evaluation performed under Office of Management and Budget Circular No. A–76 is dismissed where protester did not exhaust available administrative appeal process 372

Negotiation

Administrative determination

"Determination and Findings" by agency head

Department of Defense

Delegation of authority

Even though 10 U.S.C. 2302(1) does not list Secretary, Under Secretaries, or Assistant Secretaries of Defense as officials authorized to make D&F's justifying negotiation under 10 U.S.C. 2304(a)(16), statutes creating and reorganizing Department of Defense and expanding power of the Secretary of Defense, and legislative history of those statutes, make it clear that those officials may make such D&F's 341

Competition

Discussion with all offerors requirement

Actions not requiring

Clarification requests

Contracting agency may seek clarification of proposals from offerors, and when contacts between agency and offerors are for limited purpose of seeking and providing clarification, discussions need not be held with all offerors in competitive range 468

Equality of competition

Lacking

Time and materials contracts

Evaluation scheme for award of time and materials contract which does not take into account reimbursable material handling costs when not included in basic labor rates violates fundamental principle that all competitors must be evaluated on comparable basis since offerors who do include these costs in hourly labor rates will be evaluated on basis of total cost to Government while others will not. Scheme is further defective because it may not indicate which offer does represent lowest overall cost to Government 487

CONTRACTS—Continued
Negotiation—Continued
Determination and findings
Propriety of determination Page
Contrary to protester's arguments, facts show that D&F and supporting documents contained all required information. Protester argues that an economic analysis was not performed to establish cost benefit of expanading productive capacity rather than stockpiling items. Record shows that it was performed. Degree to which Under Secretary considered analysis in his decision will not be reviewed 341
Justification
D&F justifying negotiation under 10 U.S.C. 2304(a) (16) was signed initially by Principal Deputy to Under Secretary of Defense for Research and Engineering, an official not authorized to make such D&F. D&F was reexecuted later by Under Secretary, an authorized official. Protester argues that Under Secretary did not make D&F, but merely "rubber stamped" it. Where, as here, there is written record of reasons for decision, GAO will not probe mental processes of decision-maker to ascertain degree of his personal involvement in decision. Therefore, we find that Under Secretary made decision 341
Late proposals and quotations
Modification of proposal
Expanded best and final offer
Acceptability
Agency could consider all-or-none best and final offer notwithstanding that three of five line items were not included in offeror's initial proposal since initial proposal was included in competitive range, offerors may alter their proposals in best and final offer and agency found that proposal with respect to additional items was technically acceptable 548
National emergency authority
Sole source negotiation
Maintenance of industrial mobilization base
Our review of determinations to negotiate under 10 U.S.C. 2304(a)(16) is limited to review of whether determination is reasonable given findings. We will not review findings, since they are made final by statute. Where findings show that mobilization base is best served by having two separate sources for item, protester has previously been sole supplier, and there is only one other qualified producer, then sole-source award to that producer is reasonable 341
Offers or proposals
Unacceptable proposals
Precluded from reinstatement
When offeror has been given opportunity to clarify aspects of proposal with which contracting agency is concerned, and responses lead to discovery of technical unacceptability, agency has no obligation to conduct further discussions and may drop proposal from competitive range without allowing offeror to submit revised proposal 468
Reopening
What constitutes
When information is requested and provided which is essential to determining acceptability of proposals, negotiations have been reopened and discussions have occurred; actions of the parties, not characterizations of contracting officer, must be considered 468

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals
"All or none" proposals
Acceptance on alternative basis
Effect on competition Page

Protest that request for proposals (RFP) for automatic data processing peripheral equipment was deficient because agency permitted all-or-none proposals knowing there was little prospect of competition for several line items is denied. Offeror would not have been prejudiced by submitting proposal to furnish only some line items since agency limited all-or-none pricing to alternate proposal and included RFP requirement for cost and pricing data to insure that firm which offered to furnish items in question did not unbalance all-or-none bid 548

Sole-source basis
Authority
Awards in interest of national defense

Argument that letter contract is improper here because there is no real urgency will not be considered, since we have found that sole-source award was proper. Therefore, form of contract used could not prejudice protester 341

Parts, etc.
Competition availability

Failure of procuring agency to institute formal qualification procedure for known potential supplier, or to act in conjunction with Air Force in its qualification process of same supplier for similar parts for Air Force, contravened Defense Acquisition Regulation 3-101(d), which requires contracting officers to take action to avoid noncompetitive procurements 361

Payments
Assignments. (*See* **CLAIMS, Assignments, Contracts**)
Conflicting claims
Assignee *v.* I.R.S.

Assignment of claim to proceeds under Federal Government contract must be recognized by contracting agency and all other Federal Government components including Internal Revenue Service (IRS), if assignee complied with filing and other requirements of Assignment of Claims Act, 31 U.S.C. 203, even though assignee failed to perfect assignment under Uniform Commercial Code and similar State provisions. 56 Comp. Gen. 499, 37 *id.* 318, 20 *id.* 458, B-170454, Aug. 12, 1970, and similar cases are overruled in part 501

Protests
Award approved
Prior to resolution of protest

General Accounting Office will not question agency decision to make award prior to resolution of protest where decision was made in accordance with applicable regulations 504

Court injunction denied
Effect on merits of complaint

Although denial of motion for preliminary injunction does not go to merits of case, when arguments presented to court deal with identical issues raised in protest, General Accounting Office (GAO) will consider court's findings 468

CONTRACTS—Continued
Protests—Continued
Court-solicited aid
Scope of GAO review Page
Where material issues of protest are before court of competent jurisdiction which has issued preliminary injunction and which has asked for General Accounting Office (GAO) opinion, GAO will consider findings of fact and conclusions of law made by court, but will conduct independent review of matter 341
Timeliness of protest determination
GAO will consider untimely protests on merits where material issues of protest are before court and court has asked for GAO decision. GAO will also provide court with opinion as to timeliness of issue. Here, protest that signer of Determination and Findings (D&F) had no authority to make D&F was timely, since filed within 10 working days of knowledge of signing of D&F 341
Interested party requirement
Bidder refusing bid acceptance time extension
Where low bidder refuses to extend its bid when Government requests such an extension, bidder loses standing to protest subsequent award to second low bidder 378
Unreasonable award delay alleged
Resolicitation requested
Where protester alleges unreasonable delay in making award, which required it to decline to extend bid accemptance period, it is interested party under General Accounting Office Bid Protest Procedures since nature of issue and requested remedy of cancellation and resolicitation are such that protester has established direct and substantial interest 499
Timeliness
Significant issue exception
When protest involves questions regarding timing of Government-supervised benchmark which have not previously been considered by GAO, matter is significant and will be considered even though protest is untimely 468
Solicitation improprieties
Grant procurements
Complaint alleging that Federal grantee's specifications for particular type of bus washer unduly restrict competition, filed more than 2 months after bid opening, was not filed within reasonable time and therefore will be dismissed. In order to be considered filed within reasonable time, future complaints based on alleged improprieties in grantee solicitations which are apparent prior to bid opening or receipt of initial proposals must be filed in accordance with time standards established for bid protests in direct Federal procurements. B–188488, Aug. 3, 1977, and B–194168, Nov. 28, 1979, overruled in part. This decision was later extended by 61 Comp. Gen. —— (B–201613, Oct. 6, 1981) 414
Contention that grantee's solicitation provisions are improper will not be considered on merits since basis of complaint was not filed within reasonable time. To be considered by General Accounting Office, complaint should have been filed prior to bid opening 535

CONTRACTS—Continued

Solicitation

What constitutes

Essential information requirements Page

Procuring agency's letter to protester requesting "budgetary cost quote" did not amount to formal solicitation or request for quotations where letter did not advise protester of such essential Government requirements as time for delivery of procured items or cut-off date for submission of proposals and letter itself stated twice that it was merely request for "budgetary proposal" or "budgetary cost quote"---------- 361

Specifications

Failure to furnish something required

Information

Experience data of equipment offered

Invitation for bids' "Successful Commercial Operation" clause providing that no item of equipment would be acceptable unless equipment of approximately same type and class had operated successfully for at least one year appears to involve bid responsiveness and should have been satisfied by material submitted with bid. Even if clause is construed as relating to bidder's responsibility, it was not satisfied when preaward inquiry of equipment users disclosed that item would not be in use for one year until 2 months after award was made---------- 543

Restrictive

"All or none" bidding limitation

Protest that request for proposals (RFP) for automatic data processing peripheral equipment was deficient because agency permitted all-or-none proposals knowing there was little prospect of competition for several line items is denied. Offeror would not have been prejudiced by submitting proposal to furnish only some line items since agency limited all-or-none pricing to alternate proposal and included RFP requirement for cost and pricing data to insure that firm which offered to furnish items in question did not unbalance all-or-none bid---------- 548

Weight limitation

Hazardous materials

Protester's contention that Air Force 0.75-pound cylinder weight limitation is unduly restrictive of competition because Navy buys protester's 1.25-pound cylinder for similar use is denied. Navy determination that heavier cylinder meets its minimum needs does not preclude Air Force from considering particular use of equipment under operating procedures and conditions different from Navy---------- 548

Tests

Benchmark

After best and final offers

Propriety

Request for proposals provision allowing benchmark of tentatively selected equipment after closing date for best and final proposals is not in itself objectionable---------- 548

Reopening negotiations

If, in connection with Government-supervised benchmark, questions are likely to arise or additional information to be needed, benchmark is inherent part of negotiation process during which deficiencies must be identified and offerors given an opportunity to correct them. In this case, benchmark should precede best and final offers or agency should be prepared to reopen negotiations---------- 468

CONTRACTS—Continued
Specifications—Continued
Tests—Continued
Necessary amount of testing
Administrative determination Page

Protest that solicitation item description eliminates cylinder safety test requirements and allows use of cylinders not designed, manufactured, marked, or shipped in accordance with Department of Transportation (DOT) regulations on hazardous material is denied. Contracting activity has provided for adequate testing, and DOT regulations provide that material consigned to Department of Defense (DOD) must be packaged either according to DOT regulations or in container (cylinder) of equal or greater strength and efficiency, as required by DOD regulations. Contracting agency has determined that cylinders meet or exceed DOT requirements and need not apply for DOT exemption..... 504

Time and materials
Evaluation factors
Material handling costs
Not included in basic labor rates
Separate item for evaluation recommended

Evaluation scheme for award of time and materials contract which does not take into account reimbursable material handling costs when not included in basic labor rates violates fundamental principle that all competitors must be evaluated on comparable basis since offerors who do include these costs in hourly labor rates will be evaluated on basis of total cost to Government while others will not. Scheme is further defective because it may not indicate which offer does represent lowest overall cost to Government..... 487

CORPORATIONS
Legal Services Corporation
Lobbying

Legal Services Corporation (LSC) and its recipients organized a grass roots lobbying campaign in support of LSC reauthorization and appropriation pending before Congress, contending these activities are authorized by 42 U.S.C. 2996e(c)(2)(B) and 2996f(a)(5)(B)(ii). While these provisions allow LSC and recipients to provide testimony and appropriate comment to Congress concerning LSC legislation, they prohibit LSC and recipients from expending funds for grass roots lobbying activities..... 423

Appropriation prohibition
Moorhead Amendment

The Moorhead Amendment is a direct lobbying restriction included in the annual Legal Services Corporation (LSC) appropriation that prohibits LSC and recipients from expending Federal funds for grass roots lobbying activities. LSC has an obligation to implement this restriction and insure that its appropriations are not used for such lobbying activities... 423

COURTS
Judgments, decrees, etc.
Payment
Indefinite appropriation availability
Judgments against Government
"Front pay" Page

As a result of an employment discrimination suit brought by certain female employees, the Government Printing Office (GPO) was ordered in a court judgment to pay the plaintiffs back pay for past economic harm and an added increment of pay above that to which they were otherwise entitled, for continuing economic harm until a certain number of plaintiffs were promoted. The so-called award of "front pay" in this instance amounts to damages and should be paid from the permanent indefinite appropriations provided in 31 U.S.C. 724a. Agency appropriations are not available to pay compensation above the amount prescribed for the particular job level in question. 55 Comp. Gen. 1447 (1976) is distinguished.. 375

Res judicata
Subsequent claims

Since acquittal on criminal charges may merely involve a finding of lack of requisite intent or failure to meet the higher standard of proof beyond reasonable doubt, doctrine of *res judicata* does not bar the Government from claiming in later civil or administrative proceeding that certain items on employee's voucher were fraudulent..... 357

DEFENSE ACQUISITION REGULATION
Deviations
Approval authority
Transportation/storage of household effects

Protest that solicitation provisions which deviate from standard Defense Acquisition Regulation (DAR) clauses are improper because DAR Council approved only a "service test," rather than a deviation, is without merit where record shows that, regardless of how modifications were characterized, DAR Council carefully reviewed request for change and, in approving service test, met all requirements for approving actual deviation..... 501

Negotiated procurements
Competitive basis to maximum extent possible
Breakout of parts

Failure of procuring agency to institute formal qualification procedure for known potential supplier, or to act in conjunction with Air Force in its qualification process of same supplier for similar parts for Air Force, contravened Defense Acquisition Regulation 3-101(d), which requires contracting officers to take action to avoid noncompetitive procurements.. 361

DEFENSE DEPARTMENT
Procurement
Hazardous materials
Department of Transportation regulations. (*See* **TRANSPORTATION DEPARTMENT, Regulations, Hazardous materials, Compliance determination**)

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DELEGATION OF AUTHORITY
Heads of agencies to subordinates
Contract matters Page

Even though 10 U.S.C. 2302(1) does not list Secretary, Under Secretaries, or Assistant Secretaries of Defense as officials authorized to make D&F's justifying negotiation under 10 U.S.C. 2304(a)(16), statutes creating and reorganizing Department of Defense and expanding power of the Secretary of Defense, and legislative history of those statutes, make it clear that those officials may make such D&F's 341

DEPARTMENT OF ENERGY
Advisory committees
Establishment
Energy Policy Task Force
Federal Advisory Committee Act compliance

The Energy Policy Task Force (EPTF), a Department of Energy (DOE) advisory committee, was not legally established on the date of its first meeting because the Secretary of Energy had not eompleted consultation with General Services Administration (GSA), published determination notice, or filed its charter with the Library of Congress or congressional committees with "legislative jurisdiction" at that time as required by the Federal Advisory Committee Act (FACA). But it is thought DOE officials made good faith attempt to follow approval and filing procedures. 5 U.S.C. App. I, sec. 9 (1976); OMB Circular No. A-63, Revised (1974) 386

Approval and coordination functions

FACA legislative history shows requirement for agency head approval of advisory committee, after consultation with Office of Management and Budget (OMB), was developed to limit growing number of advisory committees. Since coordination and approval functions, although late, were duly performed by both GSA and OMB, with final decision made to authorize creation of EPTF, responsible officials had made determination this advisory committee was necessary, so basic concerns motivating Congress to establish these requirements had been addressed.. 386

Charter statement requirements

EPTF charter does not describe in sufficient detail its objectives and scope of activity or its duties as required by sections 9(c)(B) and (F) of FACA since no mention is made of the National Energy Policy Plan, even though development of a proposed plan is EPTF's sole function. Further, if EPTF's Plan drafting role gives it more than solely advisory functions, its charter should so state, citing authority given for those functions. Unless provided by statute or Presidential directive, advisory committees may be utilized solely for advisory functions under 5 U.S.C. App. I, sec. 9(b), but under 15 U.S.C. 776(a), DOE may be able to use advisory committee to perform some operational tasks 386

Membership balance requirements

All interests need not be represented or represented equally to meet FACA and Federal Energy Administration Act balance of membership requirements. Required standard must be judged on case-by-case determination depending on statute or charter creating committee. EPTF does not achieve FACA minimum balance of interest or represent all interests required by Federal Energy Administration Act. Deficiency may be overcome by changing EPTF membership to achieve better balance of energy, environmental and consumer interests. 15 U.S.C. 776(a) (Supp. III, 1979); 5 U.S.C. App. I, secs. 5(b), (c) (1976) 386

DEPARTMENT OF ENERGY—Continued
Advisory committees—Continued
Establishment—Continued
Energy Policy Task Force—Continued
Federal Advisory Committee Act compliance—Continued
Notice requirements Page

FACA requirement for public notice of creation and objectives of advisory committee was met only minimally because first Federal Register notice, printed 8 days before first meeting of EPTF, gave only broad description of EPTF purpose without referring to its major function, i.e., preparation of the National Energy Plan draft. Congress and public had no access to EPTF charter or membership list prior to meeting 386

Expenditures
Propriety
Energy Policy Task Force

Review of EPTF expenditure information supplied by DOE indicates all funds utilized to date were for travel expenses of task force members or incurred in connection with recording of meeting transcripts and were charged to Office of Secretary's Budget for travel, salary and related expenses. Since each agency is held responsible by section 5 of FACA for providing support services for each advisory committee established by or reporting to it, the use of these funds for this purpose seems legitimate ... 386

DEPARTMENT OF TRANSPORTATION (*See* **TRANSPORTATION DEPARTMENT**)

DEPARTMENTS AND ESTABLISHMENTS
Lobbying
Anti-lobbying statutes

Despite Legal Services Corporation (LSC) contentions to the contrary, the lobbying restriction in section 607(a) of the annual Treasury, Postal Service, and General Government Appropriation Act, that prohibits the use of funds in all appropriation acts for any given year, applies to funds appropriated for LSC. LSC is required to implement this provision and insure that no appropriated funds are used by the Corporation or recipients to engage in grass roots lobbying 423

Services between
Reimbursement
Real property use
"Interdepartmental waiver" doctrine

Dept. of Interior requests GAO's views on applicability of the "interdepartmental waiver" doctrine when an executive department relinquishes a withdrawn area under the Federal Land Policy and Management Act of 1976 (Act) (43 U.S.C. 1701 *et seq.* (1976)) and on proposed amendment to the public land regulations (43 C.F.R. 2374.2(b)). Doctrine ordinarily requires that restoration costs for property of one department which has been used by another department be borne by the department retaining jurisdiction over the property since restoration would be for future use and benefit of loaning department. Interior does not benefit in the sense contemplated by the doctrine from restoration of public lands. Accordingly, doctrine does not apply to withdrawn property. 59 Comp. Gen. 93 (1979) is distinguished 406

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In 57 Comp. Gen. 664 (1978) we held, for purposes of reimbursement where fraud is involved, that each day of subsistence expenses is a separate item of pay and allowances. That rule is applicable to present claim which has not been finally decided on merits and is pending on appeal. Due to discrepancies in record, we remand claim to Air Force for calculation of amount of per diem allowable under that rule 357

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Fair Labor Standards Act

Employee filed Fair Labor Standards Act (FLSA) complaint and Office of Personnel Management (OPM) issued a compliance order requiring agency to pay 30 hours overtime compensation per year retroactive to May 1, 1974. Agency states that its records do not support award of 30 hours per year. General Accounting Office will not disturb OPM's findings unless clearly erroneous and the burden of proof lies with the party challenging the findings. Here, agency statement that it cannot find travel vouchers to support OPM award does not satisfy burden of proof. Under FLSA, each agency is responsible for keeping adequate records of wages and hours. Once employee has provided sufficient evidence of hours worked, burden shifts to employing agency to come forward with evidence to contrary 354

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Timeliness of complaints

Solicitation improprieties

Complaint alleging that Federal grantee's specifications for particular type of bus washer unduly restrict competition, filed more than 2 months after bid opening, was not filed within reasonable time and therefore will be dismissed. In order to be considered filed within reasonable time, future complaints based on alleged improprieties in grantee solicitations

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Jurisdiction—Continued
Grants-in-aid—Continued
Grants procurements—Continued
Timeliness of complaints—Continued
Solicitation improprieties—Continued Page

which are apparent prior to bid opening or receipt of initial proposals must be filed in accordance with time standards established for bid protests in direct Federal procurements. B-188488, Aug. 3, 1977, and B-194168, Nov. 28, 1979, overruled in part. This decision was later extended by 61 Comp. Gen. —— (B-201613, Oct. 6, 1981)..... 414

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General Accounting Office (GAO) will no longer review complaints regarding procurements by Federal grantees which are not filed within reasonable time. Prompt filing is required so that issues can be decided while it is still practicable to take action if warranted. B-188488, Aug. 3, 1977, and B-194168, Nov. 28, 1979, overruled in part. This decision was later extended by 61 Comp. Gen. —— (B-201613, Oct. 6, 1981)..... 414

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GOVERNMENT PRINTING OFFICE
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Overtime compensation
Actual work requirement
Security police uniforms—acquisition time
Not "overtime work"

Security police employees of the United States Government Printing Office who, as a result of their work schedule, must acquire their uniforms during their off-duty hours are not entitled to overtime compensation for the time spent in acquiring their uniforms. The time involved does not constitute "overtime work" for the purposes of 5 U.S.C. 5544 (1976). In addition, the time spent by the employees is not compensable as overtime hours worked under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq*..... 431

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Under section 502(e)(4) of Surface Mining Control Act of 1977, 30 U.S.C. 1252(e)(4), Secretary of the Interior is authorized to reimburse States for interim enforcement program costs not covered in prior grant award so long as payments are from currently available appropriations. Budget change to allow grant costs questioned solely because they exceed condition on budget flexibility may be allowed under existing obligation where change does not affect purpose or scope of grant award 540

To States. (*See* **STATES, Federal aid, grants, etc.**)

INTERNATIONAL ORGANIZATIONS
Transfer of Federal employees, etc.
Lump-sum leave payments
Rate payable

Employee of Nuclear Regulatory Commission transferred to international organization under 5 U.S.C. 3581, *et seq.* effective August 16, 1978, at which time he elected to retain annual leave to his credit pursuant to 5 U.S.C. 3582(a)(4). On January 22, 1980, also pursuant to 5 U.S.C. 3582(a)(4) and prior to reemployment, employee requested lump-sum payment for annual leave retained. Consistent with computation provisions of 5 U.S.C. 3583 and implementing regulations, computation of employee's payment is based on rate of pay attaching to his Federal agency position at time of his request for lump-sum leave payment under 5 U.S.C. 3582(a)(4), not the date of the transfer. Overrules B–155634, Dec. 10, 1964 409

JUDGMENTS, DECREES, ETC.
Courts. (*See* **COURTS, Judgments, decrees, etc.**)

LABOR-MANAGEMENT RELATIONS
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Requests for GAO decisions, etc.

Employee, nonexempt under Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* (1976), travelled for 6 hours on a nonworkday during his corresponding duty hours. Although such time is hours of work under FLSA, since he had a holiday off and he only worked 38 hours under FLSA during that workweek and he has already been compensated for 40 hours under title 5, U.S. Code, he is not entitled under FLSA to 6 hours pay at his regular rate in addition to the 40 hours basic pay he has received 493

LEAVES OF ABSENCE
Civilians on military duty
Charging
Legal holidays

Employee of the District of Columbia was ordered to perform duty as member of District of Columbia National Guard for two periods that included holidays. Since the holidays in question were totally within the periods of absence on military leave, employee must be charged military leave for them. 27 Comp. Gen. 245 (1947) 381

LEAVES OF ABSENCE—Continued
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Unlimited military leave
Purpose of duty consideration
District of Columbia National Guard duty Page

Employee of the District of Columbia was ordered to perform 20 days of full-time training duty and 15 days of annual field training as a member of the District of Columbia National Guard. Since full-time training duty directed under the authority of 32 U.S.C. 502 is active duty, employee is entitled to military leave under 5 U.S.C. 6323(a) for 15 of the 20 days of such duty. Because the additional 15 days of annual field training was ordered under the authority of title 39 of the District of Columbia Code, applicable specifically to the District of Columbia National Guard, he is entitled to military leave for that encampment under 5 U.S.C. 6323(c)---------- 381

Court
Jury duty
Commencing day
Reporting/returning to work duty
Administrative discretion

When it appears that an employee will be expected to perform jury duty for a substantial part of the day on the date stated in the summons commencing jury service, the employee is not required to report to work that same day. Once summoned by a court for jury duty an employee's primary responsibility is to the court. When it is apparent that an employee will be required to perform jury duty for less than a substantial part of the day, and when it is reasonable to do so, the employee's agency may require the employee to report for work prior to reporting for or after being excused from jury duty---------- 412

Lump-sum payments
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Military
Civilians on military duty. (*See* **LEAVES OF ABSENCE, Civilians on military duty**)
District of Columbia employees. (*See* **DISTRICT OF COLUMBIA, Employees, Leaves of absence, Military**)

LEGAL SERVICES CORPORATION (*See* **CORPORATIONS, Legal Services Corporation**)

LOANS
Government insured
Limitations
Two notes representing one loan
Different interest rates
Propriety

Economic Development Administration (EDA) has authority to allow guaranteed loans to be represented by two notes, with fully guaranteed note—representing 90 percent of loan amount, having a lower interest rate than unguaranteed note—representing remaining 10 percent of loan. Notwithstanding statements to contrary in B–194153, Sept. 6, 1979, in which we said two-note procedure could be used only if substantive terms of notes, including maturity dates and interest rates, were same, EDA is not prohibited from using split interest rates provided other substantive terms remain same---------- 464

LOBBYING

Appropriation prohibition Page

Despite Legal Services Corporation (LSC) contentions to the contrary, the lobbying restriction in section 607(a) of the annual Treasury, Postal Service, and General Government Appropriation Act, that prohibits the use of funds in all appropriation acts for any given year, applies to funds appropriated for LSC. LSC is required to implement this provision and insure that no appropriated funds are used by the Corporation or recipients to engage in grass roots lobbying 423

Legislation

Use of Federal funds

The Moorhead Amendment is a direct lobbying restriction included in the annual Legal Services Corporation (LSC) appropriation that prohibits LSC and recipients from expending Federal funds for grass roots lobbying activities. LSC has an obligation to implement this restriction and insure that its appropriations are not used for such lobbying activities 423

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Travel by privately owned automobile

Between residence and headquarters

Transit strike

Employees of Urban Mass Transportation Administration are not eligible for reimbursement of excess cost of commuting by private or General Services Administration rental car over normal public transit fares, despite complete public transit shutdown during April 1980 strike. Cost of transportation to place of business is personal responsibility of employee except in limited emergency circumstances not applicable here. B–158931, May 26, 1966, and 54 Comp. Gen. 1066 (1975), are distinguished 420

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Overseas employees

Between port and duty station, etc.

Army employee who is not expected to return to overseas assignment after training in United States may be reimbursed transportation costs for shipping privately owed vehicle by American flag vessel on Government bill of lading after training is completed, agreement is signed, and employee is assigned to new permanent duty station 478

MILITARY LEAVE

Civilians on military duty. (*See* **LEAVES OF ABSENCE, Civilians on military duty**)

MILITARY PERSONNEL

Quarters allowance. (*See* **QUARTERS ALLOWANCE**)

Record correction

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Discrepancies in a Navy officer's service records which make it unclear as to whether he is entitled to retirement credit for 11 days' additional active service is a matter for consideration by the Chief of Naval Personnel or the Bo ard for the correction of Naval Records 537

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Retirement

Qualifying service Page

Navy officer retired under 10 U.S.C. 6323 may receive credit in the multiplier used in computing his retired pay for the full 57 inactive service points he earned in a year in which he also served on active duty. While on active duty he was in an active status, not an inactive status, and regulations governing the maximum number of points which may be earned require prorating of maximum allowable only on the basis of excluding periods of inactive status 537

Retired

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Employees of the District of Columbia

Military leave. (*See* **DISTRICT OF COLUMBIA, Employees, Leaves of absence, Military**)

NONAPPROPRIATED FUND ACTIVITIES

Sharing facilities, services, etc. with appropriated fund activity

Cost sharing basis for reimbursement

Personal services

Appropriated fund (AF) and non-appropriated fund (NAF) personnel on Army base operate separate billeting facilities in single hotel/motel type quarters. NAF and AF clerks, working alone, handle both NAF and AF transactions on their respective shifts. Certifying officer asks whether AF can reimburse NAF for AF work performed by NAF employees, in light of GAO decision 58 Comp. Gen. 94, that purchases of services from NAFs, when authorized, must be treated as procurements, and of finding that this procurement is unauthorized because it involves personal services. Reimbursement is authorized. Transaction should not be treated as procurement of personal services, but as method of allocating expenses of operating respective facilities on a cost sharing basis 476

NONDISCRIMINATION

Sex discrimination elimination

Compensation

Backpay and promotion

As a result of an employment discrimination suit brought by certain female employees, the Government Printing Office (GPO) was ordered in a court judgment to pay the plaintiffs back pay for past economic harm and an added increment of pay above that to which they were otherwise entitled, for continuing economic harm until a certain number of plaintiffs were promoted. The so-called award of "front pay" in this instance amounts to damages and should be paid from the permanent indefinite appropriations provided in 31 U.S.C. 724a. Agency appropriations are not available to pay compensation above the amount prescribed for the particular job level in question. 55 Comp. Gen. 1447 (1976) is distinguished 375

OFFICE OF MANAGEMENT AND BUDGET

Circulars

No. A-34

Budgetary resources

What constitutes Page

The inventory in the General Services Administration's (GSA) General Supply Fund does not constitute a budgetary resource against which obligations may be incurred. The Antideficiency Act, 31 U.S.C. 665, is violated when obligations are incurred in excess of budgetary resources. 520

OFFICE OF PERSONNEL MANAGEMENT

Jurisdiction

Fair Labor Standards Act

Compliance determination

Review by GAO

Burden of proof

Employee filed Fair Labor Standards Act (FLSA) complaint and Office of Personnel Management (OPM) issued a compliance order requiring agency to pay 30 hours overtime compensation per year retroactive to May 1, 1974. Agency states that its records do not support award of 30 hours per year. General Accounting Office will not disturb OPM's findings unless clearly erroneous and the burden of proof lies with the party challenging the findings. Here, agency statement that it cannot find travel vouchers to support OPM award does not satisfy burden of proof. Under FLSA, each agency is responsible for keeping adequate records of wages and hours. Once employee has provided sufficient evidence of hours worked, burden shifts to employing agency to come forward with evidence to contrary 354

OFFICERS AND EMPLOYEES

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Backpay. (*See* **COMPENSATION, Removals, suspensions, etc., Backpay**)

Compensation. (*See* **COMPENSATION**)

Downgrading

Saved compensation. (*See* **COMPENSATION, Downgrading, Saved compensation**)

Jury duty

Leave. (*See* **LEAVES OF ABSENCE, Court**)

Labor-management relations

Requesting GAO decisions, etc. (*See* **LABOR-MANAGEMENT RELATIONS, Federal service, Requests for GAO decisions, etc.**)

Overseas

Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)

Transportation

Household effects. (*See* **TRANSPORTATION, Household effects, Overseas employees**)

Relocation expenses

Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

OFFICERS AND EMPLOYEES—Continued

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Transportation and/or per diem

Cost comparison requirement Page

Army employee on long-term training assignment may have orders retroactively amended to authorize per diem where cost comparison required by statute was not made prior to issuing orders authorizing transportation of dependents and household goods 478

Exceptions

Entitlements under service agreements

Army employee may have orders issued authorizing advance return of dependents and household goods. Cost studies need not be made when it is agency's intent not to allow dependent travel and transportation of household goods incident to the training assignment 478

Transfers

Expenses

Relocation *v.* training

Department of Army employee stationed in Germany and assigned to long-term training in United States is not entitled to full permanent change of station entitlements until the training is competed and he is transferred to a new permanent duty station 478

International organizations

Employee of Nuclear Regulatory Commission transferred to international organization under 5 U.S.C. 3581, *et seq*, effective August 16, 1978, at which time he elected to retain annual leave to his credit pursuant to 5 U.S.C. 3582(a)(4). On January 22, 1980, also pursuant to 5 U.S.C. 3582(a)(4) and prior to reemployment, employee requested lump-sum payment for annual leave retained. Consistent with computation provisions of 5 U.S.C. 3583 and implementing regulations, computation of employee's payment is based on rate of pay attaching to his Federal agency position at time of his request for lump-sum leave payment under 5 U.S.C. 3582(a)(4), not the date of the transfer. Overrules B–155634, Dec. 1964 409

Relocation expenses

Cooperatively owned dwelling

Condominiums/cooperatives

Membership fees

Employee may not be reimbursed a cooperative home membership fee required on purchase of home at new duty station. Such fees are personal and outside the scope of costs or expenses allowable as relocation expenses under the Federal Travel Regulations 451

Leases

Unexpired lease expense

Nonreimbursable if avoidable

Employee who enters into 1-year lease when on notice that he will be transferred in 4 to 6 months may not be reimbursed lease termination expenses payable under penalty clause of lease. Authority to reimburse lease termination expenses is intended to compensate costs employee did not intend to incur at time he executed lease and which he would not have incurred but for his transfer, not costs employee could have avoided or costs employee could have avoided or costs incurred knowingly after being advised that transfer would occur 528

OFFICERS AND EMPLOYEES—Continued
Training—Continued
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Pro rata expense reimbursement
House purchase or sale
Two adjoining plots sold separately to one buyer Page

Transferred employee sold residence on one acre lot to single purchaser as two separate parcels to enable buyer to obtain financing on portion of land containing residence. Fact that portion of land not containing residence was too small to use as separate building site and fact that one-acre lot size was common acreage for single family residences in area rebut presumption raised by separate sale that smaller parcel was land in excess of that reasonably related to the residence site within meaning of paragraph 2-6.1h of the Federal Travel Regulations. Realtor's fees paid for sale of both parcels may be reimbursed 384

Real estate expenses
Lump-sum payments
Third-party lending institution

Employee may not be reimbursed for lump-sum payment to third-party lending institution which prepared financial documents ultimately used by loan originating institution for conditioned purpose of extending credit to finance employee's purchase of home. Since fee paid to third-party lending institution was stated as lump-sum payment for expenses and overhead and is finance charge within the meaning of Regulation Z (12 C.F.R. Part 226), reimbursement is precluded absent itemization to show items excluded by 12 C.F.R. 226.4(e) from the definition of finance charge 531

Service agreements
Overseas employees transferred to U.S.
Return travel, etc.
Expense liability
Constructive cost reimbursement basis

Army employee may be reimbursed constructive cost of transportation from his old to his new duty station, less the cost of transportation from his old duty station to his place of residence 478

Transportation
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PAY
Medical and dental officers
"Variable Incentive Pay"
Entitlement
Appointment to CORD program after expiration of induction authority
Status as "disqualifying active duty obligation"

Public Health Service (PHS) officer who agreed to accept a commission in PHS in October 1973 and thereafter signed a memorandum of understanding for participation in the PHS Commissioned Officer Residency Deferred program in August 1974, whereby he received a deferral from active military duty under the Military Selective Service Act, should not be considered to have disqualifying active duty obligation for purposes of variable incentive pay authorized pursuant to 37 U.S.C. 313 (1976) since induction authority, with certain exceptions not relevant here, under Military Selective Service Act expired June 30, 1973 403

PAY—Continued
Service credits
Reserves
Inactive time
Service points earned in year of active duty
Proration status Page

Navy officer retired under 10 U.S.C. 6323 may receive credit in the multiplier used in computing his retired pay for the full 57 inactive service points he earned in a year in which he also served on active duty. While on active duty he was in an active status, not an inactive status, and regulations governing the maximum number of points which may be earned require prorating of maximum allowable only on the basis of excluding periods of inactive status 537

PAYMENTS
Voluntary
No basis for valid claim

Claimant, former Environmental Protection Agency (EPA) Assistant Regional Counsel, had notices published in newspapers without prior written authorization as required by 44 U.S.C. 3702 and EPA directives. Claimant paid newspapers from his own personal funds and sought reimbursement from EPA. Since EPA could not have paid claim by newspapers directly, and since employee may not create claim in his favor by voluntarily making payment from personal funds, claim must be denied .. 379

PUBLIC LANDS
Interagency loans, transfers, etc.
Damages, restoration, etc.
Withdrawn lands
Relinquishment
"Interdepartmental waiver" doctrine inapplicability

Dept. of Interior requests GAO's views on applicability of the "interdepartmental waiver" doctrine when an executive department relinquishes a withdrawn area under the Federal Land Policy and Management Act of 1976 (Act) (43 U.S.C. 1701 *et seq.* (1976)) and on proposed amendment to the public land regulations (43 C.F.R. 2374.2(b)). Doctrine ordinarily requires that restoration costs for property of one department which has been used by another department be borne by the department retaining jurisdiction over the property since restoration would be for future use and benefit of loaning department. Interior does not benefit in the sense contemplated by the doctrine from restoration of public lands. Accordingly, doctrine does not apply to withdrawn property. 59 Comp. Gen. 93 (1979) is distinguished 406

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
With dependent rate
Child support payments by divorced member
Both parents service members
Declination evidence acceptability

Where two Air Force members who are married to each other and who have one child are divorced with the male paying child support and the female having custody of the child, the male member receives increased basic allowance for quarters (BAQ) on account of the child,

QUARTERS ALLOWANCE—Continued
Basic allowance for quarters (BAQ)—Continued
With dependent rate—Continued
Child support payments by divorced member—Continued
Both parents service members—Continued
Declination evidence acceptability—Continued Page

but the female member may claim increased BAQ on account of the child, if the male member declines to claim the child for BAQ purposes. When the male member acquires or has different dependents on which to base his claim for increased BAQ, it may be assumed (without a formal declination) that he is not claiming the common dependent for increased BAQ purposes 399

Declination of claim effect

Where two Air Force members married to each other with one child are divorced, the male member paying child support and the female member having custody of the child, the male member is entitled to receive basic allowance for quarters (BAQ) at the with dependent rate. However, if the member receiving the increased BAQ does not claim the dependent child, the female member who has custody of the child may claim BAQ at the with dependent rate 399

Declination of claim revocability

A declination to claim a dependent for increased basic allowance for quarters purposes should be in writing when possible but need not be and should not be considered irrevocable since as dependents change so should a member's ability to claim a dependent be changeable 399

Dual payment prohibition for common dependents

Where two Air Force members married to each other with one child are divorced, the male member paying child support and the female member having custody of the child, the child is the dependent of both members under 37 U.S.C. 401; however, since only one member may receive basic allowance for quarters (BAQ) based on the child as a dependent, only the member paying child support (in this case the male member) receives BAQ at the with dependent rate 399

REGULATIONS
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Travel agency use. (*See* **TRANSPORTATION, Travel agencies, Restriction on use, Applicable regulations**)

SET-OFF
Contract payments
Assignments
Claim accruing but not matured prior to assignment
Right to and time for set-off

Where IRS (or other Federal entity) has claim against contractor-assignor which arose before assignment was completed under Assignment of Claims Act, amount of Federal claim may be set off against amounts otherwise due to assignee, assuming absence of no set-off clause in the contract. Assignee stands in shoes of assignor. Government's right to set off tax debts of assignor that were in existence, even if not yet mature,

SET-OFF—Continued
Contract payments—Continued
Assignments—Continued
Claim accruing but not matured prior to assignment—Continued
Right to and time for set-off—Continued Page

prior to date on which assignment became effective are not extinguished by assignment, although actual set-off cannot be made until tax debt matures. 56 Comp. Gen. 499, 37 *id.* 318, 20 *id.* 458, B–170454, Aug. 12, 1970, and similar cases are overruled in part---------- 510

"No set-off" provision
Tax debts
Set-off precluded

If Government contract contains a "no set-off" clause, Government cannot set off tax debt of assignor under any circumstances. 56 Comp. Gen. 499, 37 *id.* 318, 20 *id.* 458, B–170454, Aug. 12, 1970, and similar cases are overruled in part---------- 510

STATES
Federal aid, grants, etc.
Amendment, etc.
Appropriation availability

Under section 502(e)(4) of Surface Mining Control Act of 1977, 30 U.S.C. 1252(e)(4), Secretary of the Interior is authorized to reimburse States for interim enforcement program costs not covered in prior grant award so long as payments are from currently available appropriations. Budget change to allow grant costs questioned solely because they exceed condition on budget flexibility may be allowed under existing obligation where change does not affect purpose or scope of grant award-- 540

STATUTES OF LIMITATION
Claims
Compensation
Fair Labor Standards Act

This Office has previously held that 6–year limitations period contained in 31 U.S.C. 71a and 237 applies to claims arising under section 204(f) of the FLSA, 29 U.S.C. 201, 204(f) (1976). Thus, where agency appeals OPM/FLSA compliance order to this Office, the 6-year limitations period continues to run until claim is received in this Office. Therefore, any portion of award under OPM compliance order which accrued more than 6 years prior to filing of claim in this Office may not be paid---- 354

STORAGE
Household effects
Overseas employees
Nontemporary
Training periods

Army employee may not be reimbursed for nontemporary storage expenses incident to training. However, agency has broad discretion to authorize period of time expenses can be allowed---------- 478

SUBSISTENCE
Per diem
Lodgings plus basis
Staying with friends, relatives, etc.
Evacuated employees
Agency for International Development Page

Agency for International Development evacuees who had initially been authorized the special subsistence allowance on a flat rate basis were advised that the Secretary of State had authorized future payment on lodging-plus basis and that those who stayed with friends or relatives would not be reimbursed any amount for lodgings. Since regulations contemplate payment on per diem basis, Secretary acted properly in authorizing reimbursement based on the lodging-plus system now in effect. Secretary's determination to prohibit reimbursement for noncommercial lodgings is within his authority and consistent with per diem regulation of certain other Federal agencies 459

SURFACE MINING CONTROL AND RECLAMATION ACT
Program authority
Appropriation availability. (*See* **APPROPRIATIONS, Interior Department, Availability, Grants**)

TELEPHONES
Private residences
Prohibition
Inapplicability
Government-leased quarters overseas
Nonoccupancy pending staff change
Accrued charges

Because of necessity to ensure telephone service in the Air Deputy's residence upon his occupancy of quarters in Norway, telephone service is secured by the U.S. Government under long-term lease. For 2 months, between incumbents, the residence was vacant but the telephone charges continued to accrue. Although 31 U.S.C. 679 prohibits using appropriated funds for telephone service in a private residence, the statute is not to be applied here where neither the outgoing nor incoming Air Deputy occupied the premises during the period covered by the charges. 11 Comp. Gen. 365 (1932), modified 490

TRANSPORTATION
Automobiles
Overseas employees
Reimbursement basis
Return to U.S. for training prior to transfer

Army employee who is not expected to return to overseas assignment after training in United States may be reimbursed transportation costs for shipping privately owned vehicle by American flag vessel on Government bill of lading after training is completed, agreement is signed, and employee is assigned to new permanent duty station 478

Dependents
Overseas employees
Return to United States
Advance travel

Army employee may have orders issued authorizing advance return of dependents and household goods. Cost studies need not be made when it is agency's intent not to allow dependent travel and transportation of household goods incident to the training assignment 478

TRANSPORTATION—Continued
Household effects
Military personnel
Procurement of services
Deviations from DAR. (*See* **DEFENSE ACQUISITION REGULATION, Deviations**)
Overseas employees
Transfers
Advance shipments
Incident to completion of service agreement Page

An employee of Dept. of the Army serving in Korea returned 5,189 pounds of his household goods to his place of actual residence in New York prior to his transfer from Korea. Upon a subsequent permanent change of station he shipped 350 pounds of unaccompanied baggage from Korea to new duty station in Virginia and requested reimbursement for shipment of 10,860 pounds from New York to new duty station. His prior shipment of household goods from Korea to place of actual residence is authorized under 5 U.S.C. 5729(a) and Federal Travel Regs. but was in lieu of, not in addition to, his later entitlement upon his transfer to Virginia. Shipment of unaccompanied baggage from Korea and household goods from New York to new duty station on subsequent change of station is authorized by 5 U.S.C. 5724 and Federal Travel Regs. but may not exceed cost of direct shipment from Korea to new duty station less the amount previously paid for prior shipment from Korea to actual residence in New York State under 5 U.S.C. 5729 517

Agency within the U.S.
Shipment to other than new duty station

Army employee may be reimbursed constructive cost of transportation from his old to his new duty station, less the cost of transportation from his old duty station to his place of residence 478

Travel agencies
Restriction on use
Applicable regulations
Notice status
Civilian employees of Department of Defense

Civilian employee of Department of Army who purchased transportation with personal funds from travel agent in connection with official travel may be reimbursed under principle of this Office embodied in paragraph C2207–4 of Vol. 2, Joint Travel Regulations, that a Government employee, unaware of the general prohibition against use of travel agents, who inadvertently purchases transportation with personal funds from a travel agent, may be paid for travel costs which would have been properly chargeable had requested service been obtained by traveler directly from carrier. 59 Comp. Gen. 443 is modified. 445

Violations by Government travelers
Reimbursement claims
Criteria for allowance

In the future this Office will review claims of Government travelers who violate the general prohibition by purchasing transportation with personal funds from a travel agent and claim reimbursement under exceptions such as that provided in paragraph C2207–4 of Vol. 2, Joint Travel Regulations, to determine not only that the use of the travel agent was inadvertent and resulted from a lack of notice of the general prohibition, but also that these contentions regarding the use of the travel agent were themselves reasonable in the circumstances of the individual traveler's claim. 59 Comp. Gen. 433 is modified 445

TRANSPORTATION DEPARTMENT
Regulations
Hazardous materials
Compliance determination
Military procurements Page

Protest that solicitation item description eliminates cylinder safety test requirements and allows use of cylinders not designed, manufactured, marked, or shipped in accordance with Department of Transportation (DOT) regulations on hazardous material is denied. Contracting activity has provided for adequate testing, and DOT regulations provide that material consigned to Department of Defense (DOD) must be packaged either according to DOT regulations or in container (cylinder) of equal or greater strength and efficiency, as required by DOD regulations. Contracting agency has determined that cylinders meet or exceed DOT requirements and need not apply for DOT exemption 504

TRAVEL AGENCIES (*See* **TRANSPORTATION, Travel agencies**)

TRAVEL EXPENSES
Headquarters
Inadequacy of transportation
Public transportation strike

Employees of Urban Mass Transportation Administration are not eligible for reimbursement of excess cost of commuting by private or General Services Administration rental car over normal public transit fares, despite complete public transit shutdown during April 1980 strike. Cost of transportation to place of business is personal responsibility of employee except in limited emergency circumstances not applicable here. B–158931, May 2, 1966, and 54 Comp. Gen. 1066 (1975), are distinguished 420

Travel agencies. (*See* **TRANSPORTATION, Travel agencies**)
Vouchers and invoices. (*See* **VOUCHERS AND INVOICES, Travel**)

UNIFORMS
Government Printing Office
Security police
Acquisition time
Overtime compensation status

Security police employees of the United States Government Printing Office who, as a result of their work schedule, must acquire their uniforms during their off-duty hours are not entitled to overtime compensation for the time spent in acquiring their uniforms. The time involved does not constitute "overtime work" for the purposes of 5 U.S.C. 5544 (1976). In addition, the time spent by the employees is not compensable as overtime hours worked under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq* 431

VOLUNTARY SERVICES
Prohibition against accepting

In the absence of specific statutory authority, Federal agencies are prohibited from accepting voluntary service from individuals except in certain emergencies. Whenever an agency is authorized by statute to accept voluntary personal services as an exception to that prohibition, the specific terms of the particular statutory authorization govern the conditions of the arrangement, including the scope of services which may be performed by the volunteers and the matter of whether the agency may pay for the volunteers' transportation, meals, and lodgings. 31 U.S.C. 665 (b) 456

VOLUNTARY SERVICES—Continued
Prohibition against accepting—Continued
Statutory exceptions
Civil Service Reform Act of 1978
Student volunteers Page

Section 301 (a) of the Civil Service Reform Act of 1978, 5 U.S.C. 3111, authorizes a limited exception to the prohibition against the acceptance of voluntary service by Federal agencies, by allowing agencies to establish certain education programs for high school and college student volunteers. Sponsoring agencies may not pay for the student volunteers' traveling or living expenses, since rhe statute and its legislative history make no provision for payment of those expenses, and the statute specifically excludes the volunteers from being considered Federal employees for most purposes including travel and transportation entitlements 456

VOUCHERS AND INVOICES
Travel
False or fraudulent claims

Since acquittal on criminal charges may merely involve a finding of lack of requisite intent or failure to meet the higher standard of proof beyond reasonable doubt, doctrine of *res judicata* does not bar the Government from claiming in later civil or administrative proceeding that certain items on employee's voucher were fraudulent 357

WORDS AND PHRASES
"Active status"

Navy officer retired under 10 U.S.C. 6323 may receive credit in the multiplier used in computing his retired pay for the full 57 inactive service points he earned in a year in which he also served on active duty. While on active duty he was in an active status, not an inactive status, and regulations governing the maximum number of points which may be earned require prorating of maximum allowable only on the basis of excluding periods of inactive status 537

"Budgetary resource"

The inventory in the General Services Administration's (GSA) General Supply Fund does not constitute a budgetary resource against which obligations may be incurred. The Antideficiency Act, 31 U.S.C. 665, is violated when obligations are incurred in excess of budgetary resources ... 520

"Encampment"

Employee of the District of Columbia was ordered to perform 20 days of full-time training duty and 15 days of annual field training as a member of the District of Columbia National Guard. Since full-time training duty directed under the authority of 32 U.S.C. 502 is active duty, employee is entitled to military leave under 5 U.S.C. 6323(a) for 15 of the 20 days of such duty. Because the additional 15 days of annual field training was ordered under the authority of title 39 of the District of Columbia Code, applicable specifically to the District of Columbia National Guard, he is entitled to military leave for that encampment under 5 U.S.C. 6323(c) 381

WORDS AND PHRASES—Continued

"Front pay" Page

As a result of an employment discrimination suit brought by certain female employees, the Government Printing Office (GPO) was ordered in a court judgment to pay the plaintiffs back pay for past economic harm and an added increment of pay above that to which they were otherwise entitled, for continuing economic harm until a certain number of plaintiffs were promoted. The so-called award of "front pay" in this instance amounts to damages and should be paid from the permanent indefinite appropriations provided in 31 U.S.C. 724a. Agency appropriations are not available to pay compensation above the amount prescribed for the particular job level in question. 55 Comp. Gen. 1447 (1976) is distinguished 375

"Interdepartmental waiver" doctrine

Department of Interior requests GAO's views on applicability of the "interdepartmental waiver" doctrine when an executive department relinquishes a withdrawn area under the Federal Land Policy and Management Act of 1976 (Act) (43 U.S.C. 1701 *et seq.* (1976)) and on proposed amendment to the public land regulations (43 C.F.R. 2374.2(b)). Doctrine ordinarily requires that restoration costs for property of one department which has been used by another department be borne by the department retaining jurisdiction over the property since restoration would be for future use and benefit of loaning department. Interior does not benefit in the sense contemplated by the doctrine from restoration of public lands. Accordingly, doctrine does not apply to withdrawn property. 59 Comp. Gen. 93 (1979) is distinguished 406

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