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[B-202596]

Transportation—Rates—Tariffs—Incorporation by Reference—Scope—Freight, All Kinds Shipments

Where formula for determining freight all kinds (FAK) rate offered in carrier's tender provides for taking percentage of applicable class 100 rate from appropriate tariff, there is no intention to further refer to the National Motor Freight Classification to determine each article's individual class rating because formula clearly implies a class 100 basis and to do so would defeat the obvious purpose of the tender to offer Government FAK rates which are in the nature of commodity rates and designed to bypass the classification rating process.

Matter of: Yellow Freight System, Inc., September 7, 1982:

Yellow Freight System, Inc. (Yellow Freight), requests review of settlement action taken by the General Services Administration (GSA) on one less than truckload (LTL) shipment of Government property which was transported from Minneapolis, Minnesota, to San Diego, California, under Government bill of lading (GBL) No. S-0527283. The carrier billed and was paid $342.05 on presentation. GSA subsequently determined that the applicable charges for the 1,650-pound shipment of pillowcases in question were $256.16 and issued a Notice of Overcharge for $76.89. When Yellow Freight declined to pay the overcharge, GSA caused deduction to be made in this amount from monies otherwise due the carrier. The carrier has not convinced us that GSA's action was incorrect

The applicable rate for the shipment is determined by the formula contained in item 1500 of Rocky Mountain Motor Tariff Bureau, Inc., United States Government Quotation ICC RMB Q33-A (RMB Q33-A). Item 1500 expressly provides LTL rates on freight all kinds (FAK) shipments weighing less than 10,000 pounds. It provides that one must first determine the applicable class 100 rate (and minimum charge), including any applicable increase, from the appropriate Rocky Mountain tariff; then, as shown in the following table, apply a percentage of the applicable class 100 rate depending on the weight of the particular shipment.

When the weight of shipment (in pounds)		The rate will be the percentage shown of the applicable class 100 rate (subject to Note 2)
is—	but less than—	
0	500	86
500	1,000	77½
1,000	2,000	77½
2,000	5,000	77½
5,000	10,000	72

Both the carrier and GSA agree that since the weight of the shipment was 1,650 pounds, the applicable percentage is 77½.

The parties also agree that the appropriate tariff in which to find the applicable class 100 rate is Rocky Mountain Motor Tariff Bureau, Inc., Tariff ICC RMB 521-B (Tariff 521-B). And they further agree that the applicable class 100 rate, upon which to base the 77½ percent, is in the class 100 column of the class rate table published in section 8 of the tariff. That table, showing, to the extent necessary, the intersecting columns and lines, follows, as it appears on original page 527 of the tariff:

CLASSES

Scale	100	* * *	77.5	* * *	50	* * *
LTL	2430		1883		1215	
5C						
1M	1965		1523		983	
2M						
5M						
10M	1505		1166		753	
20M						
TL						

The parties disagree over which weight scale (line) applies (see *Yellow Freight System, Inc.*, 60 Comp. Gen. 135, (1980) for a related issue). GSA's action is based on the scale "IM" (1,000 pounds) line on the theory that the weight of the shipment, here 1,650 pounds, controls. The carrier, however, based on instructions in the tender concerning applicability of the various weight scales, argues that the higher class 100 rate corresponding to the scale "LTL" line applies. The referenced instructions, as they appear on original page 517 of Tariff 521-B, follow:

Application of Scale LTL, 5C, 1M, 2M, 5M, 10M, 20M or TL Rates Shown in this Section

Scale LTL—Less than truckload, subject to LTL classes; or AQ classes.
Scale 5C—Minimum weight 500 pounds, subject to LTL classes.
Scale 1M—Minimum weight 1,000 pounds, subject to LTL classes.
Scale 2M—Minimum weight 2,000 pounds, subject to LTL classes.
Scale 5M—Mimimum weight 5,000 pounds, subject to LTL classes.
Scale 10M—Mimimum weight 10,000 pounds, subject to LTL classes.
Scale 20M—Mimimum weight 20,000 pounds, subject to LTL classes.
Scale TL—Rates apply on shipments subject to TL classes.

The carrier points out that the "LTL" weight scale states that it is subject to "AQ [any quantity] classes," and that section 8 of Tariff 521-B provides that the classes (100, 77.5, 50, etc.) in the rate table (for application to specific commodities shipped) are determined by reference to the governing National Motor Freight Classification (NMFC). Since the parties agree that the class 100 any quantity rating (that is, class 100, regardless of the weight of a par-

ticular shipment) in item 49390 of NMFC 100-E applies to pillowcases, Yellow Freight concludes that the 77½ percent provided in item 1500 of RMB-Q33-A should be applied to the class 100 columnar rate that corresponds to the "LTL" weight scale in the rate table because that scale, as pointed out, is subject to any quantity classes.

The false premise in the carrier's reasoning is that while the tariff requires that class ratings on individual articles for application to the tariff's rate tables are determined by reference to the NMFC, class ratings for FAK articles shipped under the tender must also be obtained from the Classification. We recognize the practice of incorporating by reference provisions of a published tariff into a Government rate tender. *See* 54 Comp. Gen. 610 (1975). However, Yellow Freight's interpretation of item 1500 extends the scope of the incorporation far beyond the tender's intent.

A tender should be given meaning in the light of the principal apparent purpose it was intended to serve. 37 Comp. Gen. 753, 755 (1958).

The language in item 1500 emphasized by the carrier does not accomplish what the carrier says it does. To determine the "applicable class 100 rate" from the appropriate tariff does not express an intention to incorporate the entire tariff and provisions requiring reference to the NMFC for individual commodity ratings. The tender clearly gives the class—class 100—so there is no need to refer to the Classification. With the known weight of a FAK shipment under 10,000 pounds, item 1500 requires referral to the tariff solely for the purpose of obtaining the class 100 rate (rather than rating), and the product of multiplying the rate by 77½ percent is a FAK, or commodity, rate, not a class rate. The distinction is crucial.

Where class rates apply, reference is made to the Classification, which assigns each article a class rating according to its transportation characteristics, while commodity rates are not subject to classification ratings; they are applicable to commodities from one point to another without reference to the Classification. See *All States Freight* v. *N.Y., N.H. & H.R. Co.,* 379 U.S. 343, 345 (1964), and 49 U.S.C. § 10704 (Supp. III, 1979).

The tables in Tariff 521-B contain class rates; therefore, their application is based on individual commodity ratings in the Classification. In item 1500 of Tender RMB Q33-A, the carrier offers FAK rates which are in the nature of commodity rates; it provides a single rate on a mixture of diverse articles. By covering hundreds of different articles, the FAK rate relieves shipping officers from the burden of classifying thousands of different articles and from segregating them according to classification ratings. See *California Commission* v. *United States,* 355 U.S. 534, 544 (1958). FAK rates offer the advantage of bypassing the classification rating process. 49 Comp. Gen. 6 (1969).

The purpose of a tender or quotation is to offer reduced rates to the Government. See *Great Northern Railway Co.* v. *United States,* 312 F.2d 901, 903 (Ct. Cl. 1962). And the obvious purpose of item 1500 of tender RMB-Q33-A was to offer a single rate on numerous diverse articles (FAK), even though only one article, pillowcases, was shipped here. If the Government had shipped a mixture of diverse articles under item 1500, it would be incongruous to assert the carrier's interpretation because reference to the Classification for the purpose of obtaining the class rating on each article would completely defeat the intent of offering a FAK rate.

We conclude that since the tender clearly provides the class (class 100) to be used in selecting the appropriate column in the tariff's rate table, there was no intention or necessity to refer to the NMFC; therefore, as contended by GSA, the any quantity class 100 rating provided for pillowcases in item 49390 of the Classification is irrelevant in determining the FAK rate under item 1500 of the tender.

GSA's audit action is sustained.

[B-205823, B-205843, B-206469]

Bonds—Bid—Surety—Affidavit (Standard Form 28)—Deficiencies—Nondisclosure of Other Bond Obligations

In determining the acceptability of an individual bid bond surety, an agency may consider, under appropriate circumstances, the surety's failure to disclose other bond obligations on the Affidavit of Individual Surety, Standard Form 28, as such disclosure is necessary to enable the contracting officer to make informed judgments concerning a surety's financial soundness.

Bonds—Bid—Surety—Unacceptable—Nondisclosure of Other Bond Obligations

Where the record indicates a continuing pattern among certain individual bid bond sureties not to disclose outstanding bond obligations on the Affidavit of Individual Surety, Standard Form 28, an agency has a reasonable basis to reject the bidder's sureties as unacceptable.

Bidders—Responsibility *v.* Bid Responsiveness—Bond Requirements

The question of the acceptability of an individual bid bond surety is one of bidder responsibility, not responsiveness.

Contracts—Protests—Bond Requirement—Bid Bonds—Bias Alleged

An allegation that a contracting officer's rejection of a protester's individual bid bond sureties was due to bias is not supported by independent evidence where General Accounting Office finds that the contracting officer's actions were reasonable.

Matter of: Dan's Janitorial Service, Inc., September 9, 1982:

Dan's Janitorial Service, Inc. (Dan's) protests the rejection of its bids under three solicitations, GS-07B-21085/7XB, GS-07B-21133/7XB, and GS-07B-21151/7XB, issued by the General Services Ad-

ministration (GSA). GSA sought janitorial services under each solicitation. Dan's complains that GSA improperly rejected Dan's bids as nonresponsive on the basis that the firm's individual bid bond sureties failed to disclose all outstanding bond obligations and thus were unacceptable. Dan's also alleges that GSA treated the firm in a biased manner.

We deny the protest.

Dan's submitted the apparent low bid in response to each of the above mentioned solicitations. Each bid was accompanied by a bid bond executed by the required two individual sureties. A total of four individual sureties executed the bonds for Dan's under the three solicitations.

Soon after bid opening under each solicitation, the contracting officer discovered, upon checking with other GSA regional offices, that three of the four sureties failed to disclose all other bonds on which they were sureties at the time they executed the bonds for Dan's. This disclosure was required by Item 10 of the Affidavit of Individual Surety, Standard Form 28, two of which accompanied each bond. One surety, who signed two bonds for Dan's on November 20, 1981, placed the word "none" under Item 10 on both of her affidavits. The contracting officer believed that this surety should have listed one of the November 20 obligations on at least one affidavit and considered this omission as a nondisclosure on both affidavits. In addition, the contracting officer determined that this surety failed to disclose one other bond obligation that the contracting officer believed to be outstanding on November 20. Another surety, who was also a signatory on two of Dan's bid bonds, listed other bond obligations on his affidavits but failed to disclose the existence of six bonds in one case and two bonds in the other. A third surety omitted two bond obligations from those he listed.

The contracting officer found that the fourth surety failed to disclose outstanding bond obligations under another GSA solicitation. Based on these nondisclosures, the contracting officer found Dan's sureties to be unacceptable and rejected Dan's bids as nonresponsive.

GSA contends that a surety's veracity is a factor that a contracting officer should be able to weigh in determining a surety's acceptability. Dan's sureties falsified their affidavits, GSA asserts, and these circumstances compelled the rejection of those sureties. GSA points out that this falsification could constitute a basis for prosecution under section 1001 of Title 18 of the United States Code.

Dan's challenges the reasonableness of the contracting officer's rejection of the firm's sureties. First, Dan's asserts that some of the undisclosed bond obligations were not outstanding at the time Dan's sureties signed their affidavits. Some undisclosed bonds were no longer obligations, Dan's states, because GSA had already awarded contracts in those procurements to bidders not indemnified by Dan's sureties, thus canceling Dan's sureties' obligations

under those solicitations. Two other bonds, Dan's continues, were not outstanding because one had been rejected and the other superseded by an amended bond. In addition, Dan's believes that it was inappropriate to designate certain bonds, such as those accompanying bids not yet submitted or opened and those issued by an individual surety to several bidders under the same solicitation, as outstanding because the likelihood of their becoming actual liabilities was unpredictable or remote. Finally, Dan's argues that it was improper for the contracting officer to reject one surety here for his nondisclosures on an affidavit concerning an unrelated GSA solicitation.

We believe that, under appropriate circumstances, GSA may consider an individual surety's failure to disclose outstanding bond obligations on his affidavit as a factor in determining an individual surety's acceptability. The purpose of the bid guarantee requirement is to protect the Government's financial interests in the event the bidder fails to execute the required contract documents and deliver the required performance and payment bonds. *See* 52 Comp. Gen. 223 (1972). To achieve that purpose, it is reasonable for the Government to require that both individual sureties on a bond have a net worth at least equal to their total potential bond liabilities, since the amount of those potential liabilities may have a bearing on the financial soundness of each surety, regardless of the actual financial risk involved. See *Clear Thru Maintenance,* 61 Comp. Gen. 456 (1982), 82-1 CPD 581. Thus, a surety must disclose all other bond obligations under Item 10 of the affidavit, regardless of the actual risk of liability on those obligations, to enable a contracting officer to make informed determinations concerning a surety's financial soundness.

The duty of the individual surety to disclose all bond obligations, without exception, is clear. Item 10 of the affidavit provides space for the surety to list "all other bonds on which [he is] surety." The affidavit also states that, by signing that document, the surety affirms that the "* * * information * * * furnished is true and complete to the best of [the surety's] knowledge." In view of the clarity of the disclosure requirement, then, a surety's failure to comply is an appropriate factor to consider when determining the acceptability of a surety.

We conclude that GSA had a reasonable basis to reject Dan's sureties as unacceptable for their nondisclosures. The record indicates a continuing pattern of nondisclosure among Dan's sureties. The undisclosed obligations that the contracting officer was able to discover were only those outstanding in other GSA regional offices, leaving unanswered the question of what additional obligations might have been outstanding elsewhere. GSA indicates the possibility of criminal prosecution of these sureties. Under these circumstances, we will not object to GSA's actions.

Dan's believes that many of its sureties' undisclosed bond obligations were not outstanding. In this regard, Dan's contends that GSA had awarded certain contracts by the time the affidavits were signed, thus canceling several of the outstanding bonds that the contracting officer determined were undisclosed. GSA specifically disputes this contention. Since the only evidence on this issue is the conflicting statements of Dan's and GSA, Dan's has not met its burden of affirmatively proving its case. See *United Inter-Mountain Telephone Company,* B-197471.2, August 14, 1981, 81-2 CPD 140.

Dan's also challenges the accuracy of the contracting officer's determinations concerning two bonds that Dan's asserts were no longer outstanding because they had been rejected or superseded. We need not consider this challenge, however, since there were sufficient other undisclosed obligations to support the contracting officer's determinations for at least one of Dan's sureties under each solicitation.

We have recently held that the question of the acceptability of an individual surety is one of bidder responsibility. See *Clear Thru Maintenance, supra.* Thus, the contracting officer here erred in rejecting Dan's bids as nonresponsive. Under the circumstances, however, rejection on responsibility grounds clearly was appropriate.

Dan's alleges that the contracting officer's rejections of its sureties amounts to bias against the firm itself. Since we have determined, however, that the contracting officer's actions in finding Dan's sureties unacceptable were reasonable, there is no independent evidence of bias here. Absent that evidence, Dan's charge is mere speculation and falls short of satisfying the requirement that the protester affirmatively prove its case. See *Data Controls/North, Inc.,* B-204812.3, February 17, 1982, 82-1 CPD 139.

The protest is denied.

[B-206333, B-206333.2]

Contracts—Small Business Concerns—Awards—Set-Asides—Administrative Determination—Reasonable Expectation of Competition

Protest against small business set-aside of procurement of microreaders is denied, since contracting officer reasonably anticipated receipt of offers from a sufficient number of small businesses so that award would be at reasonable price and record indicates agency actually received adequate competition to meet Government's needs.

Contracts—Options—Not to be Exercised—Contract Administration Matter—Not for GAO Resolution

General Accounting Office will not review agency's determination not to renew a contract since the decision whether to exercise contract renewal option is a matter of contract administration outside the ambit of the Bid Protest Procedures.

Constitutionality—Administrative Actions—Procurement Matters—Due Process Right—Small Business Set-Asides

Allegation that set-aside resulted in large business protester being excluded from the procurement without a hearing in violation of its constitutional right to due process is without merit since large business does not have constitutional right to a hearing.

Constitutionality—Administrative Actions—Procurement Matters—Hearings Right—Small Business Set-Asides

Small Business Act, 15 U.S.C. 631, 644, and implementing regulations, Federal Procurement Regulations 1-1.706-5 (1964 ed. amend. 192) grant contracting officers broad discretion to set aside particular procurements for small business. Fact that particular large business firm received contract for many years does not give firm property right to subsequent contracts. Since constitutional protection of procedural due process applies only if a right is being taken away, a hearing was not required prior to the decision to set aside the subsequent year's contract.

Contracts—Negotiation—Late Proposals and Quotations—Solicitation's Late Offer Clause—Acceptability of Offer

Protest of agency refusal to consider offer sent by regular mail and received after due date for receipt of offers is denied where circumstances of late delivery do not fall within any of solicitation's late offer clause exceptions.

Matter of: Bell & Howell; Topper Manufacturing Corporation, September 14, 1982:

Bell & Howell (B&H) and Topper Manufacturing Corporation (Topper) protest under solicitation FCGE-B9-75224-N, issued by the General Services Administration (GSA). B&H, a large business, protests the decision by GSA to set aside for small business special items 21-21 and 21-21a, microfilm readers and printers, and accessories and replacement parts under this negotiated multiple-award Federal Supply Schedule (FSS) solicitation. According to the contracting officer, the items set aside represent 3 to 5 percent of the total procurement of various microfilm-related products solicited by GSA under this solicitation. Topper protests the refusal of GSA to consider its late offer.

We deny the protests.

Bell & Howell's Protest

B&H alleges that the exclusion of B&H is a denial of due process, that the set-aside is detrimental to the public interest, that the set-aside is inconsistent with the policies of the Small Business Act because B&H's small business suppliers will be adversely affected, and that the set-aside decision was arbitrary, capricious and not in accordance with applicable regulations.

Federal Procurement Regulations (FPR) § 1-1.706-1(c) (1964 ed. amend. 192) requires that a set-aside be effected when the contracting officer determines it to be in the interest of assuring that a fair proportion of Government procurement is placed with small business concerns. For a total set-aside, FPR § 1-1.706-5(a)(2) (1964 ed.

amend. 192) requires that there must be a reasonable expectation that offers will be obtained from a sufficient number of small business concerns so that awards will be made at reasonable prices and further provides that past procurement history is an important factor to be considered in determining whether a reasonable expectation exists.

A determination under FPR § 1-1.706-5(a)(2) concerning whether adequate competition may reasonably be expected is basically a business judgment within the broad discretion of the contracting officer for which we will not substitute our judgment. We will sustain a determination under the regulation absent a clear showing of abuse of such discretion. *Belfort Instrument Company (Belfort),* B-202892, July 15, 1981, 81-2 CPD 38; *Simpson Electric Company (Simpson),* B-190320, February 15, 1978, 78-1 CPD 129.

GSA reports that the contracting officer determined that offers from a sufficient number of responsible small business concerns would be received to assure reasonable prices. This was based on the contracting officer's finding that 9 of 11 companies currently on the FSS covering these items were small business contractors, and the sales volume over the last 2 years was divided fairly equally between small and large businesses. However, GSA now admits that its estimate of the volume of sales by small business under the current contracts was mistaken. GSA reports that small business sales were approximately 20 percent, not the 50-percent figure originally relied upon, but argues that, in any event, 20 percent is a sufficient basis for the set-aside. GSA also indicates that the Small Business Administration (SBA) concurred in the set-aside determination.

GSA further states that it received offers from eight small businesses and is negotiating with six of the offerors. GSA asserts, notwithstanding its downward revision of small business sales volume under the prior procurement, that based on the prior procurement history and the actual offers received in response to the solicitation, GSA had a reasonable basis to conclude that adequate competition would occur under the set-aside and the set-aside was therefore proper.

B&H contends that GSA merely counted small businesses listed on the FSS, but that GSA was required to analyze whether sufficient competition exists among these small businesses for the broad variety of microreaders used by the Government. B&H points to the matrix in the solicitation which provides for the listing of the microfilm readers with a variety of different variations, for example, types of lens, screens and controls. B&H asserts that GSA, by its own admission, made no attempt prior to its set-aside decision, to determine whether the small businesses listed on the schedule could provide the variations indicated by the matrix.

B&H further alleges that there are only two small businesses capable of supplying even a few of the products solicited and these

only account for 8 percent, not 20 percent, of last year's Government purchases. According to B&H, the rest of the small businesses listed on the schedule are either large business concerns or small business firms which made no sales to the Government last year. B&H states that a third small business, representing 3 percent of Government sales, offers a unique device and not the variety of products needed. B&H contends that *Simpson, supra,* and *Belfort, supra,* support B&H's position that GSA was required to insure that small businesses could meet Government's needs to support the set-aside decision.

B&H points out that in *Simpson,* for example, GSA conducted a phone survey of primary Government users to determine whether qualifying small businesses could meet the Government's needs, and that only after receiving assurances that needs would be fulfilled did GSA set aside the procurement. B&H points out that, here, the set-aside product involves many variations of a product, requiring an even greater need for a user survey than in *Simpson, supra.* But GSA conducted no user survey and made no determination whether the Government's needs can be satisfied by the small businesses. B&H concludes that GSA did not have a reasonable expectation of small business competition which was capable of meeting Government needs.

In our view, the record supports GSA's decision to set aside the procurement.

Initially, we note that with respect to prior procurement history, under B&H's own analysis of the small business firms on the FSS, which GSA counted to determine the feasibility of the set-aside, two small businesses made 8 percent of the schedule sales.

We reject B&H's argument that GSA improperly counted Northwest Microfilm (Northwest), an alleged large business, which represented another 8 percent of Government sales. B&H reports there was a merger of its parent company, a large business with another large business firm. However, GSA has continued to assert throughout this protest that Northwest is a small business because the merger acquisition is not complete. In any event, the documents submitted by B&H show that public indications of the merger occurred well after GSA's decision to set aside this solicitation and the closing date for receipt of initial proposals. Therefore, GSA properly considered Northwest as a small business offeror in its review of prior procurement history. Thus, GSA, prior to its set-aside decision, relied on three small businesses, which supplied 16 percent of the Government's needs, which B&H concedes showed capability.

There are also three other small business offerors which were on the schedule, but made no sales to the Government the previous year. However, this did not preclude GSA from considering these as potential suppliers when large businesses were excluded from competition under the set-aside. Because B&H supplied a substan-

tial portion of past Government needs, the record would not necessarily show significant past sales to the Government. One of the stated purposes of a small business set-aside is to increase small business participation in Government procurements. FPR §§ 1-1.706-1(a) (1964 ed. amend. 192). To require agencies, in making a set-aside determination, to eliminate from consideration small businesses with no records of sales to the Government under prior contracts, where one large business has dominated Government sales under these prior contracts, would defeat the purpose of the small business set-aside to encourage and permit these firms to participate in Government procurements.

The set-aside decision is further supported by subsequent events. In prior decisions, we have considered the extent of small business response to a set-aside procurement. See *Simpson, supra.* Doubt as to the capability of the small business to meet the Government needs can be resolved by opening offers to determine the propriety of the set-aside. See *Fermont Division, Dynamics Corporation of America; Onan Corporation (Fermont),* 59 Comp. Gen. 533, (1980), 80-1 CPD 438; *Hein-Werner Corporation,* B-195747, May 2, 1980, 80-1 CPD 317.

B&H challenges the capability of small business to provide the full range of models indicated by the solicitation matrix.

Although GSA has requested that we not release information concerning ongoing negotiations with the firms which have submitted offers, the agency has consistently reported that several small businesses have submitted offers, and that based on negotiations conducted thus far, there is an adequate number of types of readers to insure selectivity by using activities.

The matrix indicates that GSA was soliciting readers with a variety of features. GSA did release a document to B&H for comment which is indicative of the small business competition GSA received. The document shows that several small business firms offer a variety of desk and portable models. These firms also offer rear projection models, front projection models, dual and single carrier and lens features. This supports GSA's contention that it needs will be met.

B&H's rebuttal is that, of the firms listed, only one is a viable small business contractor. B&H's conclusion is based on the fact that five of the firms on the original FSS list GSA relied on for its set-aside decision are not listed, and that two of the three small businesses with actual prior contract sales are no longer listed. We note that B&H's analysis rejects from consideration four potential small business offerors listed on the document and the prior FSS because they had no sales to the Government for the contract period. Also, two other small business firms are not considered viable because there is no record of prior contract or sales. B&H continues to consider Northwest a large business and, thus, eliminates that firm from B&H's analysis.

We disagree with this reasoning. As we already pointed out, GSA indicates that proposers, regardless or prior sales history, currently offer a variety of models GSA considers adequate for Government needs. GSA submits this evidence to indicate that viable competition has been received. The prior history of these small businesses is not germane to the question of whether or not the offerors currently can satisfy the Government's needs under this contract.

Since GSA reports that it is currently negotiating with offerors and, further, that it received adequate competition and expects that this competition will meet the Government's needs, we conclude that the subsequent competition supports GSA's initial set-aside decision. To the extent that GSA might be considering an award to Northwest, the agency may investigate the size status of that firm, and any interested party may protect its interests by availing itself of SBA size protest procedures. Finally, on this point, if the awardees cannot provide Government needs during the contract performance period, we expect that appropriate off-schedule procurements will be effected.

With regard to B&H's claim that the set-aside will adversely affect small business suppliers of B&H and therefore, is not in the interest of small businesses, we implicitly rejected this specific argument in *Simpson, supra,* where, as here, we found the set-aside proper.

B&H also alleges that its due process rights have been violated. B&H contends that GSA's failure to comply with even the minimal requirements for the set-aside decision is "an abuse of discretion, and an injury of constitutional significance." Since we have determined that GSA's actions were proper and consistent with the applicable regulations, this allegation of a due process violation is without merit.

B&H also argues that GSA's failure to grant it a hearing prior to deciding not to exercise its option to renew B&H's contract under the contract renewal clause was a violation of due process, especially in view of B&H's 18 years of unbroken awards on this FSS item. B&H contends that had it been granted a hearing, GSA would not have decided to set aside this procurement.

To the extent B&H is protesting the failure of GSA to renew the contract under the prior FSS contract renewal clause, this aspect of the protest is dismissed. We have held that the decision whether to exercise an option is a matter of contract administration outside the ambit of our Bid Protest Procedures. *Optic-Electronic Corp.,* 61 Comp. Gen. 247 (1982), 82-1 CPD 113; *Oscar Holmes & Sons Trucking Company, Inc.,* B-197080, January 15, 1980, 80-1 CPD 47.

To the extent that B&H contends it should have been given a hearing, we rejected the same argument in *Fermont Division, Dynamics Corporation,* B-199159, July 15, 1981, 81-2 CPD 34, a decision under the Defense Acquisition Regulation concerning small business set-asides, which provisions are essentially the same as

those in the FPR applying to civilian agencies. We stated the following:

> Fermont also asserts, citing *Art-Metal U.S.A.* v. *Solomon*, 473 F. Supp. 1 (D.D.C. 1978), that the set-aside policies of DOD have resulted in it being constructively debarred without a hearing in violation of DAR § 1-600 *et seq.* and in violation of its constitutional right to due process. We do not agree. The specific notice and hearing requirements of DAR § 1-600 *et seq.* apply only to those situations where the Government takes action to preclude a bidder from receiving any Government contracts and not to a decision to set aside a given procurement. *See* DAR § 1-600. The *Art-Metal* case is clearly distinguishable in that it concerns an agency's actions pending a possible debarment action. Large businesses do not have a constitutional right to notice or a hearing prior to the decision to set aside a procurement for small businesses. *Duke City Lumber Co.* v. *Butz*, 382 F. Supp. 362, 375 (D.D.C. 1974).

B&H attempts to distinguish the *Fermont* decision on the basis that the unbroken years of renewals support a course of conduct which establishes a "property right" protected by the fifth amendment. We have rejected a similar argument in *Navajo Food Products, Inc.* (*Navajo*), B-202433, September 9, 1981, 81-2 CPD 206. In that decision, the protester, which had been continually awarded contracts under Buy Indian Act set-asides for the previous 10 years, argued it had a property right to a subsequent contract which the Department of the Interior had decided to award under an unrestricted procurement. We found that the decision to set aside a particular procurement was discretionary under the act and, thus, no property right had been established by past conduct. Since constitutional protection of procedural due process only applies if a right is being taken away, Interior did not have to afford that firm a hearing before deciding not to set aside future contracts. See *Navajo, supra,* and cases cited therein.

Similarly, here, the contracting officer has broad discretion under the Small Business Act, 15 U.S.C. §§ 631, 644 (1976), and implementing regulations, FPR § 1-1.706-5 (1964 ed. amend. 192), whether or not to set aside a particular procurement. See also *Belfort, supra.* In our view, therefore, no property right was established and GSA's action did not violate B&H's due process rights.

We deny B&H's protest.

Topper Manufacturing Corporation's Protest

Topper Manufacturing Corporation (Topper) protests GSA's refusal to consider its late offer, which was submitted after the time specified in the solicitation for the receipt of offers. Topper admits that it sent its offer by regular mail on February 16, 1982, that the date specified in the solicitation as amended for receipt of offers was February 18, 1982, and that Topper's offer arrived late on February 19, 1982. Nevertheless, Topper requests that we allow it to resubmit its offer since it was informed that offers timely submitted had not been opened pending resolution of B&H's protest.

Initially, we note that, contrary to Topper's statement, GSA opened the offers. The general rule is that an offeror has the responsibility for the timely delivery of its proposal to the proper lo-

cation and personnel. *Advance Business Service, Inc.*, B-204940, October 28, 1981, 81-2 CPD 359. In the circumstances involved here, we are aware of no basis which would permit consideration of Topper's offer sent by regular mail and received after the due date for receipt of offers, since the submission of this late offer does not fall within any of the solicitation's late offer clause exceptions. See *Geronimo Service Company*, B-199864, October 28, 1980, 80-2 CPD 325.

In view of the above, rejection of the late offer was proper, and we deny Topper's protest.

[B-206346]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Occupancy of Private Quarters—Pay Grade Basis of Entitlement—Pub. L. 96-579—Temporary Duty on Shipboard Prior to Permanent Duty

A member in pay grade E-7 and above may elect not to occupy Government quarters and receive a basic allowance for quarters and a variable housing allowance instead, while performing temporary duty at his permanent duty station, a ship and its home port, prior to reporting to his permanent assignment on the ship, since Pub. L. 96-579, Dec. 23, 1980, amended 37 U.S.C. 403 to authorize such election.

Matter of: Ensign James W. Howard, USN, September 20, 1982:

The question presented in this case is whether a commissioned officer (0-1) is entitled to elect not to occupy Government quarters assigned to him and thus receive basic allowance for quarters when he performs temporary duty on the ship to which he will be permanently assigned and at the home port of the vessel prior to his reporting for permanent duty. The answer is that he may be paid basic allowance for quarters and variable housing allowance if he elects not to occupy assigned Government quarters.

The request for advance decision was made by the Disbursing Office on the U.S.S. *Arkansas* (CGN-41) and has been assigned Control Number Do-N-1384 by the Department of Defense Military Pay and Allowance Committee.

Ensign James W. Howard, USN, 167-48-9584, was ordered to temporary duty on the U.S.S. *Arkansas* and an additional period of temporary duty at the Fleet Anti-Submarine Warfare Training Center, Norfolk, Virginia, prior to reporting incident to a permanent change of station to the U.S.S. *Arkansas*, which is homeported in Norfolk, Virginia. While the submission is not entirely clear as to the period of temporary duty it is indicated that at least 2 months of the temporary duty was to be performed on the U.S.S. *Arkansas*.

Presumably, the question of whether he may elect not to occupy Government quarters arises as a result of the enactment of Public Law 96-579, approved December 23, 1980, 94 Stat. 3359, which

amended 37 U.S.C. 403. That law changed prior law to authorize a member, without dependents, in a pay grade above E–6 who is assigned Government quarters to elect not to occupy those quarters and instead to receive a basic allowance for quarters. The amendment also provided that a member without dependents who is in a pay grade below pay grade E–7 is not entitled to a basic allowance for quarters while he is on sea duty. A member of a uniformed service without dependents who is in a pay grade above pay grade E–6 and who is on sea duty is not entitled to a basic allowance for quarters while the unit to which he is assigned is deployed for a period in excess of 90 days.

Under this law a member without dependents, in pay grade E–7 and above, assigned to a ship may elect not to occupy available quarters on the ship and receive a basic allowance for quarters so long as the ship is not deployed for 90 days.

Under 37 U.S.C. 403(a)(2) (A) and (B), a member entitled to a basic allowance for quarters is entitled to a variable housing allowance when assigned to duty in an area of the United States (other than Hawaii or Alaska) which is a high housing cost area with respect to such member. The allowance is equal to the difference between the average monthly cost of housing for members of the uniformed services in the same pay grade as the member and 115 percent of the amount of his basic allowance for quarters.

The Department of Defense Military Pay and Allowances Entitlements Manual, Table 3–2–3, Rule 2, provides that a member who is assigned to a permanent station is entitled to basic allowance for quarters if he is in pay grade E–7 or higher and elects not to occupy available Government quarters. Rule 9 of the Manual provides that a member is entitled to basic allowance for quarters if he is on sea duty for 3 months or more and the member is in grade E–7 or higher while aboard ship in home port or overhaul and elects after September 30, 1980, not to occupy available quarters. The member is not entitled to basic allowance for quarters after the 90th day the ship is deployed. Note 2 to the table explains that for the purpose of the payment of basic allowance for quarters duty for a period of less than 3 months is not considered to be field duty or sea duty.

The permanent station of a member assigned to a ship is the ship, but it also includes the home port of the vessel. See Executive Order 11157, as amended, and 48 Comp. Gen. 40 (1968). Thus, when Ensign Howard reported for temporary duty aboard the U.S.S. *Arkansas*, he was performing temporary duty at his permanent station. Likewise, the duty at the school in Norfolk was temporary duty at his permanent station. Since the amendments to 37 U.S.C. 403 authorize a member, grade E–7 and above, to elect not to occupy Government quarters and receive instead a basic allowance for quarters, it is our view that if he elected not occupy available Government quarters and in fact did not occupy such quarters he

is entitled to a basic allowance for quarters during the period in question assuming his unit was not deployed more than 90 days. Similarly he is entitled to an appropriate variable housing allowance during this period. The foregoing is, of course, subject to determinations made under 37 U.S.C. 403(j)(2), which provides that the Secretary concerned may deny the right to elect not to occupy Government quarters and receive basic allowance for quarters if he determines such election would adversely affect military discipline or readiness.

The voucher is returned for payment if otherwise correct.

[B-206699]

Compensation—Double—Concurrent Military Retired and Civilian Service Pay—Maximum Limitation—Applicability—Intermittent Employment

Subsection 5532(c) of title 5, U.S. Code, requires that combined military retired pay plus Federal civilian salary not exceed the rate of basic pay for Level V of the Executive Schedule for any "pay period." The term "pay period" means the biweekly pay period fixed under title 5 for civilian employees, whether employed full-time or intermittently. Hence, the military retired pay of a retired Army officer employed intermittently as a civilian consultant is subject to reduction each biweekly pay period in which the amount of his combined retired pay and civilian salary exceeds the biweekly rate of pay prescribed for Level V of the Executive Schedule.

Matter of Lieutenant General Ernest Graves, Jr., USA (Ret.), September 20, 1982:

This action is in response to a request for a decision from Lieutenant Colonel F. N. Christophersen, FC, a disbursing officer of the United States Army Finance and Accounting Center, concerning the proper computation of the military retired pay of Lieutenant General Ernest Graves, Jr., USA (Retired). The request was forwarded here by the Office of the Comptroller of the Army after being assigned control number DO-A-1385 by the Department of Defense Military Pay and Allowance Committee.

The question presented is whether the reduction of military retired pay required under the dual compensation restriction imposed by 5 U.S.C. § 5532(c) (Supp. III 1979) should be computed on a daily, a biweekly, or monthly basis in the case of retired military personnel who are employed intermittently in a civilian capacity as consultants by executive agencies. We conclude that the reduction is properly for computation on a biweekly basis.

General Graves was retired as an officer of the Regular Army on August 1, 1981. He has since been employed in a civilian capacity by the Defense Security Assistance Agency as a consultant, with salary accruing on a daily basis for those days when he is called upon to serve.

The disbursing officer notes that because General Graves is a retired Regular officer, the provisions of 5 U.S.C. § 5532 required a reduction of his retired pay based on his intermittent employment

in 2 separate computational steps, following the expiration of the initial 30-day exemption period prescribed by 5 U.S.C. § 5532(d)(2). The first step involves a reduction of his military retired pay on a daily basis for each day of his intermittent civilian employment under the formula prescribed by 5 U.S.C. §§ 5532 (a) and (b), which applies only to retired Regular officers of the uniformed services. The second step involves a further reduction under the general requirement imposed by 5 U.S.C. § 5532(c) that combined military retired pay plus Federal civilian salary not exceed the rate of basic pay for Level V of the Executive Schedule for any "pay period."

The disbursing officer indicates that doubt has arisen concerning the proper application of the term "pay period" as used in 5 U.S.C. § 5532(c) in the computation of General Graves' net military retired pay entitlements. Uncertainty exists because his civilian salary accrues only on the days he is actually employed, and the first-step computation under the formula of 5 U.S.C. §§ 5532 (a) and (b) involves a reduction of his retired pay on a daily basis; but he is paid civilian salary on a biweekly basis and military retired pay on monthly basis. The disbursing officer notes that the net amount of his retired pay entitlements may vary somewhat depending upon whether a daily, biweekly, or monthly "pay period" is used in the computation of the retired pay reduction under 5 U.S.C. § 5532(c), and sample computations are presented to illustrate this. The disbursing officer therefore asks whether the "pay period" to be used for the reduction referred to in 5 U.S.C. § 5532(c) for intermittent employees is each day worked, the normal biweekly pay period for civilian employees, or the normal monthly pay cycle for retired military personnel. The correctness of the applicable sample computation presented is also questioned.

The provisions of 5 U.S.C. §§ 5532 (a) and (b), prescribing a formula for the reduction of the military retired pay of retired Regular officers employed in a civilian capacity with the Government are derived from section 201 of the Dual Compensation Act, Public Law 88-448, approved August 19, 1964, 78 Stat. 484. Those provisions expressly require a daily reduction of the military retired pay of a retired Regular officer holding intermittent Federal civilian employment only on "the days for which he actually" earns civilian salary. Thus, 5 U.S.C. §§ 5532 (a) and (b) require a reduction on a daily basis of the retired pay of an officer intermittently employed, in the amount computed under the prescribed formula or the amount of daily civilian salary, whichever is less. See 47 Comp. Gen. 185 (1967); and 50 *id.* 604, 606 (1971).

The provisions of 5 U.S.C. § 5532(c), on the other hand, are derived from subsection 308(a) of the Civil Service Reform Act of 1978, Public Law 95-454, approved October 13, 1978, 92 Stat. 1149. Those provisions were designed to change the pay limitation so that retired military personnel, either Regular or Reserve, who were appointed to civilian positions in the Federal service would be

subject to an absolute maximum rate of combined civilian salary and military retired pay equal to the rate payable for Level V of the Executive Schedule. See H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 25 (1978). Under 5 U.S.C. § 5532(c) a reduction of military retired pay is required for each "pay period" in which the amount of a retired service member's combined civilian salary and military retired pay exceeds that maximum rate, and the statutory language makes no distinction between a retired member holding full-time civilian employment and one employed intermittently. See, generally, *Matter of McFarlane,* 61 Comp. Gen. 221 (1982).

Although the provisions of statutory law governing the payment of military active duty and retired pay contained in titles 10 and 37 of the United States Code generally call for entitlements to be computed on a monthly basis, the term "monthly pay period" is not used. See, e.g., 10 U.S.C. §§ 1401, 3991; 37 U.S.C. § 1004. Further, the provisions of title 5 of the United States Code relating to the pay of civilian employees contain no reference to a "daily pay period" for persons employed intermittently as consultants on a per diem basis.

However, a "biweekly pay period" is established under title 5 of the United States Code for employees of executive agencies, regardless of whether their employment is full time or intermittent. See 5 U.S.C. § 5504. And we have consequently held that a person employed intermittently by an agency as a consultant, as well as a full-time employee, may not receive compensation within any "biweekly pay period" in excess of the biweekly rate of the basic pay of Level 5 of the Executive Schedule, under the pay limitation imposed by 5 U.S.C. § 5308. See *Matter of Hass,* 58 Comp. Gen. 90 (1978).

Our view is that the provisions of 5 U.S.C. § 5532(c) here in question were designed for application in a manner consistent with the other provisions of title 5 of the United States Code, described above, which relate to the pay limitations and "pay periods" of civilian employees. We therefore conclude that the term "pay period" used in 5 U.S.C. § 5532(c), as it applies to a retired service member employed in a civilian capacity by an executive agency, means the biweekly pay period fixed under 5 U.S.C. § 5504 for all the agency's employees. We conclude further that any retired member so employed, whether on a full-time or an intermittent basis is subject to a reduction of military retired pay under 5 U.S.C. § 5532(c) each biweekly agency pay period in which the amount of his combined military retired pay and civilian salary is in excess of the biweekly rate of basic pay prescribed for Level V of the Executive Schedule.

In the case of General Graves, therefore, a reduction of military retired pay on a daily basis is required under the formula prescribed by 5 U.S.C. §§ 5532 (a) and (b) for each day he earns salary as a consultant through intermittent employment with the Defense

Security Assistance Agency, since he is a retired officer of the Regular Army. His military retired pay may then be subject to a further reduction under 5 U.S.C. § 5532(c) if the amount of his remaining retired pay when combined with his civilian salary for any biweekly agency pay period exceeds the rate of basic pay prescribed for Level V of the Executive Schedule. The computation under 5 U.S.C. § 5532(c) presented by the disbursing officer covered a sample biweekly pay period appears to be correct, i.e., the amount of the reduction is determined by (1) combining the biweekly civilian salary with biweekly military retired pay (as reduced under 5 U.S.C. §§ 5532 (a) and (b), and (2)) subtracting from that sum the biweekly rate of Level V Executive Schedule basic pay.

The question presented is answered accordingly.

[B-200167]

Officers and Employees—Transfers—Real Estate Expenses—Interim Financing Loans—House Purchase—Deeds of Trust Pending Mortgage Execution

Employee executed four deeds of trust to secure interim financing for purchase of residence pending execution of first mortgage 6 months later. Mortgage was used to pay off deeds of trust. Since deeds of trust and first mortgage were secured by employee's conveyance of security interest in the property, both sets of transactions may be regarded as part of total financial package essential to purchase of residence. Consistent with 60 Comp. Gen. 650, employee may be reimbursed escrow fee charged in connection with both transactions. 55 Comp. Gen. 679 is overruled in part

Matter of: Leland D. Pemberton, September 21, 1982:

In this case, we find no objection to reimbursement of escrow fees and related costs paid by Leland D. Pemberton, a Forest Service employee, for both interim and primary financing of a home he purchased near his new duty station at Lee Vining, California.

The seller could not delay closing of the sale until approval of Mr. Pemberton's primary financing, a "Cal-Vet" loan from the State of California. Mr. Pemberton therefore obtained four temporary or interim loans from private sources, and to secure the loans he and his wife executed a deed of trust for each loan to a bank acting in the capacity of a trustee and escrow agent. For the purpose of the January 1980 purchase of the residence financed with the proceeds of those four loans, the bank charged him an escrow fee of $120. At that time he also incurred a transfer tax and other costs associated with recordation of the grant deed. When the "Cal-Vet" loan was approved in June 1980, the bank opened a second escrow account. In addition to costs ordinarily associated with the processing of a first mortgage, the bank assessed Mr. Pemberton a fee which is characterized on the disclosure and settlement statement as for "4 reconveyances at $30.00 each."

The certifying officer, National Finance Center, Department of Agriculture, asks whether the escrow and reconveyancing fees are

reimbursable costs associated with the purchase of a residence. The certifying officer points out that those costs might be considered losses due to market conditions and therefore prohibited under paragraph 2-6.2e of the Federal Travel Regulations FPMR 101-7 (May 1973).

We have recognized that costs associated with certain types of interim financing may be reimbursed incident to an employee's purchase of a residence at his new duty station. For example, where an employee who had been unable to sell his residence at his old duty station encumbered it with a second mortgage as a means of providing interim financing for the purchase of a house at his new duty station, we held that costs associated with the second mortgage were reimbursable. 60 Comp. Gen. 650 (1981). In holding that reasonable and customary costs associated with the second mortgage could be reimbursed to the same extent as expenses connected with a first mortgage, we viewed the second mortgage transaction as part of a "total financial package" essential to the purchase of the new residence. As in *Matter of Beirs,* B-184703, April 30, 1976, which involved interim financing in the nature of a second mortgage against the new residence, we noted that an employee may not be reimbursed costs associated with that secure transaction that compensate the lender for the high risk involved.

On the other hand, we denied reimbursement where interim financing of a home involved a purely personal loan not secured by a mortgage, since no real estate transactions expenses were incurred in obtaining the loan. See 55 Comp. Gen. 679 (1976). In that decision we indicated that the prohibition in 5 U.S.C. 5724a against reimbursement for losses on the sale of a residence is sufficiently broad to exclude reimbursement of any expenses relating to an interim financing loan needed to purchase a home at the new duty station because of delay in selling the former residence. To the extent that statement may be deemed to apply to financing secured by a mortgage against the employee's old or new residence, it is overruled by 60 Comp. Gen. 650 and B-184703, *supra.*

Mr. Pemberton's case differs from those cited above in that the four deeds of trust did not provide interim financing to supplement a first mortgage, but served as short-term financing pending the execution of a first mortgage. They, nevertheless, served a very similar purpose. Secured by the conveyance of an interest in the property being purchased, they facilitated that purchase pending availability of the permanent financing contemplated by the buyer. Like the second mortgage involved in 60 Comp. Gen. 650, we do not consider Mr. Pemberton's execution of the four deeds of trust extraordinary or unusual in light of the current real estate market so as to preclude reimbursement under the Federal Travel Regulations. We view Mr. Pemberton's execution of the four deeds of trust and their satisfaction out of the proceeds of the subsequently executed first mortgage as integral parts of a total financial package

essential to the purchase of the residence at his new duty station. In this regard, his case is to be distinguished from that of an employee who refinances a residence.

In cases involving second mortgages executed either as permanent or interim financing, we have allowed reimbursement to the same extent as costs associated with the first mortgage. *Matter of Beirs, supra.* The fact that the purchaser pays similar costs in connection with multiple sources of financing does not preclude reimbursement if those costs are otherwise allowable. B-166698, May 27, 1969. Since the escrow fee charged by the bank in connection with Mr. Pemberton's purchase of the property and his execution of the four deeds of trust is in the nature of a charge that may be reimbursed incident to a first mortgage, Mr. Pemberton was properly reimbursed the $120 amount of that fee.

In regard to the reconveyance fee assessed at the time the Cal-Vet loan was closed, it should be noted that we have specifically allowed reimbursement for the cost associated with a mortgage executed subsequent to the conveyance of title to the employee. *Matter of Rideoutte,* B-188716, July 6, 1977. The bank has explained that the $120 fee for "4 reconveyances at $30.00 each" was in fact a fee for an escrow opened at the time the Cal-Vet loan was approved and the interim loans were paid off. While the escrowed amount was not paid directly to the seller of the residence as in the usual transaction, but was used to satisfy Mr. Pemberton's obligations under the four deeds of trust, the fee is one that may ordinarily be reimbursed in connection with a first mortgage. Therefore, it may be reimbursed even though it is similar to the escrow fee reimbursed in connection with the January transaction.

[B-195732]

Appropriations—Availability—Contracts—Cost Overruns—Under *v.* Over Contract Ceiling—Discretionary Costs

Discretionary cost increases in cost reimbursement contracts which exceed contractually stipulated ceilings set forth in Limitation of Cost clauses and which are not enforceable by contractor are properly chargeable to funds available when the discretionary increase is granted by the contracting officer. 59 Comp. Gen. 518 and other prior inconsistent decisions are modified accordingly.

Matter of: Environmental Protection Agency—Request for Clarification of B-195732, June 11, 1980, 59 Comp. Gen. 518, September 23, 1982:

The Environmental Protection Agency (EPA) requests clarification of our decision in the matter of *Recording Obligations Under EPA cost-plus-fixed-fee-Contract,* 59 Comp. Gen. 518 (1980). That decision concerned the proper appropriation to charge for a cost overrun of a cost-plus-fixed-fee-contract with the Institute of Gas Technology for technical consulting services.

Briefly, that decision involved a cost overrun (*i.e.*, an increase in the total cost of the contract beyond the contract's ceiling) resulting from a revision in the negotiated overhead rates used to compute indirect costs. The basic contract was executed on January 17, 1975. The modification which resulted in the cost overrun was executed on March 23, 1979. This modification was negotiated pursuant to the procedures set forth in the "Negotiated Overhead Rates" clause of the basic contract which entitled the contractor to price adjustments under certain conditions. Assuming all other conditions were met, this clause, operating in conjunction with the contract's "Limitation of Cost" provision, required price adjustments for allowable indirect costs but only if the final rate would not cause the contract to exceed "any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in the contract." Clause 29, section (d). The contract, like most cost reimbursement contracts, contained a "Limitation of Cost" clause which established an estimated cost ceiling and provided that once that ceiling is reached, the contractor is under no obligation to continue performance unless additional funds are allocated to the contract. Similarly, the agency is under no obligation to raise the ceiling to fund additional costs.

In our 1980 decision, we concluded that the cost of the 1979 modification to reflect an increase in allowable overhead rates was to be paid from the original appropriation obligated for the contract, even though the modification resulted in an increase in the contract's cost ceiling. The basis for our conclusion was that the increased overhead rates were based on an antecedent contractual liability within the scope of the original contract.

EPA states it agrees with this conclusion insofar as it applies to increases in overhead rates. EPA's agreement is based on its reading of *General Electric Company* v. *United States*, 194 Ct. Cl. 678, 440 F.2d 420 (1971), and similar cases, which hold generally that increased overhead rates must be paid in excess of a contractually required ceiling where failure to give timely notice to the contracting officer pursuant to a "Limitation of Cost" clause was not within the contractor's control. However, EPA is concerned that our decision may be read as requiring that "almost all modifications which are not a breach of contract must be funded out of appropriations current when a contract is signed." This concern arises from statements in the decision to the effect that any contract modification within the scope of the original contract should be charged to funds current when the contract was entered. As discussed below, we agree with EPA that it is not necessary to charge all cost increases within the scope of a cost reimbursement contract to funds available when the contract was entered.

EPA points out that cost overruns on cost reimbursement contracts come about in three ways: (1) through cost increases not related to a change in the contract's Statement of Work, (2) through

cost increases pursuant to change orders which require additional work, and (3) through cost increases by bilateral modification, "a new agreement upon different terms than those in the original contract." In all three situations, EPA would use currently available funds to pay increases beyond the original cost ceiling set out in the contract on the theory that there is no antecedent liability, enforceable by the contractor, to grant such increases, and hence no "obligation" of originally available funds.

However, as EPA points out, cost increases allowed for overruns not related to Statement of Work changes, or for changes in the Statement of Work within the scope of the original contract which result in overruns, arise through operation of a contractual clause, the "Limitation of Cost" clause (or the "Limitation of Funds" clause in incrementally funded contracts). Thus, they are clearly within the scope of the original contract. The key, in EPA's view, is whether the contracting officer has discretion to grant or deny a change in the terms of a contract which will increase costs beyond a contractually set ceiling. EPA argues that a contracting officer's discretionary action in these circumstances results in a new obligation chargeable against current funds. EPA also appears to argue that discretionary changes which do not exceed the contract's ceiling similarly may be charged to funds current when the change is ordered.

The general rule relating to the permissible use of annual appropriations after expiration of their period of availability is that they may be applied only "to payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year," 31 U.S.C. § 712a (1976). In applying this provision, we have established the principle that a fiscal year's appropriations may only be charged for contracts executed to meet the *bona fide* needs of that year. 37 Comp. Gen. 155 (1957); 33 *id.* 57 (1953); 32 *id.* 565 (1953).

Thus, even where the fulfillment of a contract made in an earlier fiscal year has required increases in cost in later years, we have allowed the increased costs to be charged to the original appropriation on the theory that the Government's obligation under the subsequent price adjustment is to fulfill a *bona fide* need of the original fiscal year and therefore may be considered as within the obligation which was created by the original contract award. *See* 44 Comp. Gen. 399 (1965).

On the question of changes which increase the cost of the contract but do not exceed the contractually set ceiling, we continue to adhere to the view that such increases should be charged to the appropriation available when the contract was entered. This position is based on the fact that an agency must reserve funds in the amount of the contract's ceiling at its inception in order to comply with the Antideficiency Act (31 U.S.C. § 665 (1976)) prohibition against incurring obligations in excess of available appropriations

since the agency is contractually bound at the outset to fund any cost increases not related to increased work to the contract's ceiling. Since the ceiling amount must be committed at the contract's inception, any under-ceiling cost increases in later years which are within the contract's scope—whether because of changed work or not—therefore should be considered as covered by the original contractual obligation.

However, application of a rule designed to permit the use in appropriate circumstances of prior year funds, after their period of availability has expired, to preclude use of currently available funds for otherwise appropriate ends would serve no useful purpose. While an agency is required to reserve funds sufficient to cover any contingent liability which would be enforceable by the contractor in order to comply with the Antideficiency Act (including amounts for final overhead in excess of the ceiling where an enforceable right to such amount exists), it would not be reasonable to require that amounts for cost increases beyond the contract's ceiling similarly be reserved. There is no way to estimate the anticipated amount of such increases or the need for them in any future years and it would therefore be difficult to consider them as *bona fide* needs of an earlier year.

Upon reconsideration, we therefore conclude that cost increases in cost reimbursement contracts which exceed contractually stipulated ceilings and which are not based on an antecedent liability, enforceable by the contractor, may properly be charged to funds available when the discretionary increase is granted by the contracting officer. Accordingly, our 1980 decision, 59 Comp. Gen. 518, is modified to conform to this decision, as are other prior decisions inconsistent with this one.

[B-203336]

President—Former—Transition Period Funds—Availability—Inauguration Day—Travel Expenses of Invited Guests

General Accounting Office does not object to the General Services Administration (GSA) proposal to recognize ceremonial nature of Inauguration Day departure flights of outgoing President and his guests as traditional and necessary part of Presidential transition. Accordingly, GSA may use funds available under the Presidential Transition Act of 1963, as amended, 3 U.S.C. 102 note, to pay expenses of former President's guests without determining for each one the type of role each played in the transition. Of course, GSA must assure Inauguration Day travel with the former President is not subject to abuse.

Matter of: Former President Transition Travel Expenses on Inauguration Day, September 23, 1982:

The General Counsel for the General Services Administration (GSA) has requested our approval of a proposal upon which GSA may pay certain presidential transition expenses. Specifically, she proposes that the proportionate fares of any invited guests who accompany a former President during the traditional departure flight

from Washington, D.C., immediately after completion of his term of office and conclusion of the inauguration ceremonies, will be paid without further inquiry. For the reasons discussed below, we approve the proposal.

GSA administers the funds made available under the Presidential Transition Act of 1963, Pub. L. No. 88-277, approved March 7, 1964, 78 Stat. 153, as amended, 3 U.S.C. § 102 note (1976). Section 4 of the Transition Act provides:

> Sec. 4 [Services and facilities authorized to be provided to former Presidents and former Vice Presidents]. The Administrator [of General Services] is authorized to provide, upon request, to each former President and each former Vice President, for a period not to exceed six months from the date of the expiration of his term of office as President or Vice President, for use in connection with winding up the affairs of his office, necessary services and facilities of the same general character as authorized by this Act to be provided to Presidents-elect and Vice-Presidents elect. * * *

Section 3(a)(4) of the Transition Act authorized the Administrator to provide on request "necessary services and facilities" which may include:

> Payment of travel expenses and substitute allowances, including rental of Government or hired motor vehicles, found necessary by the President-elect or Vice-President-elect, as authorized for persons employed intermittently or for persons serving without compensation by section 5 of the Administrative Expenses Act of 1946, as amended (5 U.S.C. § 73b-2) [section 5703 of title 5], as may be appropriate * * *.

According to the submission, GSA has not objected to paying the travel expenses incurred by former Presidents or their staff members where the purpose of the travel was clearly transition business. Similarly, GSA has not objected to paying travel expenses incurred by members of the general public where those persons were invited by the former President and they performed some transition function at his request. However, GSA maintains that the proportionate fares of those invited guests, who travel on the inauguration day departure flight, present a payment problem because often the guests' "only role is ceremonial in nature." GSA further maintains:

> Despite this purely ceremonial relationship, it seems entirely reasonable that the former President would expect that the full cost of his traveling party would be borne out of transition funds. In many respects, it can be argued that there is hardly any activity which is more clearly transitional in nature than the departing of the former President and his entourage from the Capital.

In order to avoid trying to determine whether a particular individual is on the inauguration day flight on the basis of a substantive transition role or merely a ceremonial role which might disqualify an individual's travel from being determined necessary to the transition, GSA proposes recognition of the ceremonial aspects of this particular travel. GSA states, "The sole criteria for the payment of their travel expenses out of the transition account would be that they were invited to travel by the former President * * *." GSA further states that this standard would only be applied to the departing travel on inauguration day and could not be used for other travel during the six-month transition period.

We have no objection to GSA's proposal that the ceremonial aspects of the travel of a former President in connection with his departing Washington, D.C. on inauguration day be recognized as a necessary part of the transition. We agree with GSA that this travel is "clearly transitional in nature." Accordingly, the funds appropriated to GSA to carry out the purposes of the Transition Act may be used to pay the travel expenses of the former President's guests on his inauguration day flight. Of course, as GSA notes, this standard will not apply to Secret Service or media personnel whose organizations are responsible for their employees' travel. Also, GSA will monitor the inauguration day travel to assure it "is implemented on a reasonable basis."

[B-203731]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Adverse Agency Action Effect—Solicitation Improprieties

Protest that geographic scope of contract is excessively broad is .timely because, while it was filed with the contracting agency prior to the time fo receipt of initial proposals as required, the subsequent protest to General Accounti.g Office was not filed within 10 days of initial adverse agency action—the passage of the time for receipt of initial proposals without a change in the protested solicitation provision.

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, etc. Determinations—Revision—Cancellation *v.* Amendment of Solicitation

Where initial incorrect wage determination was deleted from solicitation after the receipt of initial proposals and new wage determinations were added, the contracting agency was not required to cancel the solicitation and resolicit to include firm that protested initial wage determination, but did not submit a proposal, where the initial wage determination was not void *ab initio,* where the change resulting from the new determination was not so substantial as to require a complete revision of the solicitation, and where the protester has not shown that it was reasonably prevented from submitting a competitive proposal.

Matter of: PRC Government Information Systems, division of Planning Research Corporation, September 23, 1982:

PRC Government Information Systems, division of Planning Research Corporation (PRC), protests request for proposals No. CDPP-W-80-H-A0008-W4 for ADP support services, issued by the General Services Administration (GSA). Essentially, PRC protests GSA's decision not to cancel the solicitation and reopen competition when the Department of Labor (DOL) ruled, in response to a protest by PRC, that the Service Contract Act, 41 U.S.C. § 351, *et seq.* (1976), wage determination included in the solicitation was improper. Instead, GSA amended the solicitation to delete the original wage determination and include the new, correct wage determinations. Since PRC had not submitted a proposal, claiming that the erroneous wage determination made that too risky, PRC contends that GSA's action prevented it from joining the competition.

We deny this portion of the protest.

PRC also protests the geographic scope of potential performance of the contract, contending that it is so broad that task orders issued for services outside the so-called primary and secondary areas will constitute improper sole-source procurements. This issue was not timely raised and, therefore, we dismiss it.

FACTUAL BACKGROUND

The solicitation contemplated a 1-year contract with two 1-year options for a wide range of ADP technical support services. This contract is the mandatory source for the requirements of GSA and several other Federal agencies for needs within the primary and secondary areas. The primary area is composed of 10 sites and any location within a specific mile radius of each site. The secondary area includes all the GSA regions 2 and 4 and a portion of GSA region 3. In addition, the solicitation provided that the contract "may be used" to provide coverage in other GSA regions that do not have existing contracts for the services, or to provide coverage for services that exceed the scope of an existing regional contract.

Prices were to be submitted on a fixed-price hourly basis for 32 separate categories of employees. These hourly rates were to be the sole compensation for work performed. There were three separate price schedules within which the geographical areas were grouped.

The solicitation estimated hours of work for the various locations, but no specific amount of work was guaranteed. The contractor would be issued task orders, which it was to respond to by submitting proposals showing how the work would be done and how many hours of labor would be provided in each category. The number of hours proposed for each category, multiplied by the fixed contract price for that category and then totaled, would yield the proposed fixed price for the task. There is a maximum dollar amount of $500,000 per task order.

The solicitation also included the standard Service Contract Act clause and wage determination No. 77-117, January 30, 1981. The wage determination listed the Federal Data Processing Center, Huntsville, Alabama (the contract's largest single work site), as the "locality." However, the wage determination also provided that it was applicable to all service employees employed on the contract, regardless of the place of performance. During the preproposal conference, GSA stated that the wage determination was a "national" wage determination.

By letter of April 2, 1981, PRC complained, among other things, that the nationwide wage determination was improper, that the scope of the contract was too broad and that it would be difficult to submit an offer as the solicitation stood. PRC asked that the solicitation be amended. GSA amended the solicitation to change some features that PRC had complained of, but did not change the wage

determination or the scope of the contract. GSA also responded to PRC's complaints by letter of April 17, 1981, stating why it disagreed with PRC's position. On April 27, 1981, prior to the time set for receipt of proposals on that day, PRC protested to GSA, again complaining that the nationwide wage determination was improper and that the contract scope was overly broad. PRC also informed GSA that these problems with the solicitation were so serious as to prevent PRC from submitting an offer and that PRC felt that competition was restricted by the problems. PRC asked that the solicitation be canceled and reissued with the objectionable elements removed or changed. The protest was referred to DOL for its comments.

Two offers were received in response to the solicitation—from the incumbent Computer Sciences Corporation (CSC) and from Computer Data Systems, Inc. (CDS). GSA then began the process of evaluation and negotiation.

On June 8, 1981, GSA received DOL's letter of June 4, 1981, which advised that the nationwide wage determination contained in the solicitation was inappropriate. DOL issued 14 new wage determinations—13 local determinations for the primary and secondary areas and one nationwide determination to cover task orders outside the primary and secondary areas. On June 8, 1981, GSA indicated to PRC that it did not intend to cancel and resolicit, but that it would only amend the solicitation. That amendment (No. 3), incorporating the new wage determinations and permitting the two firms that had submitted offers to revise price proposals, was issued with an effective date of June 11, 1981. Amendment No. 4, changing the price schedules, was issued on June 16, 1981.

PRC then protested to our Office on June 18, 1981. Award was subsequently made to CDS.

Scope of the Contract

PRC argues that the portion of the contract covering services outside the primary and secondary areas is impermissibly broad and that task orders issued for work in that area will be tantamount to impermissible sole-source contracts. PRC contends that such task orders should be competitively procured separately.

This is a protest of an alleged solicitation defect apparent on the face of the solicitation. To be timely, it must be filed with GAO or the contracting agency prior to the time for receipt of initial proposals. 4 CFR § 21.2(b)(1) (1982). PRC filed its protest with GSA prior to that time. When a protest is timely filed initially with the contracting agency, any subsequent protest to GAO to be timely, must be filed within 10 days of actual constructive notice of "initial adverse agency action." 4 CFR § 21.2(a) (1982). Where, as here, the agency protest is of an apparent solicitation defect, the passage of the time for receipt of initial proposals without correction of the

defect is initial adverse agency action. *McCaleb Associates, Inc.*, B-197209, September 2, 1980, 80-2 CPD 163. PRC did not file its protest here within 10 working days of the time for receipt of initial proposals; therefore, it is untimely and will not be considered.

PRC argues that the protest is timely for two reasons. First, PRC contends that because it understood that GSA might not fully consider its protest prior to the closing date for receipt of initial proposals and, therefore, asked for cancellation and resolicitation as a remedy, closing is not initial adverse agency action. Second, PRC argues that since it also protested orders to be issued under the contract, it was not required to protest until each order is issued. In this regard, PRC cites our decision in *Tosco Corp.*, B-187776, May 10, 1977, 77-1 CPD 329, for the proposition that a protester need not file a protest concerning one of a series of procurement actions at the beginning of the series. Alternatively, PRC contends that even if the issue is untimely, it should be considered under our "significant issue" exception. 4 CFR § 21.2(c) (1982).

The nature of the complaint, not the relief requested, is relevant to what constitutes initial adverse agency action. PRC complained of an alleged defect in the solicitation. Once GSA accepted initial proposals without having corrected the alleged deficiency, it was taking action adverse to PRC's position, and PRC was required to protest to GAO within 10 working days. PRC's argument that it was also protesting the issuance of any orders under the contract does not make the protest timely. It was obvious from the solicitation that such orders could be issued once the contract was awarded. The complaint is really against the solicitation provision. The *Tosco* decision is inapposite in these circumstances and, in any event, does not stand for the proposition for which PRC cited it.

Finally, the matter is not for consideration under our "significant issue" exception. This exception is to be used sparingly—only when the subject of the protest is a matter of widespread interest to the procurement community and has not previously been considered by GAO. Essentially, PRC's complaint is that the requirement for services outside the primary and secondary areas should be procured separately. The question of when requirements should be procured separately has been considered a number of times by GAO. See, e.g., *Interscience Systems, Inc.*, B-201890, June 30, 1981, 81-1 CPD 542; *Ampex Corporation*, B-191132, June 16, 1978, 78-1 CPD 439. Consequently, the issue is not for consideration.

Service Contract Act

Protester's Arguments

PRC contends that the solicitation should have been canceled and reissued with the new wage determinations, rather than amended to include them. PRC bases its contention on the following grounds: (1) the wage determination in the solicitation was void

ab initio, (2) the changes in the solicitation resulting from the new wage determinations were of such magnitude as to require resolicitation, and (3) GSA delayed sending necessary information to DOL, thus contributing to the new wage determinations not being issued until after the closing date for receipt of proposals.

PRC argues that the original nationwide wage determination was clearly contrary to the intent of the Service Contract Act, and that both GSA and DOL should have known that it was improper. According to PRC, when a solicitation contains such a clearly illegal wage determination, it is tantamount to having no wage determination. Since the act requires that all solicitations have the proper determination, the only appropriate remedy is cancellation of the solicitation and resolicitation with the proper wage determination.

The protester cites *Southern Packaging and Storage Company, Inc.* v. *United States,* 458 F. Supp. 726 (D.S.C. 1978), *aff'd,* 618 F.2d 1088 (4th Cir. 1979), in arguing that the nationwide wage determination was clearly illegal. According to PRC, those cases hold that the use of a nationwide wage determination in a solicitation is improper to the extent that the place or places of performance of the contract are known. PRC also points out to DOL's statement in the Federal Register that it would henceforth adhere to the principles set forth in those cases. 46 Fed. Reg. 4320, 4326 (January 16, 1981).

PRC argues that the places of performance were known in this case, so the principle of the *Southern Packaging* cases apply. Therefore, since the initial wage determination in this case was issued after the cases were decided and after DOL's declaration of adherence to that principle, the wage determination was a legal nullity requiring cancellation of the solicitation.

PRC also argues that the changes in the wage determination, specifically affecting offeror risk, were so great that only cancellation and resolicitation is a proper course of action. PRC claims that under the initial wage determination, it, and probably potential offerors other than the incumbent, could not submit an intelligent offer. Under the new wage determinations, however, PRC and others would be able to compete due to increased information and reduced risk. In this regard, PRC claims, citing *Iroquois Research Institute,* 55 Comp. Gen. 787 (1976), 76-1 CPD 123, that since the Federal Procurement Regulations (FPR) do not provide detailed guidance concerning this matter, the Defense Acquisition Regulation (DAR) must be used for guidance. DAR § 3-805.4(b) (DAC No. 76-17, September 1, 1978) states, in pertinent part, that:

> * * * no matter what stage the procurement is in, if a change or modification is so substantial as to warrant complete revision of a solicitation, the original should be canceled and a new solicitation issued. * * *

PRC details the magnitude of the change in the following way. The contract is a fixed-price contract for services. Consequently, the wages to be paid the service employees as guided by the wage determination are critical to the determining costs and prices.

Under the initial nationwide wage determination, the offeror would bear the risk of regional price variations and fluctuations because it is required to pay at least the nationwide average regardless of where the work is performed or what the local prevailing rate actually is. PRC contends that the incumbent's risk in that situation is substantially lower "because of its existing labor force and its experience with the distribution of work under the contract." Under the new wage determinations with the changed price schedules, local variations are better accounted for, and offeror risk is substantially reduced, especially for nonincumbents. This changes the basis for pricing and, thus, the nature of the contract.

PRC also contends that this general change is magnified by the specific wage determinations. The protester points out that, now, instead of a single wage rate for each category of service employee, there is a range of wage rates, with an average range of 35 percent between the highest and lowest rates. Also, PRC states that 8 of the 13 regional wage determinations, including the largest performance location, are lower than the nationwide determination. This permits an offeror to reduce its risk and offer a lower price than was previously possible.

PRC complains that GSA's tardiness in transmitting PRC's concerns about the wage determination to DOL was a major factor in the issuance of the proper wage determinations after the closing date for receipt of initial proposals. PRC first raised its concerns in a letter to GSA, dated April 2, 1981, although it did not protest until April 27, 1981. GSA did not refer PRC's letter of April 2, 1981, to DOL, but did refer its protest. PRC contends that GSA should have contacted DOL immediately after receipt of April 2, 1981 letter, which may have permitted DOL to issue the proper wage determinations prior to the closing date. PRC's cites *High Voltage Maintenance Corp.*, 56 Comp. Gen. 160 (1976), 76-2 CPD 473, as an example of a case in which the agency delayed sending Service Contract Act information to DOL, which delayed the issuance of a new wage determination, and GAO sustained the protest partially based on that factor.

PRC states that GAO has not previously considered the factual situation presented here, but cites several GAO decisions which, it argues, support its position. The decisions and PRC's interpretation of them follow.

Hayes International Corporation, 60 Comp. Gen. 288 (1981), 81-1 CPD 151. The protester objected to a nationwide wage determination, citing the *Southern Packaging* cases. GAO agreed with the *Southern Packaging* cases, but denied the protest because the solicitation was issued prior to the Court of Appeals decision and closed prior to the expiration of the time for seeking review by the Supreme Court and because the contract was awarded and performed before DOL issued its intent to follow the cases. Here, the protest should be sustained because the solicitation was issued after the de-

cisions and after the DOL announcement and, thus, the wage determination was void *ab initio.*

High Voltage Maintenance Corp., supra. This case states the general rule that the proper way to determine the effect of changesin Service Contract Act wage determinations is to compete the procurement using the new rates.

B. B. Saxon Co., Inc., 57 Comp. Gen. 501 (1978), 78-1 CPD 410. GAO held that a procuring agency could not leave a wage determination out of a solicitation when DOL determined that the service contract Act applied. GAO recommended that the defective solicitation be canceled and resolicited. Here, GSA has ignored DOL's proper wage determination, so the solicitation should be canceled and resolicited.

Minjares Building Maintenance Corp., 55 Comp. Gen. 864 (1976), 76-1 CPD 168. GAO stated that an amendment was an appropriate way to incorporate a new wage determination into a solicitation. However, in *Minjares,* the wage determination was merely a revised determination for the same locality, and there was no indication that competition was hindered by the original defective wage determination. Here, the wage determination was entirely restructured and competition has been restricted by the faulty wage determination. Consequently, merely amending the solicitation is not an appropriate response.

Agency's and Interested Parties' Arguments

In response to PRC's argument that the original nationwide wage determination was void *ab initio,* GSA states that it followed the proper procedures in requesting a wage determination and that it was bound by DOL's wage determination. Until DOL issued the new determinations, the initial determination was valid and fulfilled the requirement that the solicitation include a valid wage determination.

According to GSA, the request for a wage determination was made well before issuance of the solicitation to be certain that a wage determination would be available in sufficient time. GSA requested a nationwide determination because the requirement historically had been procured using a nationwide determination. Both GSA and CDS argue that it is far from clear that the *Southern Packaging* cases prohibit a nationwide wage determination in this instance. They both point out that in *Southern Packaging,* performance was to be at the contractor's place of business and the agency knew what firms would be probable bidders. Here, the actual places of performance will not be certain until task orders are issued. Consequently, a nationwide wage determination was at least reasonable.

GSA notes that nothing in the Service Contract Act or the implementing regulations requires cancellation and resolicitation if the wrong wage determination is initially included in a solicitation.

Concerning the timeliness of its request to DOL, GSA states that since it thought that it had adequately answered PRC's concerns in its letter of April 17, 1981, there was no reason for it to request review of the wage determination until PRC's protest of April 23, 1981. GSA received that on April 27, 1981, and sent it to DOL on April 30, 1981. CDS points out that PRC delayed resolution of the problem by waiting a month after issuance of the solicitation before it objected to the wage determination.

GSA contends that its decision to amend rather than cancel in this situation is entirely consistent with regulations and case law and was necessitated by the facts surrounding the procurement. GSA points to FPR § 1-3.805-1(d) (1964 ed. amend. 153) which states, in pertinent part, that:

> When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each *prospective contractor.* * * * [Italic added by GSA.]

GSA interprets this to mean all offerors who have a reasonable chance to be a contractor. Since PRC did not submit an offer, it does not fall into this category.

GSA, while stating that it is not bound by DAR § 3-805.4(b), asserts that its decision complies with that regulation. GSA points to the language stating that a solicitation should be canceled "if a change or modification is so substantial as to warrant complete revision of a solicitation." According to GSA, the wage rate change was not very substantial in impact on the procurement. The solicitation evaluation factors provided that technical factors would be significantly more important than price in determining the awardee. The wage determination change could affect only price, not technical factors.

Also, GSA points out that, prior to the new wage determination, the solicitation contained three price schedules. After the new determinations, the rates were grouped into four groups within which rates were similar. GSA contends that the amount of change within the schedules was minimal. According to GSA, there was only token change in the rates that represent 87 percent of the contract volume. Additionally, only 10 of the 32 positions listed in the solicitation were subject to the wage determinations. Consequently, GSA asserts that the new wage determinations had only limited effect on contract prices, and price was less important than technical factors. GSA also notes that the prices received appear to have been controlled by prevailing market conditions rather than by the minimum wage rates in the solicitation. CSC also argues that the change was minimal. CSC compared the average of the new wage determinations for each category of employee with the nationwide wage rate for each category and found that the difference for all but three categories was less than 50 cents.

GSA also argues that circumstances made cancellation and resolicitation not a viable course of action. GSA asserts that the procurement was in an advanced state, and that resolicitation would have taken approximately 4 months. GSA claims that such a delay could have adversely affected a number of "vital Government projects." Also, GSA contends that resolicitation would have been unfair to the offerors who had already expended substantial time and money to compete. In GSA's opinion, it received adequate competition and, based on contacts it had with other potential offerors, it was unlikely that any additional firms other than PRC would have joined the competition upon resolicitation.

GSA, CDS and CSC cite several GAO decisions in support of the determination to amend the solicitation rather than to cancel and resolicit. The cases and the parties' interpretations are as follow.

Cardion Electronics, 58 Comp. Gen. 591 (1979), 79-1 CPD 406. The standard of review by GAO of an agency decision concerning cancellation of a solicitation is whether the agency's decision has a reasonable basis. The protester was a potential offeror which did not submit a proposal due to certain alleged defects in the solicitation. The solicitation was later amended to correct other deficiencies and the firm protested asking for cancellation and resolicitation. GAO found that the agency was not required to cancel and resolicit it because the change in the requirements was not substantial and because the protester had not submitted a proposal or protested the alleged defects to GAO. Also, we found that an individual contractor's perception of the risk involved in a contract is not of concern to the Government.

University of New Orleans, B-184194, January 14, 1976, 76-1 CPD 22. GAO upheld a protest of an amendment to a solicitation and recommended that competition be reopened to all offerors who had submitted a proposal, but not to other potential offerors.

Raytheon Service Company; Informatics Systems Company, 59 Comp. Gen. 316 (1980), 80-1 CPD 214. GAO upheld the agency's decision to calculate the effect of a new wage determination on offers rather than amending the solicitation and permitting offerors to revise proposals when a new wage determination was issued after submission of best and final offers.

Minjares Building Maintenance Company, supra. GAO held that when a new wage determination is issued after submission of initial proposals, the agency may amend the solicitation rather than cancel and resolicit.

GAO Analysis

We find that GSA was not required to cancel and resolicit because the solicitation was not void *ab initio,* the evidence does not show that GSA improperly delayed sending information to DOL, the changes in the solicitation were not so substantial as to war-

rant complete revision, and PRC was not reasonably prevented from submitting a competitive offer by the initial wage determination.

Initially, we point out that our review of agency decisions concerning cancellation of solicitations is limited to whether the exercise of agency discretion is reasonable. *Apex International Management Services,* 60 Comp. Gen. 172 (1981), 81-1 CPD 24. PRC contends that the *Apex* decision changed the standard to whether the agency decision had a "sound basis." According to PRC, this is a stricter standard. We disagree. The decision used the terms sound basis and reasonable basis synonymously and did not change the standard.

Concerning PRC's argument that GSA's use of a nationwide wage determination was clearly improper, void *ab initio,* and, therefore, tantamount to no wage determination, we conclude that the inclusion of the nationwide wage determination eventually found to be inappropriate by DOL was not clearly improper or unreasonable in the circumstances. The *Southern Packaging* decisions do not totally prohibit nationwide wage determinations. The Court of Appeals stated, in a footnote:

> We postulate that there may be the rare and unforeseen service contract which might be performed at locations throughout the country and which would generate truly nationwide competition. In such a case, national wage rates may be permissible, although we do not decide the point. *Southern Packaging and Storage Company, Inc.* v. *United States, supra,* at 1092.

While DOL ultimately decided that the present situation is not such a rare case where a nationwide wage determination is appropriate, it was at least arguably applicable. In previous years, the requirement had been competed using a nationwide wage determination, and DOL, the agency charged with administering the Service Contract Act, issued the nationwide wage determination for use by GSA here. Further, one could argue that since the contract requirements are indefinite the places of performance of the contract cannot be known until the task orders are issued. Also, the contract is a nationwide contract and could conceivably fall within the situation discussed in the above-quoted footnote. That nationwide wage determinations are not *per se* illegal was recognized in *Hayes International Corporation, supra.*

Additionally, nothing in the statute or regulations concerning the Service Contract Act requires cancellation of a solicitation when an incorrect initial wage determination is changed. Also, GAO decisions do not require such action. While in *High Voltage Maintenance Corp., supra,* we found that the solicitation should be canceled and resolicited when a wage determination was issued after closing, in that case there was no wage determination in the solicitation. The same was true in *B. B. Saxon Co., Inc., supra.* Here, we cannot say that an arguably correct wage determination that was ultimately proven to be inappropriate is tantamount to no

wage determination. Where, as here, there is a wage determination in the RFP which is later replaced with a new determination, we have found amendment to be appropriate. *Minjares Building Maintenance Company, supra.* While we recognize, as PRC argues, that *Minjares* involved a less substantial wage rate change than the instant case, the principle is the same.

Concerning PRC's complaint that GSA should have notified DOL of PRC's April 2, 1981, letter objecting to the wage determination, we agree with GSA. At that point, GSA had received a valid wage determination from DOL and, while PRC had objected, it did not protest. We think that is was reasonable for GSA to wait until PRC protested before notifying DOL. Additionally, PRC could have notified DOL itself, or could have protested earlier.

Concerning PRC's argument that the degree of change between the first and second wage determinations was so substantial as to require cancellation, all parties have recognized and argued our decision in *Cardion Electronics, supra,* which sets forth the standard for the degree of change in a request for proposals which necessitates cancellation and resolicitation.

The essential facts in *Cardion* are that Cardion proposed to the Federal Aviation Administration (FAA), prior to the date for receipt of initial proposals, that certain changes be made in the request for proposals. The FAA did not make those changes, so Cardion notified the FAA that it could not compete. Cardion did not protest at that time. During negotiations with the single offeror, the FAA amended the RFP to make certain technical changes. At that time, Cardion protested here, arguing that the solicitation should be canceled and the requirement resolicited because the amendment reduced the scope of the contract and the risk borne by the contractor. Cardion argued that the change in the RFP was so substantial that the amendment amounted to a new procurement.

In *Cardion,* we stated the basic issue and standard, which are applicable to this case, as follows:

> * * * has Cardion shown that FAA's decision that the changes in requirements are not so substantial as to warrant complete revision of the RFP has no reasonable basis?

We also found that the magnitude of the change should not be measured by an individual offeror's perception of the change in amount of risk involved in the contract. Additionally, we stated that the scope of change permitted in an RFP before cancellation is required is greater than the amount of change allowable in the scope of an existing contract.

We find that the change resulting from the new wage determinations, while substantial, did not change the fundamental purpose or nature of the RFP. As PRC has argued, the new rates account for regional variations with substantial variation between the highest and lowest rates, and the majority of the new rates are lower than the previous rate. This generally would permit offerors to

price proposals with greater precision and to offer lower prices than they could under the nationwide determination. As GSA and the interested parties argue, the far more important technical factors in the RFP were not changed and the new wage rates were not totally different. Also, wage rates set the minimum wage, but the prevailing wage is often higher and is set by the market. This appears to be true here. It is our opinion that GSA's determination that the changes were not so substantial as to require complete revision of the solicitation was reasonable.

PRC points to the following language in *Cardion,* which it argues requires GSA to cancel and resolicit:

> If a prospective offeror believes the terms of the RFP involve too much risk, it has a choice of either submitting a proposal in response to the RFP, or protesting prior to the closing date for receipt of initial proposals and specifically challenging those areas of the RFP it believes should be changed.* * *

Cardion did neither, and we upheld the agency's decision to amend, not cancel, the solicitation. PRC contends that since it did file a protest prior to the closing date, it fulfilled the requirement set forth in *Cardion.* Once its protest was found to have merit, that is, the wage determination was changed as it asked, then it must be permitted to join the competition.

While the latter-quoted section of *Cardion* does state that a prospective offeror has a choice of protesting or submitting a proposal, we find it implicit in *Cardion* that to preserve its right to join the competition if the solicitation is changed as it requests, a protester that does not submit an offer must show that the defect in the solicitation was so material that the protester was reasonably prevented from submitting a competitive offer and that the change allows it to submit a competitive offer.

We find that PRC was not reasonably prevented from submitting a competitive offer. PRC claims that it could not submit an intelligent, competitively priced offer because the single nationwide wage determination requires it to pay an amount that could be more than the prevailing rate in many areas. PRC also argues that the incumbent's risk is lower because of its existing workforce and experience with the distribution of work under the contract. PRC then alleges that the increased number of local wage rates reduces risk and price, especially for the nonincumbent contractor.

Given the change in wage rates (generally lower), we understand that all offerors, incumbent or not, could possibly submit lower prices after the change than before. However, we do not see how the initial wage rate provided any special advantage to the incumbent or how the new wage rates decreased any inherent incumbent advantage. Under either scheme, all offerors would be required to pay at least the wage rate. The fact that the incumbent has an existing workforce does not change that requirement in either case and whatever advantage the incumbent might gain from its existing workforce would be the same under either scheme. Additional-

ly, the incumbent's knowledge of the work distribution is the same in either case and the effect of that knowledge is the same.

In addition, PRC admits to having knowledge of the actual prevailing wages in the various performance localities and the RFP provides figures showing the historical distribution of work under the contract, so even some of the inherent advantages of incumbency do not appear to be a factor here.

All offerors appear to be able to compete equally under either scheme. This was borne out by the fact that a nonincumbent was able to submit a competitive offer under the initial wage determination and then won the competition under the revised determination. In short, we do not think that PRC was materially prejudiced by the initial incorrect wage rate to the extent that it was prevented from submitting a competitive offer.

We deny the protest in part and dismiss the protest in part.

[B-172733]

Claims—Administrative Settlement—Compensation Claims—Overtime Travel—Air Safety Investigators—Abbott Court Decision Effect

The National Transportation Safety Board may administratively settle overtime travel claims of air safety investigators for periods of time not time barred under 31 U.S.C. 71a, pursuant to the Court of Claims reasoning in *Russell J. Abbott, et al.* v. *United States*, Ct. Cl. No. 317-71, May 30, 1980. Decision 52 Comp. Gen. 702 will no longer be followed.

Compensation—Overtime—Traveltime—Air Safety Investigators—Access-To-Aircraft Authority—Emergencies *v.* Non-Emergency Conditions

Travel to and from accident sites by air safety investigators on commercial airlines, performed under access-to-aircraft (cost free) authority and emergent situations, is compensable work for the purposes of 5 U.S.C. 911 and 912b. The investigators are entitled to overtime pay for such travel outside normal duty hours. Where, however, access-to-aircraft travel was utilized in non-emergent situations and no work was performed or was required during the travel, such travel only served the purpose of transporting the investigator and is not compensable overtime work.

Compensation—Overtime—Traveltime—Air Safety Investigators—Fare-Paying Air Travel—Emergency *v.* Non-Emergency

Air safety investigators traveling as fare-paying customers on commercial aircraft while proceeding to and from aircraft accidents and while in furtherance of ongoing investigations of aircraft accidents and who perform their investigative function while traveling under emergent conditions are performing work under 5 U.S.C. 911 and 912b. However, routine fare-paying air travel not under emergent conditions is not compensable.

Compensation—Overtime—Traveltime—Air Safety Investigators—Automobile, etc. Travel—Emergency *v.* Non-Emergency

Air safety investigators who travel by means other than aircraft, usually by automobile, to and from accident sites, and who are found to perform their investigative function while traveling under emergent conditions, are performing compensable overtime work under 5 U.S.C. 911 and 912b. Likewise, air safety investigators who pilot planes under the same circumstances may be paid overtime compensation for such travel.

Compensation—Overtime—Traveltime—Air Safety Investigators—Work Performance—Special Transportation of Documents, etc. Required

Air safety investigator who is ordered to transport documents, equipment and exhibits and who is required to personally travel with the items in order to protect their integrity or to ensure they are not damaged, lost, or tampered with, may have such traveltime considered work for the purpose of overtime under 5 U.S.C. 911, 912b. If, however, an investigator incidentally transports these items when the main purpose of his travel is for other reasons, then such travel is not compensable as overtime work under 5 U.S.C. 911 and 912b.

Matter of: William L. Lamb—Air Safety Investigators—Overtime Pay for Travel to and from Accidents, September 24, 1982:

Mr. B. Michael Levins, Director, Bureau of Administration, National Transportation Safety Board (NTSB), has requested our approval for the payment of overtime compensation for travel to air safety investigators, consistent with the principles established by the court in *Russell J. Abbott, et al.* v. *United States,* Ct. Cl. No. 317-71, May 30, 1980.[1] For the reasons which follow, we have no objection to paying these or similar air safety investigator claims, subject to 31 U.S.C. § 71a. Our decision 52 Comp. Gen. 702 (1973) will no longer be followed.

Background

Claimants are air safety investigators employed by NTSB to engage in the investigation and prevention of accidents and incidents involving United States aircraft anywhere in the world and foreign aircraft in the United States. Claimants are also engaged in the establishment of programs and procedures to provide for the notification and reporting of accidents. At issue here is whether they may be paid overtime compensation for travel going to and from the scene of accidents when it is performed beyond their regularly scheduled 40 hour workweeks.

The relevant overtime provisions for the period of time involved are 5 U.S.C. §§ 911 and 912b (1964) [2] which read as follows:

[1] In *Abbott,* judgments were rendered against the United States and in favor of the following named plaintiffs: William L. Lamb, Ivan R. Stracener, Philip W. Atkins, Robert E. Gilmour, John Sahaida, Robert H. Shaw, Guy D. Moshier.

[2] Now codified, as amended, at 5 U.S.C. §§ 5542(a), 5542(b) (1976).

All hours of work officially ordered or approved in excess of forty hours in any administrative workweek performed by officers and employees to whom this subchapter applies shall be considered to be overtime work and compensation for such overtime work, except as otherwise provided for in this chapter, shall be at the following rates. * * * 5 U.S.C. § 911.

For the purposes of this chapter, time spent in a travel status away from the official-duty station of any officer or employee shall be considered as hours of employment only when (1) within the days and hours of such officer's or employee's regularly scheduled administrative workweek, including regularly scheduled overtime hours, or (2) when the travel involves the performance of work while traveling or is carried out under arduous conditions. 5 U.S.C. § 912b.

The claimants, along with other air safety investigators, originally filed their claims with the General Accounting Office in 1970. Subsequently, in our decision on the overtime claim of Garnett E. Lowe, Jr., 52 Comp. Gen. 702 (1973), we held that air safety investigators could not be paid overtime compensation for traveling on commercial airline flights unless they were occupying the jumpseat in the aircraft cockpit. We also held that when the investigators piloted aircraft to their work they were not engaged in compensable work because such travel was not arduous.

We so held relying on the Commissioner's finding of facts in *Griggs* v. *United States,* Ct. Cl. No. 336-65 (Trial Div. 1967), involving another claim for overtime compensation for travel by an air safety investigator. The Commissioner described the travel as not being compensable under 5 U.S.C. § 912b since the evidence did not show the performance of work was required while traveling and since the travel could not be described as being arduous.

Claimants then pursued their legal remedies in the Court of Claims and in *Abbott,* Trial Judge Colaianni rejected the applicability of 52 Comp. Gen. 702 to the claimants' case and found that in the case of air safety investigators, travel under certain circumstances in commercial aircraft and automobiles, and travel while piloting planes could be considered compensable overtime work. *Russell J. Abbott (William L. Lamb, Plaintiff No. 15)* v. *United States,* Ct. Cl. No. 317-71, (Trial Division) May 30, 1980. Mr. Levins states that none of the parties have appealed the *Abbott* decision and judgments have been entered for the claimants by the court.

The NTSB now recommends payment of those portions of the overtime claims occurring prior to April 11, 1965, which were barred from consideration by the Court of Claims by virtue of the court's 6-year statute of limitations, 28 U.S.C. § 2501, but which may be administratively considered because claimants had previously filed their claims with GAO. See 31 U.S.C. § 71a(1) (1964). Mr. Levins accordingly asks whether NTSB may settle the investigators' claims for the period prior to April 11, 1965, based on the court's rulings in *Abbott.*

The court in *Abbott* described the reasons for and conditions of air safety investigators' travel to be as follows:

An aircraft accident or incident is a random, unscheduled occurrence which may take place under varying conditions of weather and terrain. The CAB, and its successor, the NTSB, were charged with responsibility under federal law to take custo-

dy of the wreckage, records, cargo, mail, flight records, and bodies of victims. Thus, expedient arrival at an accident scene was a necessity, and the air safety investigators, including the engineering technicians, had to be available 24 hours a day, 7 days a week, and 365 days per year.

* * * * * * *

If the distance to the accident scene was substantial, the initial phase of the travel was normally performed by the first available commercial airline flight to the airport nearest the accident scene. The investigator, if he were notified of the accident during off-duty time, would proceed from his home to the airport either in his private automobile, in a Government vehicle that might be available for his use, or in a taxi. An investigator traveling by commercial air carrier would either acquire, similar to the general public, a ticket for first class or tourist seating, or fly at no cost to the Government in an access-to-aircraft status.

See pages 4, 5, and 6 of trial judge's opinion in *Russell J. Abbott, et al. (William L. Lamb, Plaintiff No. 15)* v. *United States* Ct. Cl. No. 317-71, May 30, 1980.

I

Access-To-Aircraft Travel

The court found that access-to-aircraft authority was exercised in several situations. First, if the investigators desired or needed to make observations of the operations of the aircraft as an aid to the performance of their assigned duties and investigations, they would exercise their right to fly in the cockpit jump-seat.

Access-to-aircraft authority was also exercised when the investigator wished to travel on the same carrier involved in the accident to observe the carrier's operational procedures or when he wished to inspect a particular type of aircraft, aircraft components or route facilities involved in the accident. Additionally, when no other means of transportation to a location near an accident was reasonably available, access-to-aircraft authority was exercised on a must-ride basis. The court found that access-to-aircraft travel was generally performed in the jump-seat but seats in the cabin were also used for such travel.

The court found that, while traveling under access-to-aircraft authority, the investigators performed various duties, including meeting and briefing the crew, observing and reporting on the crew's activities and coordination, and familiarizing themselves with the aircraft, its instrumentation, the cockpit's configuration, functional operating procedures, air traffic control systems being employed, and all other facets of safety in air commerce. The court found that NTSB acknowledged that these activities were performed during access-to-aircraft travel. The court held that these activities were work within the meaning of 5 U.S.C. §§ 911 and 912b. Accordingly, time spent in access-to-aircraft travel was deemed to be compensable overtime.

The court also found, however, that some access-to-aircraft travel was accomplished when no work was performed or was required. For example, in the case of Ivan R. Stracener, Plaintiff No. 32, the

court held that his access-to-aircraft travel to a meeting in a nonemergent situation when he was not ordered to perform such travel was not compensable overtime work. See page 21 of trial judge's opinion in *Russell J. Abbott, et al. (Ivan R. Stracener, Plaintiff No. 32)* v. *United States* Ct. Cl. No. 317-71, May 30, 1980.

We have no objection to the application of these rules to claims arising prior to April 11, 1965. As to most of the access-to-aircraft travel the court found that the travel was not merely for the purposes of transporting the investigator but also served the purpose of allowing the investigator to perform his investigative function. Under the facts as determined by the court, the investigators were engaged in direct, productive benefit while traveling, and may therefore be compensated for such work under 5 U.S.C. §§ 911, 912b. *Burich* v. *United States* 366 F. 2d 984 (Ct. Cl. 1966). Where, however, access-to-aircraft travel was performed in nonemergent conditions as in the above case of Mr. Stracener, the travel is not compensable at overtime rates. Payments of overtime compensation for access-to-aircraft travel should accordingly not include such travel during which work was not performed or required.

II

Travel As Fare-Paying Customers

The air safety investigators also claimed in the *Abbott* case that their travel as fare-paying customers on commercial aircraft while proceeding to aircraft accidents, and while in furtherance of ongoing investigations of aircraft accidents, was work. The court found in this regard that, although there were no official orders directing air safety investigators to work while enroute to an accident site, they were expected to go into action immediately upon arrival. Accordingly, while traveling to an accident site it was necessary to review checklists, discuss with or brief other investigators on the status of the investigation, familiarize themselves with the type of plane involved in the accident and maintain contact with air traffic control so as to gather as much information as possible. The investigator would plan the course of action to be taken upon arrival at the accident scene, maintain contact with ground points to locate the accident site, and accumulate additional information. At times they would also study manuals to refresh their memories of different systems of the particular aircraft involved in the accident.

After completing their investigation at the accident site, the investigators were expected to return to their duty stations as expeditiously as possible. They were also expected to file their reports within 10 days. Since there was a real possibility of being assigned to a new accident shortly after returning to their duty stations, it was imperative that the most advantageous use be made of their travel periods.

The court held that the above activities performed in emergent conditions constituted the performance of work while traveling. The court stated:

> It is clear, * * * that work performed while traveling to and from the scene of an accident was not voluntary, for the investigators were never given a free choice. *Anderson* v. *United States*, 136 Ct. Cl. 365, 369 (1956). The emergent nature of each accident clearly required the performance of work while traveling to and from the accident. Had plaintiffs not worked in the face of the clear necessity to be as informed as possible about the accident and to have a good understanding of what they were going to do upon their arrival at the accident scene, they would have been derelict in the performance of their duties. *Byrnes* v. *United States*, [330 F. 2d 986 (Ct. Cl. 1964)]. There was more than a "tacit expectation" that plaintiffs would work while traveling to and from the scene of an accident; they were induced to work, and inducement to work is sufficient under the Federal Employees Pay Act to satisfy the requirement that the work be "officially ordered or approved." *Fix* v. *United States*, 177 Ct. Cl. 369, 375 (1966).

Page 22 of the Trial Judge's opinion, *Russell J. Abbott, et al. (William L. Lamb, Plaintiff No. 15)* v. *United States,* Ct. Cl. No. 317-71, May 30, 1980.

The court distinguished its holding from our decision 52 Comp. Gen. 702 (1973), cited above, as follows:

> It should * * * be realized that the Comptroller General's opinion was not based on factual findings made after a full hearing of the evidence, but was rather written in response to a letter requesting a ruling. The opinion was based on those facts found by Commissioner Maletz in *Griggs* v. *United States*, No. 336-65 (Ct. Cl. Trial Div. 1967). In *Griggs*, however, Commissioner Maletz did not conclude that plaintiffs had worked while traveling. Plaintiff sought overtime solely on the grounds that the travel was performed under emergent conditions. The Commissioner and the Comptroller General were clearly correct in holding that the existence of emergency conditions is not, by itself, a sufficient ground for awarding overtime compensation.
>
> By contrast, plaintiffs here seek overtime compensation on the ground that they performed work while traveling. Thus the opinion of the Comptroller General and the opinion of Commissioner Maletz are, on this point, factually distinguishable.

Pages 25, and 26 of the Trial Judge's opinion in *Russell J. Abbott, et al. (William L. Lamb, Plaintiff No. 15)* v. *United States,* Ct. Cl. No. 317-71, May 30, 1980.

In view of the fact the *Abbott* court found that the investigators were performing their investigative function and were thus working while traveling on commercial airlines to and from accidents, we agree that such traveltime is compensable work under 5 U.S.C. §§ 911 and 912b. Likewise, we agree with the court's statement that, although the existence of an emergency is not, by itself, sufficient to award overtime pay, the emergent conditions in these specific cases effectively required that the investigators perform work while they were traveling and such work was induced so that it was tantamount to having been ordered or approved. *Baylor* v. *United States,* 198 Ct. Cl. 331 (1972). Compare *Gene L. DeCondo,* B-146288, January 3, 1975. Accordingly, overtime payments for such travel may be administratively made for those investigators otherwise so entitled.

III

Travel by Means Other Than Aircraft

Also involved here are claims for overtime for work performed while traveling by means other than aircraft, commonly by automobile. The court held that work performed while traveling to and from an accident site by means other than aircraft, for the reasons stated in application to work performed aboard aircraft, was officially ordered or approved.

The court found that investigators utilized their traveltime, among other things, to sort evidence, and review, prepare, and record notes relating to the investigation. When traveling with other investigators, they would discuss the results of the investigation to that point, the possible causes of the accident, and the changes which should be made to conclude the investigation. The court found that, where these activities were required to be performed during travel because of the constraints of time due to the obvious unplanned nature of aircraft accidents, such traveltime was spent in the performance of compensable work.

Again, in view of the court's review of all the evidence and its factual determination that this work had to be performed while the investigators were traveling, we have no objection to an administrative finding that such traveltime is work under 5 U.S.C. §§ 911 and 912b.

As the court noted, the facts applicable to air safety investigators are distinguishable from those in *Barth* v. *United States,* 568 F. 2d 1329 (Ct. Cl. 1978), where the travel served no purpose other than to transport the employee from one place to another. Here, the absolute necessity to proceed as quickly and expeditiously as possible and the emergent nature of the travel dictated that the investigators utilize their travel periods for the performance of work which was necessarily, primarily, and predominantly for their employer's benefit.

IV

Effect of Emergent Conditions on Travel

We do note, however, that the court allowed the investigators' claims for compensation for traveltime only to the extent that the investigators could prove that they performed work under the above rules, and claims were reduced or denied where there was no evidence to show that the investigator performed work or was required to do so while traveling.

A major reason for the *Abbott* court's decision that the investigators were performing work while traveling was that, given the emergent conditions of the travel, the investigators' function necessarily had to be performed during the travel as it was of such a

nature that it could not be left until after the travel was completed. Accordingly, where emergent conditions did not exist for the travel, the *Abbott* court found that the travel did not require the performance of work and any work performed in such cases was voluntary, not ordered or approved, and thus such travel would not be compensable. The NTSB should be similarly guided in its settlement of these claims.

V

Travel While Piloting a Plane

The *Abbott* court also allowed the claims of investigators who piloted their planes in emergent conditions under the same circumstances to those existing for automobile travel. We likewise have no objection to administrative payments where work was performed during emergent travel.

The court did allow overtime compensation for nonemergent travel in a case where the investigator was delivering an aircraft for testing. We agree with the court's following analysis of such travel and it may be applied in like cases:

> The travel was not performed to transport plaintiff from one point to another. The plaintiff was delivering the airplane, and this is no different than the transport of a prisoner by a sheriff, *Burich* v. *United States*, * * * or the work of a chauffeur or a truck driver.

Russell J. Abbott, et al., (Robert E. Gilmour, Plaintiff No. 10) v. *United States* Ct. Cl. No. 317-71, May 30, 1980. Other nonemergent travel which only served the purpose of transporting the investigator, however, may not be considered compensable work.

VI

Transporting Documents, Equipment, and Exhibits

The *Abbott* court also approved overtime compensation for travel during which documents, equipment, and exhibits were transported by an investigator. For example, one plaintiff was directed by his supervisor to travel from Washington, D.C., to New York City in his personal automobile to transport 267 pounds of exhibits that would be needed at a hearing for which he was a member of the technical panel.

As to whether or not an employee is entitled to overtime compensation while transporting various items, we are guided by the following language in B-178458, June 22, 1973:

> A courier is one whose duties include carrying information, mail, supplies, etc., work which to a large extent can be performed only while traveling and which would be compensable * * *. In most instances of travel, a Government employee will necessarily transport supplies or equipment and to this extent incidentally serve a "courier" function. We have expressly held, however, that the fact that incident to the purpose of travel, files, documents, supplies, etc. are transported, does not change the character of travel.

In that case an employee traveled with 100 pounds of excess baggage containing tools and equipment. We denied overtime compensation for the travel because there was no indication that the transportation of that equipment was other than incidental to the employee's transportation or that the employee's function during travel was to accompany, protect, or perform work on the equipment.

Accordingly, it is our view that if an investigator is ordered to transport documents, equipment and exhibits and is required to personally travel with the items in order to protect their integrity or to ensure they are not damaged, lost or tampered with, then such time should be considered as compensable work. If, however, the investigator incidentally transports documents, equipment, or exhibits when the main purpose of his travel is for other reasons, then such travel is not compensable as overtime work. As we stated in the latter cited case "whether the transportation of equipment is merely incidental to the employee's travel, or is itself the employee's primary function is for determination by the administrative agency." The NTSB should make its decisions accordingly.

VII

CONCLUSION

Accordingly, the NTSB may administratively settle the claims of air safety investigators for overtime compensation for travel which occurred prior to April 11, 1965, under the above guidelines as long as a claim was timely filed in this Office in accordance with 31 U.S.C. § 71a, Decision 52 Comp. Gen. 702 (1973) will no longer be followed.

[B-203553]

Clothing and Personal Furnishings—Special Clothing and Equipment—Reimbursement Criteria

The purchase of an air purifier for the individual office of an Internal Revenue Service (IRS) employee who suffers from allergies may not be made with public funds. Although he may not be able to perform his official duties satisfactorily in the usual office environment because of his handicap, the purchase of a corrective device is his personal responsibility. Modified by B-203553, Feb. 22, 1983, upon additional facts submitted.

Certifying Officers—Relief—Lack of Due Care, etc.—Evidence—Prior Agency Policy Effect

Fact that previous purchases of air purifiers had been approved by IRS officials without question is not, by itself, sufficient to justify the purchase of an air purifier from imprest funds in the instant case. It may be relevant, however, in determining whether the imprest fund cashier acted in good faith and exercised due care for the purpose of relieving her from personal responsibility for the improper payment pursuant to 31 U.S.C. 82a-2. This Office has insufficient information to make relief determination on its own motion and requests findings and recommendations from IRS.

Matter of: Internal Revenue Service—Purchases of Air Purifier with Imprest Funds, September 24, 1982:

The Chief, Resources Management Division, Atlanta District, Internal Revenue Service (IRS), requests a determination on whether it is permissible to purchase an ecologizer with appropriated funds. An ecologizer, also known popularly as a "smoke eater," is a device which purifies the air by removing cigar and cigarette smoke, dust, and other objectional odors. He has forwarded a voucher for $36 for an ecologizer purchased last May through the Small Purchase Imprest Fund, to purify the air in the office of an IRS employee who suffers from allergies. The IRS certifying officer has refused to certify the request for reimbursement on the ground that the expenditure was personal in nature, and he therefore requested the imprest fund cashier to replenish the fund herself.

We agree with the certifying officer that the instant expenditure for an ecologizer was not authorized, based on the justification presented. However, we would not necessarily agree that the imprest fund cashier must restore the account from her personal funds if a request for relief is presented to us pursuant to 31 U.S.C. § 82a-2.

The established rule is that, in the absence of specific statutory authority, the cost of special equipment and furnishings to enable an employee to perform his or her official duties constitutes a personal expense of the employee and is not payable from appropriated funds. We turned down a request to approve the costs of laboratory coats to protect the clothing of employees working on the Washington Aqueduct (3 Comp. Gen. 433 (1924)); the cost of a "Sacroease" office chair for an employee with a bad back (B-187246, June 15, 1977); and the cost of a bed board for an employee who was traveling on official business and also had a bad back (B-166411, September 3, 1975). It should be noted that in the 1975 case, agency officials had previously authorized similar expenditures which were paid without question. We understand that this is also the situation in the instant case.

On the other hand, in 23 Comp. Gen. 831 (1944), we approved the rental of an amplifying device for the official telephone of an employee with a hearing handicap. Similarly, we approved the purchase of special prescription filter spectacles for Geological Survey employees operating stereoscopic map platting instruments. (45 Comp. Gen. 215 (1965).) Even more recently, we permitted the Navy to purchase luggage for members of a recruiting team who were required to travel on official business for 26 weeks a year. (B-200154, February 12, 1981.)

The rationale of these decisions, which superficially seem inconsistent, may be useful in providing guidance for future agency procurements of this nature. We recognize that there is room for differences of opinion about the result reached in specific cases. The factual situations in the cited cases are described to illustrate some

prior applications of the principle, but the particular circumstances involved should not themselves be read as providing definitive guidelines for applying the principle in the future.

In all three decisions where the purchase was disapproved, the item procured was essential or highly desirable for the particular employee to perform his duties but it was not essential to the transaction of offical business from the Government's standpoint. The item, in other words, primarily served the needs of an individual or specific group of individuals, who had requirements not shared by the majority of other employees. We did not accept the argument that since the employee's services could not be performed without the equipment and his services were valuable to the Government, the expense was therefore primarily for the benefit of the Government. We also found (in the two "bad back" cases) that the equipment required could reasonably be expected to be furnished by the employee himself in order to overcome a personal problem which hampered the accomplishment of his official duties.

The telephone amplifying device we approved in 23 Comp. Gen. 831 would also appear to be a piece of equipment necessary to overcome a personal handicap. However, the agency involved convinced us at that time that it had a severe problem hiring qualified employees because of the wartime draft. It was absolutely essential to make the best use possible of the limited staff it had, which included a deaf employee. We found, therefore, that the primary need for the amplifying device wás not the employee's but the agency's. This was also the rationale for the filter spectacles in 45 Comp. Gen. 215. Employees who did not use the special glasses to operate the equipment would lose the required visual skills before reaching the normal retirement age. As for the luggage in the 1981 Navy case, described earlier, we simply felt that it was unreasonable to expect employees to subject their personal equipment to the kind of wear and tear that Navy's frequent travel requirements engendered.

Returning now to the ecologizer device, we are told, by way of justification, that (1) "the item is needed to purify the air in an area occupied by an IRS employee who suffers from allergies;" (2) "the item is essential for the employee to accomplish his job and is, therefore, properly purchased by the Government," and (3) that a number of these devices were previously obtained via purchase orders, and paid without objection after "two independent contracting officers judged that this type item was not a 'personal convenience' item and purchase was appropriate."

We have no problem with the factual statements in one and two, above. We disagree, however, with the conclusion that "therefore," the items may be properly purchased by the Government. We have been told only that a particular employee cannot function in his assigned work space because he suffers from a particular handicap—an allergy—not shared by his fellow employees. The correc-

tive device is to be installed in his own office, and unlike the agency's previous purchases of ecologizers which, according to copies of purchase vouchers included in the submission, were for a conference room and for a grand jury hearing room, it benefits no one but the allergic employee. It appears to us, based on the sparse record before us, that this situation is closely analogous to B-187246, June 15, 1977, discussed above, in which we disapproved the purchase of a special chair for an employee with a bad back.

From the information provided to us, we find that the expenditure for the ecologizer was made primarily for the benefit of a single employee who suffers from a disability that makes his work environment unhabitable. It amounts to a personal benefit which may not be conferred with public funds.

The fact that the agency has previously approved similar purchases, while not itself sufficient justification to approve the voucher in question, may nevertheless be relevant in determining whether the imprest fund cashier should be relieved of liability for the improper expenditure under 31 U.S.C. § 82a-2. This Office is authorized to relieve accountable officers of personal responsibility for an illegal, improper, or incorrect payment on our own motion or upon written findings and recommendations made by the head of the department, agency, or independent establishment concerned, or his designees, if we are able to find that such payment was not the result of bad faith or lack of due care on the part of the accountable officer.

The record is too sparse to enable us to relieve the accountable officer on our own motion. We do not know, for example, whether the findings of the two contracting officers that ecologizers were not pieces of personal equipment related to previous purchases for a conference room and a grand jury hearing room rather than for an individual office. If this was the case, did the imprest fund cashier stretch their findings to cover the instant purchase without checking with higher authority? There are a number of similar questions relating to good faith and exercise of due care that we woud prefer to have the agency address, before we can concur with the chief's suggestions that the imprest fund should not be held responsible for repayment of the fund.

[B-206272]

General Accounting Office—Jurisdiction—Cooperative Agreements—Complaints Against Agency Use—Criteria For Review

General Accounting Office (GAO) will review propriety of assistance awards when there appears to be a conflict of interest or when there is a showing that an agency is using a grant or cooperative agreement to avoid statutory and regulatory requirements for competition. 58 Comp. Gen. 785 and B-194229, Sept. 20, 1979, are distinguished.

Federal Grant and Cooperative Agreement Act of 1977—Compliance—Cooperative Agreements—Procurement *v.* Cooperative Agreement—Administrative Discretion

Federal Grant and Cooperative Agreement Act gives agencies considerable discretion in determining whether to use a contract, grant, or cooperative agreement, and GAO will not question determinations unless it appears that an agency has disregarded statutory and regulatory guidance or lacked program authority to enter into a particular relationship.

Cooperative Agreements—Propriety of Use—In Lieu of Procurement—Agency Purpose—Third Party Services—Statutory Grants-Program Authority

When an agency's principal purpose is to acquire the services of an organization that ultimately will assist the authorized recipient of a grant or cooperative agreement, a contract should be used, unless the agency's program legislation specifically permits it to make grants to intermediaries.

Matter of: Civic Action Institute, September 24, 1982:

The Civic Action Institute complains of the Department of Housing and Urban Development's award of a cooperative agreement to the National Citizens Participation Council (NCPC), a non-profit membership organization. The latter group, as a result of HUD's acceptance of its unsolicited proposal, will provide technical assistance to Community Development Block Grant recipients on the use of volunteers to supplement grant funds in carrying out their programs. We sustain the complaint.

Background

In its initial complaint to our Office in February 1982, the Institute stated that it objected to possible "sole source" awards to either NCPC or the National Urban Coalition. All three organizations (the Institute under the name of the Center for Governmental Studies) has been providing similar services under cooperative agreements that expired in October 1981. The Institute indicated that it has submitted two unsolicited proposals for continued services and that HUD had rejected the first. During development of the complaint, HUD also rejected the second and, on March 3, 1982, entered into a cooperative agreement with NCPC to provide technical assistance on a cost-reimbursement basis up to $281,476.

The Institute's allegations are several: that HUD's use of a cooperative agreement was improper, avoiding application of procurement regulations; that the award was based on political considerations, not merit, since the Institute is uniquely qualified to provide technical assistance on use of volunteers; and that the award is contrary to HUD's 1982 Technical Assistance Strategy, which gives priority to working with States and local governments, rather than directly with citizen organizations.

USE OF A COOPERATIVE AGREEMENT

The Institute argues that the Federal Grant and Cooperative Agreement Act, which states that contracts are to be used to acquire goods or services for the "direct benefit" of the Government, mandates use of a contract in this case. According to the Institute, HUD is the direct beneficiary of NCPC's services, since the organization is providing technical assistance which HUD itself otherwise would be required to provide under the Housing and Community Development Act of 1974, as amended, 42 U.S.C. §§ 5301-5320 (Supp. IV 1980).

In support of its arguments, the Institute cites a report by our Office entitled "Agencies Need Better Guidance for Choosing Among Contracts, Grant, and Cooperative Agreements," GGD 81-88, September 4, 1981, which states that when an organization is not one that an agency is statutorily authorized to assist, but is merely being used to provide services to another entity which is eligible for assistance, in our opinion the proper instrument is a procurement contract.

HUD responds that our Office should not consider this complaint at all, because it concerns the propriety of an assistance award and because we previously have stated that we will not interfere with the functions and responsibilities of grantor agencies in making such awards. In addition, HUD interprets the Federal Grant and Cooperative Agreement Act as permitting any agency which otherwise may enter into contracts, grants, or cooperative agreements to choose among these, depending on the purpose that it seeks to accomplish. HUD cites our decisions in *Burgoes & Associates,* 58 Comp. Gen. 785 (1979), 79-2 CPD 194, and *Bloomsbury West, Inc.,* B-194229, September 20, 1979, 79-2 CPD 205, as approving use of grants or cooperative agreements when, as here, the agency's principal purpose is to transfer services to States and local governments.

GAO ANALYSIS

There are two exceptions to our policy of not reviewing the propriety of assistance awards: when there appears to be a conflict of interest (not alleged here) or when there is a showing that an agency is using a grant or cooperative agreement to avoid the statutory and regulatory requirements for competition that would apply to a procurement. At a minimum, the latter requires a clear demonstration that a particular project or undertaking properly should have been the subject of a procurement. *Electronic Space Systems Corporation,* 61 Comp. Gen. 428 (1982), 82-1 CPD 505. The Federal Grant and Cooperative Agreement Act gives agencies considerable discretion in determining whether to use a contract, grant, or cooperative agreement, and we will not question such determinations unless it appears that the agency disregarded statu-

tory and regulatory guidance or lacked authority to enter into a particular relationship. *Id.*

Here, it is clear that HUD has basic authority to provide technical assistance to Community Development Block Grant recipients. Since the 1977 amendments to the Housing and Community Development Act, funds have been appropriated yearly for a:

> special discretionary fund for use by the Secretary in making grants
>
> * * * * * * *
>
> to States, units of general local government, Indian tribes, or areawide planning organizations for the purpose of providing technical assistance in planning, developing, and administering assistance * * *.

In addition, under the 1978 amendments to the Act, the Secretary may provide:

> directly or through contracts, technical assistance * * * to such governmental units, or to a group designated by such a governmental unit for the purpose of assisting that governmental unit to carry out its Community Development Program. 42 U.S.C. § 5307(a)(8) (Supp. IV 1980) (current version at 42 U.S.C.A. § 5307(b)(4) (Dec. 1981)).

We agree with HUD that the references to "grants" and "contracts" in this section do not necessarily limit it to these particular instruments, since under the Federal Grant and Cooperative Agreement Act, the agency's purpose should determine which of these is appropriate. But, in our opinion, the Act does not give HUD discretion to use a grant or cooperative agreement when third parties, such as NCPC, actually will be providing the technical assistance to authorized recipients, *i.e.,* units of State and local government and/or their designees.

As we indicated in our September 1981 report, the "direct benefit" language of the Federal Grant and Cooperative Agreement Act does not necessarily resolve the question of which instrument should be used. When third parties are involved, in our opinion the choice depends upon whether the Government's principal purpose is to "*acquire*" an intermediary's services, which ultimately may be delivered to an authorized recipient, or whether the Government's purpose is to "*assist*" the intermediary in providing goods or services to the authorized recipient. In the former situation, we believe a procurement contract, rather than an assistance relationship, is proper. *See* GGD 81-88, *supra,* at 10, 11 (italic in original); *see also* S. Rep. No. 97-180, 97th Cong. 1st Sess. 3 (1981), in which the Senate Committee on Governmental Affairs, commenting on a bill to amend the Federal Grant and Cooperative Agreement Act, concurs in this view.

The bid protest decisions cited by HUD do not deal with the question of assistance to third parties. In *Burgos & Associates,* the Commerce Department's Office of Minority Business Enterprise awarded a grant to an intermediary to provide management and technical assistance to minority business firms. Use of a grant in that case was proper because Executive Order No. 11625, October

13, 1971, authorized the agency to assist public and private organizations which in turn would assist minority business enterprise. In *Bloomsbury West,* however, the (then) Department of Health, Education, and Welfare, through a grant, funded an intermediary which provided technical assistance on desegregation to public schools. The agency's authority to provide such assistance through grants to third parties was less clear, since the enabling legislation, 42 U.S.C. § 2000c-2, did not specify the form of assistance, but merely authorized making available—to school boards and other governmental units legally responsible for operating public schools—personnel of the Office of Education or "other persons specially equipped to advise and assist them in coping with [desegregation] problems."

In this case, there is no provision in the Housing and Community Development Act that authorizes HUD to make grants to third parties (other than designees) in order to deliver technical assistance to Community Development Block Grant recipients. In our opinion, since HUD's principal purpose was to acquire the services of NCPC to aid in the delivery of technical assistance, a contract should have been used. In view of this finding, we do not believe it is necessary for us to review the Institute's other allegations regarding HUD's choice among unsolicited proposals for a cooperative agreement.

The complaint is sustained.

We are not, however, recommending remedial action here. As we acknowledged in our September 1981 report, the distinction between assisting an intermediary and acquiring the services of an intermediary is not always clear. GGD 81-88, *supra* at 11. HUD has been among the agencies disagreeing with our interpretation of the Federal Grant and Cooperative Agreement Act, noting the absence of guidance from the Office of Management and Budget, which has responsibility for interpreting and implementing the Act. *Id.* at 80. In addition, our decisions in *Burgos & Associates* and *Bloomsbury West,* as noted above, approved the use of grants to third parties without discussing the circumstances under which such assistance would be improper. Moreover, the Civil Action Institute itself attempted to obtain a cooperative agreement, and did not complain to our Office about this form of assistance until it appeared that HUD would not continue to fund both the Institute and NCPC as technical assistance providers.

In view of all these circumstances, we will apply our holding requiring the use of contracts in third party situations such as this one only prospectively. By letter of today we are advising the Secretary of HUD that in the future a contract should be used unless the agency has statutory authority—other than the Federal Grant and Cooperative Agreement Act—to award grants or cooperative agreements to intermediaries.

[B-207501]

Courts—Administrative Matters—Employees—Judicial Officials—Salary Linkage With Judges'—"Pay Cap" Ceiling Applicability

Salaries of the Directors of Administrative Office of the United States Courts and Federal Judicial Center and the Administrative Assistant to the Chief Justice are by statute linked to the salary of a Federal district judge. Under Article III of the Constitution, as interpreted by the Supreme Court, Federal district judges have received several recent pay increases, notwithstanding the enactment of pay caps limiting pay increases for executive, legislative, and judicial branch officials. Since district judges' salaries have increased, these three officials are entitled to the same increases, despite pay caps.

Matter of: William E. Foley, *et al.*,—Application of "Pay Caps" to Three Judicial Branch Positions, September 27, 1982:

The issue presented is whether the "pay caps" contained in various appropriations acts since 1976 limit the salaries of three judicial branch employees whose pay is set by statute to be "the same as" the pay of a United States district court judge. We hold that the Director of the Administrative Office of the United States Courts, the Director of the Federal Judicial Center, and the Administrative Assistant to the Chief Justice, are not subject to the pay caps contained in recent appropriations acts to the extent that the pay caps do not apply to district judges. The three officials, by specific statutory authority, are to be paid "the same as" district judges whose pay has increased, despite the enactment of pay caps, because of the constitutional protection accorded Article III judges against diminution of their salaries.

Background

This decision is in response to a request from the Honorable William D. Ford, Chairman, Committee on Post Office and Civil Service, House of Representatives, requesting our review of the rates of pay set for the positions of Director, Administrative Office of the United States Courts, Director, Federal Judicial Center, and Administrative Assistant to the Chief Justice. Pursuant to Pay Order 82-2 issued by the Administrative Office of the United States Courts (47 Fed. Reg. 4715, February 2, 1982), these three positions now receive an annual salary of $70,300 while Public Law 97-92, 95 Stat. 1183 (1981), places a "cap" on the salaries of top executive, legislative, and judicial branch employees at $59,500. We have received a letter on this matter from the General Counsel of the Administrative Office of the United States Courts (hereinafter referred to as the Administrative Office) defending the higher salary rate for these three positions on the basis of the statutory provisions directly linking the pay of the three positions to the pay of a Federal district judge.

The Director of the Administrative Office is the administrative officer of the Federal courts. 28 U.S.C. § 604. Prior to 1967 his salary was fixed at a specific amount ranging from $10,000 in 1939 to $27,000 in 1964. See 28 U.S.C. § 603. In 1967, pursuant to section 213(d) of the Federal Salary Act, Public Law 90-206, 81 Stat. 613, 635 (1967), the Congress provided that his salary "shall be the same as the salary of a district judge." 28 U.S.C. § 603 (1970).

The salaries of the other two judicial branch officials which are in question are set by reference to the salary of the Director of the Administrative Office. The Director of the Federal Judicial Center receives compensation "the same as that of" the Director of the Administrative Office. See 28 U.S.C. § 626 (1976). The Administrative Assistant to the Chief Justice receives a salary fixed by the Chief Justice "at a rate which shall not exceed the salary payable" to the Director of Administrative Office. 28 U.S.C. § 677(a) (1976). Since the salaries of the positions of Director of the Federal Judicial Center and Administrative Assistant to the Chief Justice are tied to the salary of the Director of the Administrative Office, we shall focus our discussion on the salary rate of this latter position.

The salaries of high-level executive, legislative, and judicial branch officials are subject to adjustment by two mechanisms. First, the Federal Salary Act of 1967, Public Law 90-206, Title II, 81 Stat. 613, establishes the mechanism for a quadrennial review of executive, legislative, and judicial salaries. See 2 U.S.C. §§ 351-361 (1970). Second, the Executive Salary Cost-of-Living Adjustment Act, Public Law 94-82, Title II, 89 Stat. 419 (1975), provides that salaries covered by the Federal Salary Act of 1967 will receive the same comparability adjustment on October 1 of each year as is made to the General Schedule under the provisions of 5 U.S.C. § 5305. See 5 U.S.C. § 5318. See also 28 U.S.C. § 461.

In 1976 the Congress imposed the first in a series of "caps" on executive, legislative, and judicial branch salaries by limiting the use of appropriated funds to pay the salaries referred to in section 225(f) of the Federal Salary Act of 1967, as amended (2 U.S.C. § 356), to the rate payable on September 30, 1976. See Public Law 94-440, Title II, October 1, 1976, 90 Stat. 1439. The one flaw in this legislation with respect to Federal judges covered by Article III of the Constitution was that the pay cap was held by the Supreme Court to have "diminished" the compensation of Federal judges which, by operation of Public Law 94-82, automatically increased by 4.8 percent on October 1, 1976. In *United States* v. *Will, et al.*, 449 U.S. 200 (1980), the Supreme Court held that Public Law 94-440 violated the compensation clause of Article III of the Constitution by purportedly repealing a pay increase that had already taken effect.

Pay cap legislation was passed in 1977 and 1978 to prevent the scheduled October increases from taking effect as intended on the salaries of high-level executive, legislative, and judicial branch em-

ployees. Since these appropriation act limitations were enacted prior to the October 1 effective date, they were not found to be unconstitutional with respect to Federal judges. *United States* v. *Will,* 449 U.S. 200, 226–229. See also Public Law 95–66, July 11, 1977, 91 Stat. 270; Public Law 95–391, § 304(a), September 30, 1978, 92 Stat. 763, 788–789.

In 1979 the pay cap legislation contained in a continuing appropriations act was not enacted until after October 1. See Public Law 96–86, § 101(c), October 12, 1979, 93 Stat. 656, 657–658. The Supreme Court ruled in *Will* that although the language of the 1979 pay cap referred to "executive employees," the limitation was intended to apply to judges as well as other high-level Federal officials. 449 U.S. 200, 229–230. As was the case in 1976, the Supreme Court ruled in *Will* that the 1979 pay limitation violated Article III of the Constitution with respect to Federal judges. 449 U.S. 200, 230.

Pursuant to the *Will* decision, the salaries of Federal judges were also increased in 1980 and 1981. The pay limitation in 1980 was contained in Public Law 96–369, § 101(c), October 1, 1980, 94 Stat. 1351, 1352, and it resulted in a pay increase for Federal judges of 9.1 percent. See Executive Order 12,248, 45 Fed. Reg. 69,199 (1980). Similarly, Federal judges received a 4.8 percent pay increase in 1981 since the pay limitation was contained in Public Law 97–51, § 101(c), October 1, 1981, 95 Stat. 958. See Executive Order 12,330, 3 CFR 188, 196 (1982).

Since the Supreme Court's decision in *Will,* the salary rates of the Director of the Administrative Office and the other two positions have been increased consistently with that of the district judges, and that salary is now set at $70,300.

OPINION

The language of 28 U.S.C. § 603 is clear and unambiguous in providing that the salary of the Director of the Administrative Office shall be "the same as" that of a district judge. Our review of the pay cap legislation from 1976 to 1981 reveals no express reference to the Director's salary and no attempt to amend or repeal section 603.

The key issue is whether the intent of the Congress to link the pay of the Director and district judges or the intent of Congress to apply the pay cap to the Director is paramount. After a review of the two acts, and their legislative history, we have concluded that the linkage of the pay of the two positions is paramount.

The recent pay caps have limited or prevented annual pay increases for Federal executives under the Executive Salary Cost-of-Living Adjustment Act. However, the three judicial branch positions in question are not included under the latter authority since the Act, Public Law 94–82, enumerates the eight judicial officers

who are subject to the annual adjustment, including district judges. See 28 U.S.C. § 461. We have held that this authority is limited to the eight judicial officers expressly mentioned (not including these three positions), and does not therefore apply to other judicial officers such as magistrates and jury commissioners. 55 Comp. Gen. 1077 (1976).

There remains, however, a conflict between the application of a pay cap which purportedly covers all high-level executive, legislative, and judicial branch employees and the language of a specific statute which provides the salary of a position shall be "the same as" that of a district judge. As noted by the report from the Administrative Office, repeals by implication are not favored. *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936). In addition, without clear intention, a specific statute will not be controlled or nullified by a general statute, regardless of the priority of enactment. *Morton* v. *Mancari,* 417 U.S. 535, 550–551 (1974), as quoted in *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

We further note that the Congress, in the Federal Salary Act of 1967, set the salary of the Deputy Director of the Administrative Office at level V of the Executive Schedule. See 28 U.S.C. § 603 (1970). By setting the salary of the Director at a rate "the same as" a district judge, the Congress evidently intended to link the salary to a comparable judicial position rather than to the Executive Schedule. We do not believe it is appropriate to undo that linkage in the absence of clear congressional intent to repeal or limit the operation of 28 U.S.C. § 603.

We believe the same analysis applies to the positions of Director, Federal Judicial Center, and Administrative Assistant to the Chief Justice. Neither 28 U.S.C. § 626 nor 28 U.S.C. § 677(a), which link the salary of these two positions to the salary of the Director, Administrative Office, has been repealed or amended by the pay cap legislation.

As noted above, the most recent pay cap contained in Public Law 97–92 limits pay for positions in the Executive Schedule or positions which "correspond" to those rates of pay. See Public Law 97–92, §§ 101(g) and 141. The three judicial branch positions are not positions in the Executive Schedule and their salaries do not "correspond" to the rates of pay of the Executive Schedule. Instead, by statute, they are linked to the pay of a district judge.

Accordingly, we conclude that, despite the general application of the pay caps, the salaries of these three judicial branch positions have been properly set at a rate "the same as" that of a district judge.

[B-198451]

Accountable Officers—Relief—Illegal or Erroneous Payments—Relief Authority—Not Delegated to Agencies

Monetary limit established by General Accounting Office (GAO) (currently $500) for administrative resolution of irregularities in the accounts of accountable officers applies only to the physical loss or deficiency of Government funds, and not to illegal or improper payments. Accordingly, request for relief under 31 U.S.C 82a-2 was properly submitted to GAO where deficiency of $102 resulted from improper payment based on fraudulently altered travel orders.

To the Office of the Assistant Secretary, Department of the Army, September 28, 1982:

This responds to your request that we relieve Lt. Col. Duane G. Ingalsbe, Finance and Accounting Officer, 7th Infantry Division and Fort Ord, Fort Ord, California, from liability for a deficiency in his account in the amount of $102.20 resulting from an improper payment. The request for relief was submitted in accordance with 31 U.S.C. § 82a-2. For reasons to be discussed below, Lt. Col. Ingalsbe's account must now be considered settled and relief is not necessary. However, the request poses a threshold issue that requires comment—the applicability of the General Accounting Office's $500 limit on the administrative resolution of irregularities in the accounts of accountable officers.

Facts

On August 24, 1978, a woman identifying herself as 1st Lt. Debra A. Hounsell walked into the Fort Ord Finance Office, presented travel orders purporting to assign her to active duty in San Francisco, and requested a travel advance of $304.40. The orders contained minor discrepancies which could have been typographical errors, but otherwise appeared normal and valid. A travel clerk at the Finance Office prepared a travel voucher based on the orders and sent Ms. Hounsell to the disbursing section. There, a cashier checked her military identification card (DD Form 2A) and gave her the money.

It was subsequently discovered that the travel orders and ID card were fradulent. According to the record, Ms. Hounsell had found a set of travel orders in a garbage can at Ft. Hamilton, New York, altered the name, date, and destination, and photocopied the altered order until the changes were no longer discernible. She then used the phony travel orders to obtain a temporary ID card and the travel advance. She had also used the false documents to obtain another travel advance at a different location and medical treatment at an Army hospital.

Upon discovering the fraud, the Army conducted a thorough investigation which resulted in locating Ms. Hounsell. Ms. Hounsell has paid back $202.20, reducing the amount of the deficiency to $102.20. Although further collection is possible, the record suggests

that it is unlikely. The Fort Ord Finance Office has taken steps to guard against similar incidents in the future.

Army initially viewed this as a "physical loss" case, cognizable under 31 U.S.C. § 95a. However, we advised that it must be treated as an improper payment, citing B-75978, June 1, 1948, and B-178953, August 8, 1973.

The $500 Limit

Before submitting the relief request under 31 U.S.C. § 82a-2, Army officials informally questioned whether the request was necessary since the loss was less than $500. We encouraged the request to permit us to clarify the matter.

In 1969, the Comptroller General issued a circular letter to all department and agency heads, B-161457, August 1, 1969, subject: "Audit and Settlement of Accountable Officers' Accounts." The letter stated:

> An irregularity arising from a single incident or series of similar incidents occurring about the same time amounting to less than $150 may be resolved by administrative action appropriate to the circumstances. Such cases will be properly documented and available for GAO review on a site audit basis. A central control record shall be maintained by each department and agency of all such actions.
>
> The provisions of this section do not apply to exceptions or charges raised by the GAO.

The GAO Policy and Procedures Manual for guidance of Federal Agencies was then amended to incorporate this new authority. 7 GAO § 28.14.

In 1974, the limit was raised to $500. The increase was announced in 54 Comp. Gen. 112, 113, and in another circular letter to department and agency heads issued on the same day, B-161457, August 14, 1974.

The documents cited above all speak in terms of "irregularities," and 7 GAO § 28.14, as amended in 1970, indicates that the term "irregularity" encompasses both physical losses and improper payments.

However, a more recent decision states that the $500 limit applies only to physical losses and not to improper payments. 59 Comp. Gen. 113 (1979). This seemingly inconsistent guidance prompted the Army's inquiry in this case.

We believe 59 Comp. Gen. 113 is correct and that the $500 limit should be viewed as applicable only to "physical loss or deficiency" cases and not to illegal or improper payments. For the most part, the law governing the physical loss or deficiency of Government funds is clear, and most cases center around the determination of whether there was any contributing negligence on the part of the accountable officer. Our numerous decisions in this area should provide adequate guidance to agencies in resolving most smaller losses.

With respect to illegal or improper payments, however, the law is continually evolving, and our decisions constitute one of the pri-

mary vehicles in this evoluation. The legislative history of 31 U.S.C. § 82a-2 (and this is relevent to 31 U.S.C. § 82c governing certifying officers in civilian agencies also) indicates that, for purposes of accountability and relief, an illegal or improper payment "is one which the Comptroller General finds is not in strict technical conformity with the requirements of law * * *" H.R. Rep. No. 996, 84th Cong., 1st Sess., quoted in 49 Comp. Gen. 38, 40 (1969).

The decisions that further define these concepts may result from requests for advance decisions, but they may also arise in the guise of accountable officer relief requests. Often, the amount of an individual payment is small, but the principle involved may have much greater significance in terms of precedent. It is largely through this process that the body of "appropriations law" has developed, and continues to develop, for the guidance of fiscal, contracting, and legal staffs of Government agencies. Also, the ways in which the Government does business change over time (for example, increased computerization, statistical sampling, electronic funds transfer, etc.), and these changes make it necessary for the General Accounting Office to periodically re-evaluate its positions and approaches.

For these reasons, we think it is important that cases involving illegal or improper payments continue to be submitted to this Office. Accordingly, the $500 limit for administrative resolution of irregularities applies only to physical losses or deficiencies and not to illegal or improper payments. The relief request in this case is therefore properly before us.

We note finally in this connection that there is a "de minimis" rule even for improper payments. A 1976 circular letter (B-161457, July 14, 1976) advised as follows:

> [I]n lieu of requesting a decision by the Comptroller General for items of $25 or less, disbursing and certifying officers may hereafter rely upon written advice from an agency official designated by the head of each department or agency. A copy of the document containing such advice should be attached to the voucher and the propriety of any such payment will be considered conclusive on the General Accounting Office in its settlement of the accounts involved.

While this letter was issued in the context of payments questioned in advance rather than those discovered after the fact, its result is to obviate the need to seek relief in these cases, and we see no reason why a similar approach should not be used in cases where the improper payment was not discovered until after it was made.

Statute of Limitations

The application of the 3-year statute of limitations prescribed by 31 U.S.C. § 82i was discussed in detail in a recent decision, also to the Army, B-198451.2, September 15, 1982. (A copy is enclosed for your convenience.) The loss in this case occurred on August 24, 1978, and the record suggests no reason to suspect fraud or criminality on the part of any Army accountable officer. Without deciding whether the 3-year period began to run on the date of the loss,

the last day of the month, or the last day of the fiscal quarter, it is clear in any event that the 3-year period has elapsed. Accordingly, for the reasons stated in our September 15 decision, it is no longer necessary to relieve Lt. Col. Ingalsbe and his account must be considered settled.

[B-205836]

Appropriations—Deficiencies—Anti-Deficiency Act—Exceptions—Foreign Currency Accommodation Exchanges—Army Department

Losses incurred from time to time throughout year by Accounting and Finance Officer, Department of the Army, while making accommodations exchanges and exchange transactions pursuant to 31 U.S.C. 492a, are accepted part of handling these transactions. As an accountable officer, the Finance Officer is not liable for losses in foreign currency dealings which occur because Army Regulations call for him to use an estimated, rather than the actual, exchange rate. Under 31 U.S.C. 492b an agency is authorized to place itself in a deficiency situation and not be in violation of the Antideficiency Act.

Disbursing Officers—Liability—Foreign Currency Accommodation Exchanges—Losses—Army Regulations—Exchange Rate Formula Propriety

Treasury Department calls for agencies making accommodations exchanges and exchange transactions to use an estimated, rather than the actual, foreign exchange rate. Army Regulations call for the use of an "average rate formula." The Army has decided to test the "pegged rate formula" in Europe as, in effect, a deviation from the average rate formula. The Treasury Department, which under the statute has overall responsibility for these transactions, has no objection to this method. We also have no legal objection to this method of estimating the exchange rate. In our view, an Accounting and Finance Officer in Europe may use this method, as long as it is properly authorized by the Army, without concern about being held liable for losses resulting from foreign currency exchanges. However, the Army should take action to rectify certain areas of concern, such as the potential for abuse by individual officers who may be permitted to vary the pegged rate to lessen their gains and losses.

Matter of: Losses on exchange of foreign currency for accommodation purposes—use of pegged rate, September 28, 1982:

Lieutenant Colonel H. D. Flynn, Finance and Accounting Officer, U.S. Army in Europe, requests an advance decision as to the proper method of effecting official and accommodation exchanges of foreign currency.

Specifically, he asks whether the use of the "pegged rate" system of accounting is authorized, or whether in fact it may violate the Antideficiency Act, 31 U.S.C. § 665, or the provisions of 31 U.S.C. § 628. He also asked whether he is liable for losses incurred in exchanges. For the reasons discussed below, we find that the use of the pegged rate in foreign exchanges is not in this situation a violation of any statutory or regulatory provision and the Finance and Accounting Officer is not personally liable under the various accountable officer statutes for losses on exchanges.

Disbursing officers of the United States, such as LTC Flynn, are authorized by 31 U.S.C. §§ 492a to 492c (1976) to conduct foreign exchange transactions for "official purposes, or for the accommodation of members of the Armed Forces and civilian personnel of the United States Government," as well as other classes of individuals mentioned in section 492a and implementing regulations.

As the General Counsel of the Treasury has advised us, it believes that sound cash management requires that some exchange rate other than the actual exchange rate be used. The "average rate formula," described in AR 37-103, sec. 12-52b, was formerly used in Europe and is generally used by the Army in other areas. Since March 1980, the Army, pursuant to an unsigned letter of instruction, has been using the "pegged rate method" in Europe on a trial basis.

The pegged rate is generally set once a month, but if the actual exchange rate substantially fluctuates within a month, it may be adjusted more often. When the rate is adjusted, the Finance Officer calculates, for the time the old rate was in effect, the actual dollar cost of currency purchased during that period and an accounting adjustment is made for the difference between the dollar amount debited to the various accounts based on the pegged rate and the actual cost of the currency. For example, the voucher LTC Flynn submitted to us in the amount of $347,990.94 covers a loss adjustment for a 2-week period in May 1981, and which, in turn, was caused by his decision to raise exchange rates to offset previous gains which it appears he had been instructed to do.

Army Finance Officers throughout the world record their adjustments throughout the fiscal year to an account entitled "Gains and Deficiencies in Exchange Transactions, Army." At fiscal year's end, all these gains and losses are offset against each other. If the overall balance is positive, the overall gain is deposited from the account to the Treasury as miscellaneous receipts. If there is a loss in this account, 31 U.S.C. § 492b provides that, in effect, the Army may obtain an overall deficiency appropriation to make up any losses.[1] In other words, the statute contemplates that losses could exceed gains, leading to a deficit situation in which an agency does not have appropriations sufficient in the fiscal year to eradicate the overall loss. It thereby carves out an exception to the Antideficiency Act and certainly is not a violation of it or 31 U.S.C. § 628.

Obviously, if there were to be no gains and losses, i.e., if foreign currency were bought and sold at the same rate, there would be no

[1] In the fiscal year 1979 Defense Appropriations Act, (Pub. L. No. 95-457 Oct. 13, 1978, 92 Stat. 1231), a Foreign Currency Fund was created, the purpose of which was to permit Defense managers in the field to execute approved programs without their being subject to uncertainties caused by day-to-day fluctuations in foreign currency exchange rates. It was established as an indefinite no-year appropriation and was intended to eliminate the need for the agency to request supplemental appropriations to complete approved programs. *See* S. Rep. No. 96-393, 96th Cong. 1st. Sess. 117, 118 (1979). *See also* 58 Comp. Gen. 46 (1978). There is no indication that the Foreign Currency Fund applies to accommodation and exchange transactions authorized by 31 U.S.C. § 492a-c. Therefore, unless Congress makes an appropriation similar to the Fund available for transactions authorized by § 492a-c, the Army is required to request a supplemental appropriation for any yearly loss on exchange transactions incurred due to the foreign currency exchange rate.

need for sections 492a to 492c. Accordingly, it is clear that the Congress expected that accounting for foreign currency would result in gains and losses throughout the year. *See*, for example, H.R. Rep. No. 511, 83rd Cong., 1st Sess. 2 (1953) and S. Rep. No. 210, 83rd Cong., 1st Sess., 1953 U.S. Code Cong. and Admin. News 1685. The losses incurred periodically throughout the year in making accommodation exchanges and exchange transactions are an expected result of doing business this way. Provided the Finance Officer is neither negligent nor guilty of fraud, he will not be held liable as an accountable officer for these losses. Relief under the applicable accountable officer relief statutes need not be requested on account of these losses.

Finally, we come to LTC Flynn's question concerning the use of the pegged rate. Treasury's General Counsel states that his Department "has not formally exercised its authority to concur in either the Army regulations governing exchange transactions, (AR) 37-103, of the directive setting forth the pegged rate exception to those regulations."

In the past few years the various agencies involved in these types of transactions have developed and implemented a number of other formulas for setting an estimated exchange rate. Treasury's major concern is that "* * * foreign currency purchased to cover foreign currency disbursements be held for the shortest time possible prior to disbursement." The pegged rate was apparently adopted in response to this concern. Even though Treasury has not "formally" concurred in Army's exchange rate regulations, we understand that it has advised the Army that so long as the pegged rate does not vary from the prevailing rate by more than 5 percent on any given day, that method does not seem objectionable. We also have no legal basis to object to use of the pegged rate. However, both Treasury and this Office have some practical reservations, discussed further below, about this system if the Army should decide to implement it.

LTC Flynn further points out that the pegged rate method is not authorized by AR 37-103 which provides for the use of the average rate and makes no mention of the pegged rate. He notes that paragraph 1-2a(5) of that regulation provides:

> (5) The provisions are mandatory except where deviations are specifically authorized by Headquarters, Department of the Army. Requests for deviation will be forwarded through command channels to Commander, USAFAC, ATTN: FINCY, Indianapolis, IN 46249.

As part of a plan designed to reduce the size of local depository accounts, the Army Finance and Accounting Center, Europe, agreed to test the pegged rate system based on a draft letter of Instruction from Headquarters, USAREUR. The Office of the Assistant Comptroller of the Army (Finance and Accounting), Indianapolis, concurred in this test in January 1980. However, it appears, according to LTC Flynn, that no formal deviation from Army Regula-

tions has been issued by the Army, and LTC Flynn is not satisfied that he is properly authorized, to use the pegged rate. This is an internal departmental matter, however, which we cannot resolve for him.

While we have no legal objections to the use of the pegged rate by LTC Flynn, we feel that the Army, should it finally adopt this system, should tighten administrative controls. We are concerned that use of the pegged rate system permits potential abuse by allowing individual officers to adjust the rate to achieve, in effect, whatever gain or loss is desired.

The Treasury Department has also recognized that a potential for abuse exists whenever an individual disbursing official has discretion for setting an estimated rate of exchange without guidelines for automatic adjustments to reflect current currency market rates. As the pegged rate contains no automatic adjustment, disbursing officers may set artifically high or low rates, thereby inflating the appropriation account to which the payment is charged at the expense of the Gains and Deficiencies Account. Treasury has stated that it has no objection to use of an estimated rate formula such as the pegged rate so long as the rate does not vary on any given day more than 5 percentage points from the prevailing rate at which the Finance Officer could purchase the currency. This standard would also appear to satisfy our objections. The Army, has, Treasury advised us, agreed to this modification. To prevent problems we feel that the Army should adopt a method of verification to assure that a proper rate—one within 5 percent variation—is used by its Finance Officers.

[B-207996]

Attorneys—Indigent Defendant Representation—Leave, etc.—Attorneys in Non-Attorney Positions—Involuntary Summons

An employee of the Veterans Administration who is licensed as an attorney in New Jersey was involuntarily summoned to represent an indigent defendant. He may not be excused from duty since he is not entitled to court leave and may not be granted administrative leave under these circumstances. See 44 Comp. Gen. 643.

Matter of: Elmer DeRitter, Jr.—Leave to Represent Indigent Defendant, September 28, 1982:

This decision is in response to an inquiry from the Newark, New Jersey, Regional Office of the Veterans Administration (VA), as to whether an employee assigned to represent an indigent defendant may be granted court leave for that purpose. We hold that an employee in this situation may not be excused on court leave or administrative leave and may be compensated by the Government only to the extent he has to his credit and requests a grant of annual leave.

The employee in question, Mr. Elmer DeRitter, Jr., is the Loan Guaranty Officer at the New Jersey VA Regional Office and is an

attorney licensed to practice law in the State of New Jersey. In New Jersey, indigency assignments are selected from a list of licensed attorneys, and Mr. DeRitter was summoned to represent an indigent defendant in Municipal Court, Borough of Netcong, New Jersey, on May 8, 1982. Although both Mr. DeRitter and the Director of the Regional Office requested that he be relieved of his assignment, they were informed that this could not be done.

The statutory provisions which authorize court leave, 5 U.S.C. § 6322 (a) and (b), permit a grant of court leave only when an employee serves on a jury or, in certain circumstances, acts as a witness. There is no provision for court leave when an employee is directed to serve as an attorney. Mr. DeRitter, therefore, may not be granted court leave.

Nor may he be granted administrative leave for this purpose. In 44 Comp. Gen. 643 (1965), we held that Government attorneys involuntarily assigned to represent indigents in State or Federal courts may not have such service regarded as being in furtherance of a Federal function so as to be entitled to administrative leave, and that, in the absence of statutory authority, attorneys appointed to represent indigent defendants may not be excused for such service without a charge to annual leave or a loss of compensation.

While there is no general statutory authority under which Federal employees may be excused from their official duties on administrative leave without loss of pay or charge to leave, we have recognized that, even in the absence of a statute controlling the matter, the head of an agency may, in certain situations, excuse an employee for brief periods of time without charge to leave or loss of pay. The various purposes for which the granting of administrative leave has been recognized by the Office of Personnel Management include (1) registration and voting, (2) Civil Defense activities, (3) blood donations, and (4) weather conditions. See Federal Personnel Manual Supplement 990-2, Book 630, Subchapter 11. See also 54 Comp. Gen. 706 (1975); B-185128, December 3, 1975; B-156287, June 26, 1974.

From the foregoing list it is apparent that a determination on the propriety of granting administrative leave in a given case is not necessarily dependent upon a finding that the particular activity concerned is in furtherance of a Federal function. All of the activities listed in the OPM guidelines, however, require only brief absences. We believe that our decisions and OPM's guidelines limit an agency's discretion to grant administrative leave to situations involving brief absences. See 54 Comp. Gen. 706 (1976).

Where the absences are for an indeterminate amount of time, a grant of administrative leave is not appropriate unless the absence is in connection with furthering a function of the agency. Assignments to represent indigent defendants may involve a considerable commitment of time on the part of the attorney which would be of longer duration than contemplated by the OPM guidelines. There-

fore, since such assignments are not regarded as furthering a function of the agency, a grant of administrative leave would not be appropriate.

It does not appear that Mr. DeRitter is required to be an attorney in order to qualify for his position as a Loan Guaranty Officer. However, we recognize the argument that it may be unfair to force a Government attorney, who is required to be a member of a bar to qualify for his position, to use annual leave to meet this obligation of bar membership. But, the representation of indigent clients is only one of several requirements for bar membership. In most states, of course, bar membership is predicated on passing an exam, and, in many states, on pursuing continuing legal education. It would be inconsistent to grant administrative leave to allow an attorney to fulfill one such requirement, even if the time required is brief, but not the others. We have previously held that grants of administrative leave for bar preparation are not appropriate. See B-156287, February 5, 1975.

In light of the above, we hold that Mr. DeRitter may not be excused from duty to serve as an attorney for an indigent defendant by charging his absence to court leave or administrative leave.

[B-202845]

Civil Rights Act—Title VII—Discrimination complaints—Equal Employment Opportunity Commission Hearings—Travel Expense Reimbursement—Outside Agency Applicant/Complainant

In the absence of specific authority therefor, the National Aeronautics and Space Administration may not pay in advance the travel expenses of an outside applicant/complainant to attend an equal employment opportunity hearing requested by the complainant. 48 Comp. Gen. 110 and 48 *id.* 644 are distinguished.

Matter of: Expenses of Outside Applicant/Complainant to Travel to Agency EEO Hearing, September 29, 1982:

This action is in response to a request by the then Acting Administrator of the National Aeronautics and Space Administration (Administration) as to whether the Administration may properly pay in advance the travel expenses of an outside applicant/complainant to attend an equal employment opportunity hearing which has been requested by the complainant. For the reasons set forth below, we find no basis upon which the Administration may authorize the complainant's travel to the hearing at Government expense.

The Administration has advised that it has been charged with discrimination under Title VII of the Civil Rights Act of 1964, as amended, codified at 42 U.S.C. §§ 2000e *et seq.* by an applicant for a position with the Administration's headquarters office in Washington, D.C. The unsuccessful applicant, an employee with the Los An-

geles Regional Office of the Equal Employment Opportunity Commission (Commission) has requested an administrative hearing on her complaint which has been appropriately scheduled for Washington, D.C. The Administration informs us that it has been advised by the Commission that the Administration would be responsible for the payment of the complainant's travel expenses to the hearing on the discrimination complaint. The Administration states that neither its enabling legislation nor its appropriation act authorizes such use of appropriated funds and that the Federal Travel Regulations (FPMR 101-7) do not provide for agencies to assume such costs. The Administration further states that it is not aware of any court case or Comptroller General decision which has held that Federal agencies are responsible for paying the travel expenses for an "outside applicant/complainant" to attend an equal employment opportunity hearing. Lastly, the Administration notes that the regulations promulgated by the Commission to implement Title VII of the Civil Rights Act, set forth at 29 CFR Part 1613 (1981), do not require that an agency assume such travel expenses. Thus, the Administration has requested our determination on the propriety of such an expenditure for which it finds no authority.

In considering this matter we requested the views of the Commission which has responsibility for administering and enforcing Title VII and other non-discrimination and affirmative action requirements for Federal employment. See 42 U.S.C. § 2000e-16 (Supp. IV 1980), Reorganization Plan No. 1 of 1978, 43 FR 19807, 92 Stat. 3781, and Executive Order 12106, December 28, 1978.

Our review indicates that there is not any provision in Title VII which would require or authorize the Administration to pay in advance the complainant's travel expenses and the Commission does not contend that Title VII contains such an authorization. As indicated above, although the complainant is a Government employee, her action was filed not as an employee of the Administration but as an applicant for employment. Thus, for purposes of travel costs she is neither an employee of the Administration nor is the travel official business of her current employer. In its response, the Commission has advised us that the primary authority for the payment of travel expenses by the Administration in this case is 5 U.S.C. § 5703. This statute provides authority for agencies to authorize in appropriate circumstances the invitational travel of an individual serving without pay, and to pay the individual's travel or transportation expenses while away from his home or regular place of business. The Commission relies upon our decisions in 48 Comp. Gen. 110 (1968) and 48 *id.* 644 (1969) in support of its view that the complainant's travel expenses to the hearing would come within the scope of invitational travel to non-Government employees pursuant to 5 U.S.C. § 5703. In 48 Comp. Gen. 110 we held that non-Government employees invited as witnesses to an administrative hearing to testify for the Government could be allowed payment of travel

expenses under 5 U.S.C. § 5703, as persons serving without compensation. In the latter case, 48 Comp. Gen. 644, we held that the invitational travel of non-Government employees pursuant to 5 U.S.C. § 5703 is also proper with regard to the travel of private individuals called as witnesses in adverse action proceedings on behalf of either the Government or the employee provided that the presiding hearing officer determined that such testimony is necessary for a proper disposition of the case. We stated therein that it was in the interest of the Government to reach a sound decision since adverse actions directed against competent employees could result in impairment of the work of the activity concerned. Thus, we determined that where the presiding hearing officer determined that an employee had reasonably shown that the testimony of a witness is substantial, material and necessary for a proper disposition of the case, the witness may be considered within the scope of 5 U.S.C. § 5703, even though the witness is, in effect, to testify on behalf of the employee. The Commission states that, thus, the Comptroller General has examined 5 U.S.C. § 5703, and has concluded that it is in the best interest of the Government for the agency conducting the proceeding to pay for the travel expenses of relevant witnesses regardless of for whom that witness is testifying. The Commission contends that this same rationale should be applicable to a complainant who is also a witness on his or her own behalf.

We do not agree with the Commission's view that outside applicant/complainants are entitled to the payment of travel expenses on the same basis as non-Government employees who are summoned as witnesses. The role of a complainant is clearly distinguishable from that of a witness. Unlike a witness, a complainant has a direct interest in the proceeding. For example, a complainant who prevails on a title VII complaint may be entitled to such remedies as employment or reemployment in a desired position, backpay, reimbursement of certain costs, as well as other appropriate relief. See 42 U.S.C. § 2000e–16 and 29 CFR 1613.271 (1981). Since a complainant and a witness each has a distinctly different relationship to the outcome of the administrative proceeding we do not view a complainant as being entitled to reimbursement of travel expenses on the same basis as a witness. We note that with regard to the payment of mileage for witnesses in the Federal courts under 28 U.S.C. § 1821, the courts have long recognized a distinction between witnesses and parties to the action. Parties generally are not entitled to witness fees and mileage for their attendance. See *Picking* v. *Pennsylvania R., Co.*, 11 F.R.D. 71 (M.D. Pennsylvania 1951), appeal dismissed 201 F. 2d 672, *cert. denied* 73 S. Ct. 1144, 345 U.S. 1000, rehearing denied 74 S. Ct. 18, 346 U.S. 843. See also *Morrison* v. *Alleluia Cushion Co. Inc.*, 73 F.R.D. 70 (N.D. Mississippi, E.D. 1976). In view of the relationship of the complainant to the Government and the various remedies available to the suc-

cessful complainant we do not find it appropriate to view complainants as eligible for invitational travel under 5 U.S.C. § 5703.

The Commission also contends that 5 U.S.C. § 5751(a), which governs the travel expenses of Federal employees summoned as witnesses, provides authority for the payment of the complainant's travel expenses. This statute provides in pertinent part as follows:

> (a) Under such regulations as the Attorney General may prescribe, an employee as defined by section 2105 of this title * * * summoned, or assigned by his agency, to testify or produce official records on behalf of the United States is entitled to travel expenses under subchapter I of this chapter. If the case involves the activity in connection with which he is employed, the travel expenses are paid from the appropriation otherwise available for travel expenses of the employee under proper certification by a certifying official of the agency concerned. If the case does not involve its activity, the employing agency may advance or pay the travel expenses of the employee, and later obtain reimbursement from the agency properly chargeable with the travel expenses.

The Commission states that in view of the above provision it may authorize payment of the complainant's travel expenses and then seek reimbursement from the Administration. However, by its express language 5 U.S.C. § 5751(a) applies to witnesses. In addition, subsection 5751(a) only applies where the employee has been summoned or assigned by his agency to testify or produce official records "on behalf of the United States." The Commission has stated its belief that the complainant's testimony in the context of an equal employment opportunity proceeding would be on behalf of the United States within the meaning of 5 U.S.C. § 5751(a) in view of the intent of Congress that Federal employment be free of discrimination. Although we agree with the Commission that equal employment opportunity in Federal employment is certainly in the interest of the United States, we do not believe that either the language of subsection 5751(a) or its legislative history supports a construction of the phrase "on behalf of the United States" beyond its plain and customary meaning. Thus, we do not view a complainant's testimony on her behalf on a discrimination complaint as being testimony on behalf of the United States as contemplated by 5 U.S.C. § 5751(a). Accordingly, we find no authority under 5 U.S.C. § 5751(a) for the Commission to pay the complainant's travel expenses and to then seek reimbursement from the Administration.

In view of the above, the Administration may not pay in advance the travel expenses of the outside applicant/complainant to attend the hearing on her complaint.

We emphasize, however, that we are not deciding here the question of an agency's paying travel expenses of an outside applicant/complainant who has prevailed on his or her discrimination complaint. That is a different question which, if necessary, we would address in an appropriate case.

[B-206560]

General Services Administration—Services For Other Agencies, etc.—Space Assignment—Maintenance, etc. Services—Delegation of Procurement Authority—Absence

Since Treasury Department lacks specific statutory authorization or a delegation of authority from General Services Administration (GSA), Treasury Department may not itself procure building services by entering into a service contract with an independent third party contractor. Any building services Treasury Department desires would have to be provided or otherwise arranged by GSA which has the statutory authority and responsibility to make repairs, etc., to public buildings.

Matter of: IRS maintenance and repairs of occupied building, September 29, 1982:

The Assistant Secretary (Administration) of the Department of the Treasury has requested our opinion regarding the legality of a Federal agency expending its appropriated funds for maintenance, repairs, or services to buildings assigned to it by the General Services Administration (GSA).

Specifically, the Assistant Secretary poses two questions:

1. Whether a Federal agency, absent a delegation of authority from GSA, may enter into contracts with third parties for maintenance, repairs, or services to buildings in instances where GSA is unwilling or unable to provide services adequate to protect the health and safety of the agency's employees, and

2. If so, whether Treasury Department may withhold from its standard level user charge payments to GSA for amount which Treasury Department has paid to a third party contractor for services rendered.

For reasons stated below, we hold that GSA has the exclusive statutory authority to provide or otherwise to arrange for maintenance, repairs, and necessary services required to house occupant agencies. Therefore, the issue of whether Treasury Department can make deductions from the standard level user charge it pays to GSA is moot. Also, compare 57 Comp. Gen. 130 (1977).

Under Reorganization Plan No. 18, effective July 1, 1950, 15 Fed. Reg. 3177, 64 Stat. 1270, (40 U.S.C. § 490 note), any authority of other Government agencies to lease and assign space in federally occupied buildings outside the District of Columbia was transferred to the Administrator of General Services. Section 1 of Reorganization Plan No. 18 provided for transfer to GSA of leasing authority in pertinent part as follows:

> Transfer of space assignments and leasing functions—All functions with respect to acquiring space in buildings by lease, and all functions with respect to assigning and reassigning space in buildings for use by agencies (including both space in buildings acquired by lease and space in Government-owned buildings), are hereby transferred from the respective agencies in which such functions are now vested to the Administrator of General Services * * *

To further effectuate this transfer of functions and authorities to GSA, Section 2 of Reorganization Plan No. 18 placed the responsi-

bility of providing building maintenance in GSA. It provided in pertinent part as follows:

> All functions with respect to the operation maintenance, and custody of office buildings owned by the Government and of any office buildings or parts thereof acquired by lease * * * are hereby transferred from the respective agencies in which now vested to the Administrator of General Services * * *

In response to Reorganization Plan No. 18, Congress enacted the Federal Property and Administrative Services Act of 1949, as amended, (Property Act), ch. 288, approved June 30, 1949, 63 Stat. 377, 40 U.S.C. §§ 471 *et seq.* (1976). The 1950 amendment to the Property Act, now located at 40 U.S.C. § 490, was intended by Congress to provide continuing statutory authority to do essentially what the Reorganization Plan had comtemplated. *See* S. Rep. 81-2140, 81st Cong., 2d Sess. (1950). The Property Act provided that GSA shall perform centralized property management functions for agencies of the Federal Government. It charged GSA with the maintenance, operation, and protection of Federal facilities under its jurisdiction. *See generally* 40 U.S.C. § 490 (1976). See also the Public Buildings Act of 1959, as amended, 40 U.S.C. §§ 601 *et seq.* (1976).

It was the intent of Congress to simplify the management and utilization of Government properties, to eliminate competition among various Federal agencies, to reduce waste and duplicative actions, and to realize savings through merger of common services. *See* H.R. Rep. No. 670, 81st Cong., 1st Sess. pp. 4, 7 (1949) and S. Rep. No. 1625, 81st Cong., 2d Sess. 7 (1950). Therefore, in view of the intent of Congress to mandate GSA to perform centralized leasing and management functions on buildings assigned by GSA to an occupant agency, we are unable to accept the proposition advanced by the Treasury Department that it has implied inherent procurement authority, independent from GSA, to enter into service contracts with a third party in instances where Treasury feels the service normally provided by GSA is inadequate.

Although Treasury Department acknowledges that it was the intent of Congress to centralize in GSA the authority and responsibility for providing facilities and incidental services to occupant agencies, it contends that Executive Order No. 12196, 45 Fed. Reg. 12769 (1980), has created an "inherent authority" in the head of the occupant agency to enter into service contracts with an independent contractor to maintain and repair its building in order to protect the health and safety of the agency's employees. We accept the Treasury Department's contention to the extent that the Executive order has placed a duty on the head of each occupant agency to furnish to employees an environment that is free from recognized hazards that are likely to cause serious bodily harm or death to its employees. However, we cannot agree with the proposition that the Exective order vests any authority in the head of the occupant agency to contract for independent building services.

Executive Order 12196, entitled "Occupational Safety and Health Programs for Federal Employees," provides in pertinent part as follows:

> The head of each agency shall:
>
> (a) Furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm. (§ 1-201(a) (1980))

It further states that the head of each agency shall:

> (e) Assure prompt abatement of unsafe or unhealthy working conditions. * * * When a hazard cannot be abated without assistance of the General Services Administration or other Federal lessor agency, an agency shall act with the lessor agency to secure abatement. *Id.* § 1-201(e).

In our view, this Executive order places a duty on the head of the occupant agency to consult and to coordinate occupational safety and health programs with GSA in accordance with section 19 of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 668 (1976). It provides an orderly scheme for an occupant agency to notify GSA of deficiencies in building services normally provided by GSA. Section 1-602(b) of the Executive order clearly mandates the Administrator of GSA to

> assure prompt attention to reports from agencies of unsafe or unhealthy conditions of facilities subject to the authority of the General Services Administration; where abatement cannot be promptly effected, [the Administrator of General Services shall] submit to the agency head a timetable for action to correct the conditions; and give priority in the allocation of resources available to the Administrator for prompt abatement of conditions.

Our reading of this Executive order is that it explicitly continues GSA's responsibility to provide or otherwise to arrange for building services in buildings it assigns to other Federal Government agencies. Nowhere does the Executive order give authority to the occupant agency to maintain or repair these buildings.

Further, the Treasury Department does not have specific statutory authority which would authorize it to contract independently for building services. *See* B-162021, July 6, 1977. Nor does the Treasury Department have an appropriate delegation of authority from GSA to contract for such services. Therefore, any building services the Treasury Department desires would have to be provided or otherwise arranged by GSA.

In view of the answer to your first question that Treasury may not enter into contracts for building service and repairs, we need not answer you, second question concerning Treasury's withholding from its SLUC payments to GSA those amounts it pays to contractors for these services. For a general discussion of SLUC payments, compare 57 Comp. Gen. 130 (1979).

[B-203984]

St. Elizabeths Hospital—Appropriations—Deficiencies—Anti-Deficiency Act—Services to District of Columbia—Reimbursement Shortages

Where current appropriation to St. Elizabeths Hospital is limited in amount, Hospital will violate Antideficiency Act, 31 U.S.C. 665(a), if obligations exceed this amount even though Hospital is entitled to, but has not received, reimbursement from the District of Columbia for services provided District residents.

St. Elizabeths Hospital—Appropriations—Deficiencies—"Authorized by Law"—Specific Authority Requirement

Antideficiency Act, 31 U.S.C. 665(a), phrase excepting obligations authorized by law does not provide authority for St. Elizabeths Hospital to exceed appropriation on basis of mandatory language in District of Columbia Code, 21 D.C. 501, *et seq.*

District of Columbia—Federal Payments—Set-Off—St. Elizabeths Hospital Claims—Services to District Residents

When the Federal payment to the District of Columbia has been appropriated and apportioned it becomes due and payable to the District. At this time, before payment to the District, it is available for offset for claims of St. Elizabeths Hospital for services provided District residents.

Matter of: St. Elizabeths Hospital—District of Columbia Payments, September 30, 1982:

The Superintendent of St. Elizabeths Hospital (Hospital) has asked for our decision concerning various questions that have arisen as a result of the Hospital's financial relationship with the District of Columbia (District). The Hospital, a part of the National Institute of Mental Health of the Department of Health and Human Services (HHS), is a public mental health hospital primarily serving the District of Columbia. The Hospital receives a direct Federal appropriation and other Federal reimbursements from miscellaneous sources such as executive Federal agencies for care of their beneficiaries. However, a substantial portion of the Hospital's budget is intended to come from payments from the District of Columbia for services provided indigent District residents.

The Hospital's appropriation, prior to fiscal year 1982, provided, in effect, that if the reimbursements due for patient care were not made, the Hospital's appropriation could cover the shortage up to a certain level. *See, e.g.,* Pub. L. No. 96-536, 94 Stat. 3166 (1980), incorporating by reference H.R. 4389, 96th Cong., p. 24. Accordingly, if the District of Columbia did not pay for the services provided District residents, the shortage, to a certain extent, would be made up by an automatic increase in the Hospital's own appropriation.

The Superintendent indicates that until recently the District failed to reimburse the Hospital for the full amount due. According to the Hospital, at the time of the submission, the District had not paid $34,040,500 of the amount billed by the Hospital. In order to better understand all aspects of this request we had a meeting at-

tended by representatives of HHS, including the Hospital, the Department of Treasury, the Office of Management and Budget (OMB) and the District. We also requested formal comments on this matter from these organizations, but have received them only from HHS and OMB. We were informed at the meeting that the District of Columbia has now paid the Federal Government the amount in arrears and, as far as we know, is current with its payment for fiscal year 1982. Nevertheless, the Hospital believes that the same deficit financial situation is likely to recur.

Any future deficit would leave the Hospital in an extremely precarious position because as the Superintendent explains, the way in which the Hospital is funded has been drastically changed, beginning with its appropriation for fiscal year 1982. Under the new scheme, the Hospital has an appropriation limited to a maximum $98,864,000, Pub. L. No. 97-92, 95 Stat. 1183 (1981), incorporating by reference H.R. 4560, 97th Cong., pp. 23-24. This amount (the cap) is based on an annual budget for the Hospital, less an amount approximately equal to the expected payment from the District for services provided by the Hospital to District residents.

The new appropriation cap assumes that the Hospital will actually receive payments from the District when due during the fiscal year that service is provided. Since this is an uncertain assumption in view of past practice, the Superintendent has asked a number of questions concerning the new appropriation and his authority to recover claims against the District of Columbia. Many of the questions originally asked have become moot as a result of the payments made by the District. However, the following questions remain:

1. As the Hospital's appropriation is capped, will there be an Antideficiency Act violation if the Hospital provides unreimbursed services to District of Columbia patients that result in the Hospital exceeding the cap?
2. Does the legislative mandate of 21 D.C. Code § 501 *et seq.* (1981 Ed.) that the Hospital provide care to those eligible, satisfy the Antideficiency Act provision excepting obligations authorized by law?
3. Can monies appropriated as part of the Federal payment to the District of Columbia government under 47 D.C. § 3401 *et seq.* (1981 Ed.) be withheld as an offset to the District's indebtedness to St. Elizabeths Hospital?
4. Can the Comptroller General require the District government to adjust its account with the Treasury regarding the difference between its actual payment on the Hospital's account and the amounts due and payable by virtue of their appropriations?

Additionally, the Superintendent inquires about the applicability of 1 D.C. Code § 1132 (1981 Ed.) which provides for the making of

agreements between the District of Columbia and the Federal Government for the provision of services and indicates how they are to be paid.

Question 1: As the Hospital's appropriation is capped, will there be an Antideficiency Act violation if the Hospital provides unreimbursed services to indigent District of Columbia patients that result in the Hospital exceeding the cap?

Answer: If the Hospital incurs obligations exceeding any cap on its appropriation, it will be in violation of the Antideficiency Act, 31 U.S.C. § 665(a), which prohibits incurring obligations in excess of the amount available in an appropriation. As described in the submission, the Hospital depends upon substantial reimbursements from the District of Columbia. If these are not forthcoming prior to exhaustion of the amount appropriated and apportioned to the Hospital, further obligations for patient care and related expenses will violate 31 U.S.C. § 665(a) which is a criminal offense if done intentionally. To avoid this, the Hospital may have to suspend operations and make immediate arrangements to transfer all patients to facilities in the jurisdiction responsible for their care. Since the great majority of the patients are District of Columbia residents, the District will have to assume financial responsibility for their care in any event. We know that the District of Columbia Government is well aware of that possibility, as a result of the new method of appropriating for St. Elizabeths Hospital expenses. We hope that it will forestall such a financial crisis for the Hospital by continuing to keep its reimbursements current.

Question 2: Do the legislative mandates of 21 D.C. Code § 501 *et seq.* (1981 Ed.), that the Hospital provide care to those eligible, satisfy the Antideficiency Act provision excepting obligations authorized by law?

Answer: The Antideficiency Act provides at 31 U.S.C. § 665(a) as follows:

> (a) 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. [Italic supplied.]

The Superintendent suggests that the phrase "authorized by law" appearing at the end of the provision quoted above may except activities authorized under statutes such as 21 D.C. Code § 501 *et seq.* (1981 Ed.) from the Antideficiency Act prohibitions. The Superintendent refers to his authority under 21 D.C. Code §§ 511, 513, and 545(b), in particular, which require him to admit patients to the Hospital under certain circumstances. For example, 21 D.C. Code § 513 provides as follows:

> A friend or relative of a person believed to be suffering from a mental illness may apply on behalf of that person to the admitting psychiatrist of a hospital by presenting the person, together with a referral from a practicing physician. For the purpose

of examination and treatment, a private hospital may accept a person so presented and referred, and *a public hospital shall accept a person so presented and referred,* if, in the judgment of the admitting psychiatrist, the need for examination and treatment is indicated on the basis of the person's mental condition and the person signs a statement at the time of the admission stating that he does not object to hospitalization * * * [Italic supplied.]

Although this provision requires the Superintendent to admit qualifying patients into the Hospital, it does not authorize him to incur obligations in excess of available appropriations. The exception in the last sentence of 31 U.S.C. § 665(a), quoted above, is for situations in which an agency has specific authority to make contracts or incur other obligations in excess of or in advance of appropriations adequate to cover those obligations. This kind of authority is sometimes called "contract authority."

Contract authority is generally stated by statute in clear and unmistakable terms. See, for example, the exception made in 41 U.S.C. § 11 for military purchases of "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies." Another section of the Antideficiency Act itself contains an exception for personal services "in cases of emergency involving the safety of human life or the protection of property." 31 U.S.C. § 665(b). See also the general discussion of the "otherwise authorized" exception in 56 Comp. Gen. 437 (1977), particularly pages 443-444. There we analyzed the provisions of section 10 of the River and Harbor Act of 1922 which specifically authorized the Corps of Engineers to enter into large multi-year civil works projects without seeking an appropriation for expenses beyond the first year's needs. We found that this language also provided an exception to the Antideficiency Act.

It is therefore not sufficient that St. Elizabeths Hospital has a statutory mandate to treat all patients who meet the eligibility requirements for admission unless the statute also permits continued operation regardless of the adequacy of the Hospital's remaining appropriations. We interpret the cap on the appropriation as indicating that Congress intended no exception in the case of the Hospital. Therefore, if the mandatory admission of patients would cause a deficiency because the District of Columbia is in arrears with its reimbursements, the Superintendent must reduce nonmandatory expenditures to bring the Hospital within the limits of its available funds. If this cannot be accomplished, and the District of Columbia payments are still not forthcoming, the Superintendent may be required to suspend operations and make the alternate arrangements for patient care, discussed above.

Question 3: Can monies appropriated as part of the Federal payment to the District of Columbia Government pursuant to 47 D.C. § 3401 *et seq.* (1981 Ed.) be withheld as an offset to the District's indebtedness to St. Elizabeths Hospital?

Answer: The District of Columbia is a distinct entity from the Federal Government, one capable of becoming indebted to the

United States. 60 Comp. Gen. 710 (1981). Thus by billing the District for patient care, the Hospital has a claim against the District on behalf of the United States. If the District does not pay this claim in a timely fashion, the Hospital is required by the Claims Collection Standards issued under the Federal Claims Collection Act, 31 U.S.C. §§ 951-953 (1976), to aggressively pursue collection of the debt. 4 CFR § 102.1.

Offset is usually available against any claim the debtor has against the United States, since it has long been held that the United States, just like private parties, is entitled to the common law right of offset. See *Gratiot* v. *United States,* 40 U.S. (15 Pet.) 336 (1841). Agencies are thus required to attempt to collect a claim by offset from funds in their control owed to the debtor, among other steps, if a debtor does not make timely payment. 4 CFR § 102.3. Accordingly, the answer to this question depends upon whether the Federal payment, once appropriated, can be considered to be funds owed by the United States to the District.

The District is funded by a Federal payment and its own revenues. 47 D.C. Code § 3401 *et seq.* (1981 Ed.). The Federal payment, after being appropriated, is apportioned by the Office of Management and Budget for payment to the District. After apportionment the Federal payment is due and payable to the District. It is at this point—after apportionment but before actual payment by the Department of the Treasury—that the Federal payment constitutes money owed by the United States to the District and is available for offset.

Funds from both the Federal payment and District revenues, once received, are deposited in the General Fund of the District of Columbia, from which they may be obligated and expended only in accordance with congressional directives. 47 D.C. Code § 304 (1981 Ed.). Thus the Federal payment is no longer available for offset once it has been apportioned by the Office of Management and Budget and paid over to the District of Columbia.

OMB's practice is to apportion the Federal payment so that it is all paid out by Treasury before the end of the second quarter of the fiscal year. Thus offset is an effective remedy for the Hospital only with respect to claims for patient care already provided during the first half of the fiscal year.

It has been suggested that 32 D.C. Code § 602 (1981 Ed.) may provide St. Elizabeths some relief. This provision provides:

> The expense of the indigent patients admitted to Saint Elizbeths Hospital from the District of Columbia shall be reported to the Treasury Department, and charged against the appropriations to be paid toward the expenses of the District by the general government, without regard to the date of their admission. (Mar. 3, 1879, 20 Stat. 395, ch. 182, § 1; July 1, 1916, 39 Stat. 309, ch. 209, § 1; 1973 Ed., § 32-402.)

The last source for this provision as it appears in the D.C. Code is a 1916 Appropriation Act, ch. 209, 39 Stat. 309, July 1, 1916. It no longer reflects the Federal relationship with the District Gov-

ernment and the way in which the Federal payment is handled. When this provision originated, District funds were in a Treasury account against which charges could be made. Since fiscal year 1925 Congress has appropriated a lump sum contribution toward the District's general expenses. *Compare* ch. 302, 43 Stat. 539 *with* ch. 148, 42 Stat. 1327; *see* S. Rep. No. 1612, 75th Cong., 3d Sess. 8 (1938). As these funds are now paid over to the District early in the year, the mechanism created by section 602 is simply not a viable method of payment for most of the year. There is, indeed, considerable question as to whether this provision has even been properly identified in the District Code as permanent law. Each of the sources given for the section is an appropriation act that gives no indication of an intent that it is to be permanent legislation. See 39 Stat. 309, *supra*; ch. 182, 20 Stat. 395, March 3, 1879. We do not have to conclude that section 602 is not permanent legislation since we believe that even if properly codified, it is obsolete.

Question 4: Can the Comptroller General require the District government to adjust its account with the Treasury regarding the differences between its actual payment on the Hospital account and the amounts due and payable by virtue of their appropriations?

Answer: The method for collecting debts owed the Federal Government by the District is the Claims Collection Act. 60 Comp. Gen. 710, *supra.* The authority of the Comptroller General to adjust accounts under 31 U.S.C. § 71 (1976) is the authority to determine the legal status of the account and take exception to unauthorized payments. The Comptroller General can also settle claims for and against the United States, *id.,* which means he can determine that money is owed and the amount, but this settlement authority does not extend to, in effect, transferring funds between accounts. An enactment of the Congress is required for that purpose. 31 U.S.C. § 628–1.

Finally, we see no basis for applying the provision of 1 D.C. Code § 1132 (1981 Ed.) to the situation before us. It is not at all clear whether this provision, which provides for agreements for payments for services between the District and the Federal Government, has any application to District–Federal relationship where, as in this case, the terms of the relationships are set forth by statute. We have been informed that OMB considers that 1 D.C. Code § 1132 was principally intended to take care of situations like marches or demonstrations, mentioned in subsection (b) of that section, which require intergovernmental cooperation and which entail unforeseeable mixtures of Federal and District participation. Further, there is no such agreement in this instance, much less an OMB approval, as required in 1 D.C. Code 1131 (1981 Ed.). Under the circumstances, we are unable to see how this provision has any legal impact on the questions already discussed.

[B-207973.2]

Contracts—Small Business Concerns—Awards—Size Status—Protests to Agency—Timeliness

Awardee's restriction on disclosure of its supplier does not excuse protester's failure to protest awardee's small business size status within 5 working days of bid opening, as required by applicable regulation, where protester has neither alleged nor shown that solicitation prohibited bidders from restricting the disclosure of their suppliers.

Contracts—Small Business Concerns—Awards—Self-Certification—Acceptance—Absent Impeaching Evidence

Protest that contracting officer abused his discretion in not protesting awardee's size status to Small Business Administration is summarily denied because the protester has neither alleged nor shown that information that would reasonably impeach the awardee's self-certification was available to the contracting officer. DAR 1-703(b)(2).

Matter of: Putnam Mills Corporation, September 30, 1982:

Putnam Mills Corporation (Putnam) protests a contracting officer's refusal to consider Putnam's protest against H. Landau & Co.'s (Landau) size status for the purposes of the present procurement. The contract has been awarded to Landau under invitation for bids (IFB) No. DLA100-82-B-0583, a small business set-aside issued by the Defense Logistics Agency, Defense Personnel Support Center (DLA).

Putnam filed a June 25, 1982 size status protest with the contracting officer after filing the same size status protest, dated June 18, with our Office. Putnam's size status protest alleged that Landau is not a small business because its source of supply Duro Finishing & Printing Corp. (Duro).

We dismissed the June 18 protest because it concerned small business size status, which is by law a matter to be determined by the Small Business Administration (SBA). *Putnam Mills Corporation,* B-207973, July 6, 1982, 82-2 CPD 25. The contracting officer dismissed Putnam's June 25 protest on the ground it was untimely under Defense Acquisition Regulation (DAR) § 1-703(b)(1) (Defense Acquisition Circular No. 76-19, July 27, 1979) because it was filed more than 5 days after the May 4 bid opening. The contracting officer referred the matter to the SBA for purposes of future procurements. *See* DAR §1-703(b)(1)(b).

On July 8, 1982, 2 days after we had dismissed Putnam's June 18 protest, Putnam sent a letter to our Office protesting the contracting officer's refusal to consider Putnam's size status protest for the purposes of the present procurement. It is apparent that Putnam had not received our July 6 decision by July 8 because its July 8 letter does not request reconsideration, but rather alleges new grounds to supplement its June 18 protest.

We have reopened this case as a new protest rather than a request for reconsideration of our July 6 decision because Putnam's July 8 letter, unlike its June 18 letter, raises an issue that our

Office does review. See *Computer Sciences Corporation,* B-190632, August 9, 1979, 79-2 CPD 102. Under DAR § 1-703(b)(1), size protests are to be filed with the contracting officer for referral to SBA. *Ridg-U-Rak, Inc.,* B-207837, July 26, 1982, 82-2 CPD 78. However, our Office does review the timeliness of size protests filed with a contracting officer. See *M & H Concrete Structure, Inc.,* B-206276, April 15, 1982, 82-1 CPD 348; *R. E. Brown Co., Inc.,* B-193672, August 29, 1979, 79-2 CPD 164; *NASCO Products Co.,* 46 Comp. Gen. 342, 345 (1966). We also consider whether a contracting officer abused his discretionary authority under DAR § 1-703(b)(2) to question the small business status of a bidder. See *Keco Industries, Inc.,* 56 Comp. Gen. 878, 881-82 (1977), 77-2 CPD 98.

We will not request an agency report in this case because it is clear from Putnam's July 8 letter that both grounds of protest are without merit. Therefore, the protest is summarily denied.

A protest against the small business status of a bidder must be filed within the 5-day period under DAR § 1-703(b)(1), which provides that:

> * * *Any bidder, offeror, or other interested party may, in connection with a contract involving a small business set aside or otherwise involving small business preferential consideration, challenge the small business status of any bidder or offeror by sending or delivering a protest to the contracting officer responsible for the particular acquisition. * * * In order to apply to the acquisition in question, such protest must be filed with and delivered to the contracting officer prior to the close of business on the fifth day exclusive of Saturday, Sunday, and legal holidays after bid opening date for formally advertised and small business restricted advertised acquisitions.* * *

Putnam's first ground of protest is that the contracting officer improperly determined that its protest was untimely because it was not filed within 5 working days of bid opening. Putnam contends it could not file within 5 days because Landau had concealed its supplier.

Apparently, the subject solicitation contained no prohibition against restricting the disclosure of suppliers. In the absence of such a provision, it is not improper for a bidder which certifies that its supplier will be a small business to conceal the identity of its supplier in the competitive atmosphere of DLA Defense Personnel Support Center procurements. See *Uffner Textile Corporation,* B-205050, December 4, 1981, 81-2 CPD 443, in which we denied a protest involving an awardee which restricted the disclosure of its subcontractor. See also *Unit Portions Inc.,* B-202783, October 14, 1981, 81-2 CPD 308. Of course, whether the bidder complies with its certification is a matter of contract administration for the contracting agency.

Putnam did not file a protest against the small business status of Landau within the 5-day period. We find no basis for an exception to the timeliness requirement where the solicitation does not require that bidders be notified of their competitors' source of supply. See *M & H Concrete Structures, Inc., supra,* in which we denied a

protest that the agency's failure to notify the third low bidder of disqualification of the low bidder for award and of the agency's intention to award to the second low bidder prevented the protester from objecting to the small business status of that bidder within the 5-day period since DAR § 1-703(b)(1) specifically requires bidders to "challenge the small business status of any bidder or offeror" within the 5-day period.

Putnam contends that even if its protest was untimely, the contracting officer should have questioned Landau's size status under DAR § 1-703(b)(2). That regulation permits the contracting officer to question the size status of a bidder by filing a written protest with the SBA at any time.

The questioning of size status by a contracting officer under DAR § 1-703(b)(2) is a matter of discretion. *Eller & Company, Inc.,* B-191986, June 16, 1978, 78-1 CPD 441; *Evergreen Funeral Home,* B-184149, November 6, 1975, 75-2 CPD 282. A contracting officer's exercise or nonexercise of discretion must be measured against a standard of reasonableness in the particular case. See *Keco Industries, Inc., supra.* Consistent with this standard, we have held the intent of DAR § 1-703(b)(2) is that if information is brought to the attention of a contracting officer which would reasonably impeach the self-certification of a bidder, the contracting officer must file a direct protest with the SBA in order to assure that the self-certification process is not being abused. *Keco Industries, Inc., supra.*

Although Putnam alleges the contracting officer should have questioned Landau's size status under DAR § 1-703(b)(2), it has neither alleged nor shown that the contracting officer was aware of information prior to award that would reasonably impeach Landau's self-certification. In the absence of such information (or a timely size status protest), a contracting officer may accept a small business size certificate at face value. *Eller & Company, Inc., supra; Keco Industries, Inc., supra.* Under these circumstances, the contracting officer's decision to refer Putnam's protest to SBA for purposes of future procurements, but not for the present procurement, will not be questioned by our Office. See *Eller & Company, Inc., supra; Capital Fur Inc.,* B-187810, April 6, 1977, 77-1 CPD 237.

The protest is summarily denied.

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Commission it is necessary to annualize the partial-year amount over the full fiscal year. Annualizing the $250,000 appropriation over the full year results in a figure of $1 million. Reducing this amount by the 4 percent reduction required by the continuing resolution gives a funding level of $960,000 473

Deficiencies

Anti-Deficiency Act

Exceptions

Foreign currency accommodation exchanges

Army Department

Losses incurred from time to time throughout year by Accounting and Finance Officer, Department of the Army, while making accommodations exchanges and exchange transactions pursuant to 31 U.S.C. 492a, are accepted part of handling these transactions. As an accountable officer, the Finance Officer is not liable for losses in foreign currency dealings which occur because Army Regulations call for him to use an estimated, rather than the actual, exchange rate. Under 31 U.S.C. 492b an agency is authorized to place itself in a deficiency situation and not be in violation of the Antideficiency Act 649

Violations

Contracts

Modification

Antideficiency Act, 31 U.S.C. 665(a), forbids incurring of obligations in advance of appropriations. A renewal option which extends performance of services for an additional fiscal year may only be exercised when funds for the new fiscal year have been made available 184

Fiscal year

Availability beyond

Contracts

Modification

Cost overruns

Discretionary cost increases in cost reimbursement contracts which exceed contractually stipulated ceilings set forth in Limitation of Cost clauses and which are not enforceable by contractor are properly chargeable to funds available when the discretionary increase is granted by the contracting officer. 59 Comp. Gen. 518 and other prior inconsistent decisions are modified accordingly 610

Performance extension

Department of Interior entered into contract for necessary facilities and staff to operate nonresidential project camps for youth. In last month of fiscal year 1980, Interior executed modifications to this contract extending period of performance of contract from Oct. 1, 1980, to May 31, 1981, and providing for a new service to be performed by contractor during extension period. As Interior did not have a *bona fide* need for services provided by modifications until they were performed in fiscal 1981, they are chargeable to Interior's 1981 appropriation. 31 U.S.C. 712a permits use of annual appropriations only for expenses serving the needs of the year for which the appropriation was made. Fact that supplemental agreements modi-

APPROPRIATIONS—Continued Page
Fiscal year—Continued
Availability beyond—Continued
Contracts—Continued
Modification—Continued
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fied basic contract which itself was properly charged to 1980 appropriation does not change this result. Only modifications within scope of original contract may be charged to same appropriation as original contract 184
Federal aid, grants, etc.
Obligation under stipulated and agreed order
Payments after order vacated
Department of Health and Human Services should make further payments to grantees only to the extent grantee incurred obligations in reliance on the grant agreement. Grants may then be terminated .. 509
Gains and Deficiencies Account
Charging
Exchange transactions
Vietnam evacuation
Loss of approximately $1,070,000 of piaster currency abandoned in Vietnam may be charged to Gains and Deficiencies Account, 31 U.S.C. 492b, since piasters were acquired and held for exchange transaction operations and became worthless when South Vietnamese Government fell. To extent inconsistent, 56 Comp. Gen. 791 (1977) is overruled 132
Impounding
Impoundment Control Act
Reporting to Congress
Rescission *v.* deferral
Program termination costs
A proposal by DOE to defer use of no-year funds to fiscal year 1983 was not a proposed rescission under section 1012(a) of the Impoundment Control Act of 1974, 31 U.S.C. 1402(a), merely because it would have been used to cover expenses incurred in connection with the termination of authorized projects and activities. Where all available budget authority will in fact be expended for termination costs, a rescission proposal is not required 482
Program termination
Prior to Congressional action on proposed deferral
Propriety
There is no legal requirement that would have prevented DOE from initiating termination activities within the Fossil Energy Research and Development Program in advance of congressional action on a proposed deferral of funds from that program. 482
Rescission *v.* deferral. (*See* APPROPRIATIONS, Impounding, Impoundment Control Act, Reporting to Congress)

APPROPRIATIONS—Continued Page
Interior Department
Availability
Official reception and representation expense fund
Agency discretion
Christmas party
To the extent funds are available in the Dept. of Interior's official reception and representation fund, they may be applied to the costs incurred for a Christmas party given by the Secretary of the Interior and to reimburse any amounts already spent from salary and expense accounts and from donated funds for that purpose. Unlike the Christmas party, which was attended by Government officials and their guests, the use of the fund for a breakfast given by the wife of the Secretary of the Interior for the wives of high-level Government officials would be inappropriate because the breakfast was hosted and attended entirely by private persons. The amount of any shortfall for expenses attributable to the Christmas party, as well as the expenses of the breakfast, must be paid by the officials who authorized the expenditures 260
Limitations
Compensation
Judicial officials
"Pay cap" applicability
Salaries of the Directors of Administrative Office of the United States Courts and Federal Judicial Center and the Administrative Assistant to the Chief Justice are by statute linked to the salary of a Federal district judge. Under Article III of the Constitution, as interpreted by the Supreme Court, Federal district judges have received several recent pay increases, notwithstanding the enactment of pay caps limiting pay increases for executive, legislative, and judicial branch officials. Since district judges' salaries have increased, these three officials are entitled to the same increases, despite pay caps 642
Lump-sum
"Available until expended" for authorized projects
Fiscal year 1978 appropriation act, Pub. L. 95–96, contained lump-sum amount, available until expended, for authorized reclamation projects "as authorized by law." Latter phrase limited use of funds so that for any project, funds may only be obligated in accord with authorization for that project. Pub. L. 95–46 authorized appropriations, to be obligated only in fiscal year 1978, to continue San Luis Unit, Central Valley Project, California, distribution systems and drains construction pending congressional reconsideration of permanent authorization increase. In accord with authorization limitation, appropriation—otherwise available until expended—was properly obligated only in fiscal year 1978 for distribution systems and drains construction 532
Obligation
Advance of appropriation availability
Antideficiency Act
Presidential appointees exempt from leave act
Compensation
Upon passage of a supplemental appropriation, Commissioners of the Copyright Royalty Tribunal may be paid for the interim where

APPROPRIATIONS—Continued Page
Obligation—Continued
Advance of appropriation availability—Continued
Antideficiency Act—Continued
Presidential appointees exempt from leave act—Continued
Compensation—Continued
the agency was without sufficient funds to pay them. Under 17 U.S.C. 802, the Commissioners are presidential appointees. They are also exempt from the provisions of the Annual and Sick Leave Act, 5 U.S.C. 6301 *et seq.* As such, they are entitled to compensation simply by virtue of their status as officers, regardless of the availability of funds. In other words, for the purposes of the Antideficiency Act, the Tribunal is authorized by law to incur Commissioners' salary expenses even in the absence of available adequate appropriations to liquidate the obligation 586
Beyond fiscal year availability. (*See* APPROPRIATIONS, Fiscal year, Availability beyond)
Potential liability
Litigation pending
Evidence
Acceptability
Department of Health and Human Services, as successor to Community Services Administration (CSA), should not recover funds expended pursuant to Stipulation and Agreed Order entered to resolve court action alleging CSA improperly withheld payments due plaintiffs under fiscal year 1979 Crisis Intervention Program. Although Order was subsequently vacated, grant fund appropriation was validly obligated prior to close of fiscal year 1979 by filing evidence of potential liability because of pending litigation, pursuant to 31 U.S.C. 200(a)(6). Funds were therefore still available when grants were made in fiscal year 1980 509
Panama Canal Commission
Restrictions
Administrator's residence maintenance
Expense limitation
Residence staffing salaries excluded
Pub. L. 96-400, Oct. 9, 1980, limited Panama Canal Commission appropriations for operating expenses to not more than $60,000 for the maintenance of the Administrator's residence. This limit did not apply to additional $41,000 for residence employee's salaries which in past were charged to Administrator's Office, absent indication of intention to cut total cost estimate of $108,000 (including an additional amount of $7,000 for repairs) to $60,000. Finding in report, ID-81-57, Aug. 4, 1981, is affirmed 520
Reimbursement
Fees for services to the public. (*See* FEES, Services to the public, Charges, Collection and disposition)
Interagency services
Merit Systems Protection Board services. (*See* DEPARTMENTS AND ESTABLISHMENTS, Services between, Reimbursement, Merit Systems Protection Board services)

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Restrictions
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Limitations. (*See* APPROPRIATIONS, Limitations, Compensation)
St. Elizabeths Hospital. (*See* ST. ELIZABETHS HOSPITAL, Appropriations)
State Department
Reimbursement
Overseas services to other agencies
Vietnam evacuation effect
Checks issued by United States Disbursing Officer before April 1975 evacuation of South Vietnam should be charged against State's fiscal year 1975 appropriations since the accounting records that would have shown the agency appropriations against which the checks would have been charged were lost. To the extent inconsistent, 56 Comp. Gen. 791 (1977) is overruled 132

ARCHITECT AND ENGINEERING CONTRACTS (*See* CONTRACTS, Architect, engineering, etc. services)
ARMED SERVICES PROCUREMENT REGULATION (*See* DEFENSE ACQUISITION REGULATION)

ARMY DEPARTMENT
Regulations
Reserves
Training assemblies
Pay entitlement
Army Reserve member awaiting assignment to initial active duty for training attended 22 training assemblies after termination of 180-day period following his enlistment. The member's claim for training pay may not be allowed since Army Regulation 140-1 provides that a nonprior service member is not eligible for inactive duty training pay (drill pay) for assemblies attended after the expiration of 180 days while awaiting initial active duty for training 332

ASSIGNMENT OF CLAIMS (*See* CLAIMS, Assignments)

ATTORNEYS
Fees
Agency authority to award
Civil Rights Act complaints
Discrimination complaint settlement
Defending official's reimbursement claim
Employee, who was named as an alleged discriminating official in discrimination complaint, claims reimbursement of attorney fees incurred during investigation of complaint. Claim is denied since, in the absence of express statutory authority, attorney fees are not reimbursable. Neither regulations regarding alleged discriminating officials nor Civil Rights Act or its implementing regulations provide authority for reimbursement of attorney fees in this situation 411
Regulation authority
Prospective application
Employee filed discrimination complaint and was awarded retroactive promotion in 1979. Claim for attorney fees is denied since Gener-

ATTORNEYS—Continued Page
Fees—Continued
Agency authority to award—Continued
Civil Rights Act complaints—Continued
Regulation authority—Continued
Prospective application—Continued
al Accounting Office (GAO) is without authority under Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(k) and 2000e-16, to consider discrimination complaints or claims for attorney fees incident to such complaints. Regulations authorizing payment of attorney fees in discrimination cases were issued subsequent to this employee's case and are not retroactively effective 326
Bar admission fees
Reimbursement
Incumbent appeals officers
Merit Systems Protection Board
Pursuant to a program to assist appeals officers meet a new requirement that they be bar-admitted attorneys, the Merit Systems Protection Board (the Board) seeks to reimburse them for their initial bar admission fees. These fees are personal obligations of attorneys. They are not reimbursable, even through the requirement was later imposed on incumbent employees and the Board supports the reimbursement as part of an effort to avoid losing these employees by a reduction-in-force. B-187525, Oct. 15, 1976, is distinguished..... 357
Bar review
Reimbursement
Government employees
Law school tuition and bar review course tuition are similarly necessary expenses incurred in order to qualify for a legal position. Therefore they, like bar admission fees, are personal to the employees and are not payable from appropriated funds. The Board should make no further payments under its bar assistance program and should recover tuition and fees already paid to its employees unless waiver is granted pursuant to 5 U.S.C. 5584. B-187525, Oct. 15, 1976, is distinguished 357
Civil Service Reform Act of 1978
"Appropriate authority" decisions
Review
Back Pay Act regulations
Employee filed discrimination complaint and was awarded retroactive promotion as remedy under Title VII of Civil Rights Act. Claim for attorney fees under Back Pay Act, as amended, 5 U.S.C. 5596, is denied since employee is appealing to GAO only agency's denial of attorney fees which is not permitted under regulations implementing the Back Pay Act..... 326
Merit Systems Protection Board complaints
Against supervisors
Appropriation availability
Chairman, International Trade Commission, requests decision on whether Commission may use appropriated funds to furnish legal representation to employee brought before Merit Systems Protection Board on complaint of the Board's Special Counsel. Commission funds are available to provide counsel in cases in which supervisor

ATTORNEYS—Continued Page
Fees—Continued
Civil Service Reform Act of 1978—Continued
Merit Systems Protection Board complaints—Continued
Against supervisors—Continued
Appropriation availability—Continued
performed the conduct which is the subject of the Special Counsel's complaint within the scope of employment and the agency determines that it is in its interest to provide representation. Conduct is within the scope of a supervisor's employment if it is in furtherance of, or incident to, the carrying out of official duties. Because such conduct is in furtherance of an agency function, the cost of counsel may be considered a necessary expense incurred in performing that function 515
Merit Systems Protection Board decisions
Adverse
Appeal
An employee who successfully appealed his separation from his agency before the MSPB claims reimbursement of legal fees. Since the legal fees claimed relate to the services of an attorney in connection with the appeal to MSPB and not General Accounting Office, payment of such fees is for consideration by MSPB under 5 U.S.C. 7701(g)(1) (Supp. III, 1979). Any appeal from an adverse decision by the MSPB would be to a Federal court. 5 U.S.C. 7703 (Supp. III, 1979) 578
Finality
Air Force employee was downgraded, but was later restored retroactively by Air Force following decision of Merit Systems Protection Board (MSPB) regarding personnel actions related to "unacceptable performance." Claim for attorney fees was denied by Air Force and MSPB. Our Office has no authority to review decisions of MSPB under 5 U.S.C. 7701. In addition, under regulations implementing Back Pay Act amendments, such claim for attorney fees is subject to review only if provided for by statute or regulation. Since no review by General Accounting Office of claim presented here is authorized by statute or regulation, we may not review the prior denials..... 289
Discrimination complaints. (*See* **ATTORNEYS, Fees, Agency authority to award, Civil Rights Act complaints**)
Grievance proceedings
Under agency procedures
Not involving pay or allowances
Fee reimbursement claim
Employee, who was issued letter of reprimand for discrimination against subordinate employee, filed grievance under agency grivance procedures and claims attorney fees incident to favorable grivance decision. Claim is denied since, in the absence of express statutory authority, attorney fees are not reimbursable. Grievance was not before Merit Systems Protection Board, which has authority to award attorney fees, and grievance did not involve reduction in pay or allowances which is necessary to bring it within scope of Back Pay Act, as amended 411

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Hire
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Advisory commission authority
United States Advisory Commission on Public Diplomacy
Contract entered into by the United States Advisory Commission on Public Diplomacy with private law firm for legal services concerning authority of the Advisory Commission and extent of its independence does not constitute illegal personal services contract, since law firm was hired on an independent contract basis requiring no more than minimal supervision and not on employer-employee basis. Further more, type of legal services required, involving legal analysis of authority and independence of Advisory Commission, was not related to litigation within jurisdiction of Department of Justice. Also, Advisory Commission's need for second legal opinion, unencumbered by conflict of interest, was not unreasonable under circumstances 69
Indigent defendant representation
Leave, etc.
Attorneys in non-attorney positions
Involuntary summons
An employee of the Veterans' Administration who is licensed as an attorney in New Jersey was involuntarily summoned to represent an indigent defendant. He may not be excused from duty since he is not entitled to court leave and may not be granted administrative leave under these circumstances. See 44 Comp. Gen. 643 653

BANKRUPTCY
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Bankrupt annuitants, etc.
Survivor Benefit Plan
Payments to trustee
Court order compliance
Although 10 U.S.C. 1450(i) provides that a Survivor Benefit Plan (SBP) annuity is not subject to assignment, attachment, garnishment, or other legal process, the annuity may be paid to a trustee in bankruptcy pursuant to the order of a bankruptcy court in a proceeding under Chapter 13 of the Bankruptcy Code (11 U.S.C. 1301–1330 (Supp. III, 1979)), since such proceeding is completely voluntary on the part of the debtor and court could order the annuitant to pay the trustee. Thus, Government receives a good acquitance when the annuity is paid to the trustee at the request of the annuitant..... 245
Military personnel
Readjustment pay
An Air Force officer who received readjustment pay upon discharge subsequently enlisted and completed 20 years of active duty for retirement. Upon retirement, the member's retired pay was withheld until an amount equal to 75 percent of his readjustment pay was recouped as is required under 10 U.S.C. 687(f). Although the member received a discharge in bankruptcy effective shortly after he retired, this did not entitle him to receive the retired pay withheld under section 687. Deduction from retired pay in the amount of 75 percent of readjustment pay is not a debt and, therefore, it is not discharged by an adjudication of personal bankruptcy 67

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BIDDERS
Debarment
Suspension. (*See* **BIDDERS, Suspension**)
Responsibility *v.* bid responsiveness
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Questions concerning an individual surety's financial acceptability are matters of responsibility rather than responsiveness 456
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Suspension
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Affiliate status
Agency has reasonable basis for suspending company on basis of its being affiliated with previously suspended firm where ownership of company had been transferred by owner of suspended firm to his wife and the company is organized and managed by key employees of the suspended firm and uses facilities and personnel of that firm 553
Protest status. (*See* **CONTRACTS, Protests, Interested party requirement, Suspended, debarred, etc. contractors**)

BIDS
Acceptance time limitation
Bids offering different acceptance periods
Shorter periods
Extension propriety
Protest determination effect
The rule, expressed in recent General Acounting Office decisions, that a bidder offering less than the requested bid acceptance period cannot extend that period to accept award when others have offered the requested period does not apply where an award in fact was made to another firm within the shorter bid acceptance period and the bidder that offered the shorter period filed a timely and successful protest that it should have received the contract. 60 Comp. Gen. 666 and B-206012, Feb. 24, 1982, distinguished 423
Responsiveness of bid
Solicitation provisions
A bidder can offer an acceptance period that is shorter than the one requested and still be responsive to a solicitation that does not mandate a minimum acceptance period, although the bidder runs the risk that award will not be made before the shorter period expires. 60 Comp. Gen. 666 and B-206012, Feb. 24, 1982, distinguished 423
Failure to comply
Waiver
One bid received
Compliance with a bid acceptance period stated in an invitation generally is a material requirement because a bidder offering a shorter acceptance period has an unfair bidding advantage since it is not exposed to market place risks and fluctuations for as long as its competitors are. Where only one bid is received, however, the fact that it offers a shorter acceptance period than solicited does not re-

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quire its rejection, since there are no competitors subject to possible prejudice 192
Aggregate *v.* separable items, prices, etc.
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Protest against multiple contract awards under a solicitation containing the "Additive and Deductive Items" clause, which clearly advises that award will be made to the low aggregate bidder, is sustained. Award must be made on the same terms offered to all bidders and multiple awards were improper even though the aggregate award would be more costly to the Government 317
Ambiguous
Rejection
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Prior decision—in which General Accounting Office held a bid to be ambiguous and nonresponsive where bidder designated responsive qualified products list product by manufacturer's designation but a nonresponsive product by superseded qualified products list test number—is affirmed. Recommendation is made to terminate contract for convenience of Government, particularly where this is second recent procurement where protester has been deprived of contracts improperly awarded to another firm 571
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Competitive system
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Possibility that Government might realize monetary savings in particular procurement if material deficiency is corrected or waived is outweighed by the importance of maintaining the integrity of the competitive bidding system 269
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While foreign bidders may enjoy competitive advantages because they are exempt from U.S. requirements concerning equal opportunity, environmental protection, and the like, there is no Federal law which seeks to equalize such competition 431
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Statutory requirement that all interested persons be afforded a full and equal opportunity to acquire petroleum products is not satisfied when two subsidiaries of the same parent corporation participate separately in a lottery sale. Distinguished by B-204821, March 16, 1982 121

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Criteria
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Not prejudicial to protester
Determination of low bidder based on cost adjustment process which was not disclosed to bidders is defective. Nevertheless, since protester was not prejudiced by evaluation, protest is denied 205
Foreign *v.* domestic components of end product
Canadian components
Status
Protester was not prejudiced by successful bidder representing that foreign content in end product is zero where protester contends that two components in successful bidder's end item comprising 30 to 40 percent of the cost of the end item are Canadian, since no evaluation factor is required to be added to the bid where the components are Canadian or where the cost of components which are made in the United States exceeds 50 percent of the cost of all the components..... 247
Foreign military sales items
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Compensation factor
Just because bidder bids the same price for foreign military sales items as it has for other items in the IFB does not mean that the bidder has failed to include in the foreign sales items the compensation required for the use of Government-furnished production property. Government is not subsidizing cost of foreign sales items, since the contractor is required to pay the rental due the Government for the use of Government property in connection with the manufacture of foreign sales items 247
Lowest cost to Government
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When procuring agency's best estimate involves unknown factors, so there are no realistic safeguards to insure that mathematically unbalanced bid which is evaluated as low actually results in lowest cost to Government, bid should be rejected under solicitation clause warning against material unbalancing 99
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Where award date was unavoidably delayed so as to shorten contract performance period by one month, award to bidder evaluated as low under performance period specified in solicitation is not improper even though awardee would not be low under evaluation based on shorter actual performance period, since competition was fair, prices had been exposed, and probable cost of resolicitation would exceed difference in prices bid by protester and awardee 48
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An assignment of funds held by the Government as retainages or allegedly due the bidder under other Government contracts in lieu of

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Invitation for bids
Amendments
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Failure of bidder to acknowledge amendment may not be waived on basis that bidder was not sent amendment by agency where evidence does not indicate deliberate effort by agency to exclude bidder from competing on procurement. Also, allegation by bidder—that it was aware of contents of amendment because of discussions with subcontractors and considered amendment in preparing its bid—does not negate necessity for acknowledging amendment, since bid responsiveness must be determined from bid itself 269
Cost increase
Significant
Rejection of low bid which did not contain acknowledgment of amendment was proper since, while amendment's cost effect was insignificant compared with total price of low bid, cost effect amounted to more than 11 times the difference between the two low bids. Therefore, waiver of protester's failure to acknowledge amendment would not be justified because amendment had more than a trivial or negligible effect on price. *See* Defense Acquisition Regulation 2-405(iv)(B) (1976 ed.) 269
Materiality determination
Cost-increase estimates of protester
Protester's estimate of cost increases produced by unacknowledged amendment may not be used to determine the materiality of amendment since this would permit protester to become eligible for award by citing costs that would permit waiver or to avoid award by placing a larger cost value on the effects of amendment 269
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Agency's regulatory mailing requirements
Compliance not established
Record must reasonably indicate that copies of amendment were mailed in accordance with regulatory requirements if protester is to be charged with the risk of nonreceipt of amendment. Agency compliance with regulation is not reasonably established where 3 of 4 bidders appear not to have received amendment in the mail 253
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Bidder exclusion not intended
Failure of bidder to acknowledge amendment may not be waived on basis that bidder was not sent amendment by agency where evidence does not indicate deliberate effort by agency to exclude bidder from competing on procurement. Also, allegation by bidder—that it

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was aware of contents of amendment because of discussions with subcontractors and considered amendment in preparing its bid—does not negate necessity for acknowledging amendment, since bid responsiveness must be determined from bid itself 269
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Lesser quantity award right
Insufficient funding for total quantity
Partial award not required
Provision of the solicitation which gives the Government the right to make an award for a quantity less than the quantity called for by the solicitation does not require the agency to make an award of a lesser quantity where there are insufficient funds to award the total quantity 281
Single *v.* multiple award basis
Protest against multiple contract awards under a solicitation containing the "Additive and Deductive Items" clause, which clearly advises that award will be made to the low aggregate bidder, is sustained. Award must be made on the same terms offered to all bidders and multiple awards were improper even though the aggregate award would be more costly to the Government 317
Cancellation
After bid opening
Auction prohibition
Nonapplicability
Proper cancellatioin of invitation for bids (IFB) because sufficient funds are unavailable does not constitute an auction as that term is used in Defense Acquisition Regulation (DAR) 3-805.3(c), which refers to negotiated procurements 281
Insufficient funding
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A contracting agency may properly cancel a solicitation after bid opening where it determines that sufficient funds are not available for award of the total quantity advertised 281
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Where increased quantities added by amendment are no longer needed, agency may accept bid for initial quantities even though bidder did not acknowledge amendment since solicitation did not prohibit bids for less than the specified quantity nor the agency from accepting less than the specified quantity 496
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Nonresponsive bids
Mistake procedure to correct
Fact that bidder awarded contract used cumulative method of pricing additive bid items, while others used the additive method stipulated in the invitation for bids (IFB), does not constitute a compelling reason to cancel the solicitation and readvertise 227

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Cancellation—Continued
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Reinstatement
Price comparison with invalid resolicitation
Auction prohibition
It would be fundamentally unfair and tantamount to sanctioning a prohibited auction for an agency to declare unreasonably high the low bid under a reinstated solicitation based on a comparison with the low bid under a resolicitation where a bidding misrepresentation by the resolicitation's low bidder in connection with the first procurement created the auction situation. 60 Comp. Gen. 666 and B-206012, Feb. 24, 1982, distinguished 423
Award propriety
A procuring agency properly may make award to a bidder at the price it bid under a reinstated IFB despite the fact that that bidder submitted a lower bid under an invalid resolicitation. 60 Comp. Gen. 666 and B-206012, Feb. 24, 1982, distinguished 423
Defective
First article testing
Alternative basis provision
Military procurement
Invitation for bids (IFB) which solicited alternative bids: (1) with first article testing and (2) without such testing—although it appeared first article testing would be required of all bidders—violated intent of DAR 1-1903(b), which states that in such cases the agency should not solicit alternative bids. Although this deficiency is not considered compelling reason for cancellation of procurement, General Accounting Office recommends that revised specifications be reviewed by quality control personnel as to need for first article testing prior to, rather than after, issuance of IFB 496
Not prejudicial to protester
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Undisclosed
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Specifications
Deviations
Form *v.* substance
Price establishment
Insertion in low bid of unit prices per appliance, instead of monthly unit price as required by invitation for bids, was not material deviation requiring rejection of bid as nonresponsive, but was matter of form having no effect on services being procured, since the correct total prices were entered for each period and monthly unit price was easily ascertainable by simple arithmetical calculation 444

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Where bid was signed, absence of signature required on accompying documentation is an irregularity in form rather than substance. Absence of required second copy of documentation is an irregularity in form 247
Government property use
Authorization requirement
Contracting officer's authority
Challenge of authority of contracting officer to issue an authorization to bidder for use of Government property is overcome by documentation furnished by agency establishing that the contracting officer was authorized to issue authorization. Contention that no authorization was provided for bidder to use Government property is overcome by written authorization provided before bid opening to contracting officer responsible for immediate IFB by contracting officer having cognizance of the property 247
Property identification in bid
Where letter authorizing use of Government property by bidder granted permission to use property on "attached list" which was not attached, but contracting officer found that "attached list" had reference to list of property bidder had furnished for rent-free approval which included evaluation factor for rent-free use, there was substantial compliance with invitation for bids (IFB) requirement that authorization identify Government property authorized for use and state that the authorized use is to be rent free provided an appropriate evaluation factor is added to the bid 247
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Prior decision—in which General Accounting Office held a bid to be ambiguous and nonresponsive where bidder designated responsive qualified products list product by manufacturer's designation but a nonresponsive product by superseded qualified products list test number—is affirmed. Recommendation is made to terminate contract for convenience of Government, particularly where this is second recent procurement where protester has been deprived of contracts improperly awarded to another firm 571
Tests
First article
Administrative determination
Decision to waive first article testing is essentially a discretionary one which will not be disturbed unless it is clearly arbitrary or capricious. Where previous procurement indicated specifications were defective, agency was not arbitrary in requiring first article testing for first items produced under revised specifications and in rejecting low bid which was based solely on waiver of first article testing 496

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Specifications—Continued
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First article—Continued
Waiver propriety
It is not necessary to consider on the merits allegation that the contracting agency should not have waived first article testing, since, with or without first article testing, successful bidder remains the low bidder 247
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Correction
Still lowest bid
Although the successful bidder failed to use the proper production period in the calculation of the evaluation factor for rent-free use of Government property, the contracting agency used the proper production period in its calculation and the successful bidder still remained low so the protester was not prejudiced by the computation in the successful bidder's bid 247
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Where the low bidder, alleging two mistakes in bid before award, presents clear and convincing documentary evidence of mistake and intended bid with respect to only one error, correction is allowed as to that error, and waiver of second mistake due to omission of costs is allowed where record discloses that "intended bid" would remain low 30
Intended bid price uncertainty
Correction inconsistent with competitive bidding system
Agency properly refused to consider bidder's work papers and to allow correction of bid where there was discrepancy between unit and extended price, bid would be low only if extended price governed, and intended bid was not apparent from bid, since applicable regulation does not allow correction of mistake in bid when another bidder would be displaced as low bidder by the correction, unless intended bid can be determined from bid itself 118
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Certifying officers
Responsibilities
Pacific Northwest Electric Power Planning and Conservation Act
Safeguards proposed by Bonneville Power Administration (BPA) certifying officer to govern certification of payments by BPA to Pacific Northwest Electric Power and Conservation Planning Council, pursuant to Pub. L. 96-501, are adequate to fulfill certifying officer's responsibility under 31 U.S.C. 82c for assuring compliance with requirements of Pub. L. 96-501. BPA certifying officer is also responsible for assuring that such payments are consistent with any other applicable legal requirements 477

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BUREAU OF RECLAMATION

Appropriation limitation

San Luis Unit

Distribution systems, etc.

Fiscal year 1978 appropriation act, Pub. L. 95-96, contained lump-sum amount, available until expended, for authorized reclamation projects "as authorized by law." Latter phrase limited use of funds so that for any project, funds may only be obligated in accord with authorization for that project. Pub. L. 95-46 authorized appropriations, to be obligated only in fiscal year 1978, to continue San Luis Unit, Central Valley Project, California, distribution systems and drains construction pending congressional reconsideration of permanent authorization increase. In accord with authorization limitation, appropriation—otherwise available until expended—was properly obligated only in fiscal year 1978 for distribution systems and drains construction 532

BUY AMERICAN ACT

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Defense procurement

Decision to waive the Buy American Act is vested in the discretion of department heads. 431

Agreements with foreign countries

Place of production *v.* bidder's nationality

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Responsiveness of bid

Buy American Act, as implemented by the Defense Acquisition Regulation, provides a preference for suppliers of dometic end products, but does not require that bidders offering foreign end products be rejected as nonresponsive 431

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While foreign bidders may enjoy competitive advantages because they are exempt from U.S. requirements concerning equal opportunity, environmental protection, and the like, there is no Federal law which seeks to equalize such competition 431

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Status
Under Panama Canal Treaty, 1977
Foreign area
Residence maintenance expense purpose
Expenditures for operation and maintenance of residence of Administrator of Panama Canal Commission are subject to regulations issued under 5 U.S.C. 5913, applicable to official residences in foreign areas. Under Panama Canal Act, Pub. L. No. 96-70, areas and installations in Republic of Panama made available to United States pursuant to Panama Canal Treaty and related agreements, formerly in Canal Zone, are foreign. Report ID-81-57, Aug. 5, 1981, is modified to the extent that it is inconsistent with this decision 520

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Equal Employment Opportunity Commission hearings
Travel expense reimbursement
Outside agency applicant/complainant
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Contract Disputes Act of 1978 effect
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COMMERCE BUSINESS DAILY
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COMMERCE DEPARTMENT
Economic Development Administration
Loan guarantees
Public Works and Economic Development Act
Private lender requirement
Scope of applicability
Economic Development Administration (EDA) does not have authority to implement proposal whereby public lenders would be permitted to purchase guaranteed portion of loans made by private lending institutions to private borrowers under 42 U.S.C. 3142. Whether purchase of the guaranteed note by the public lender is necessarily contemplated when loan guarantee is initially approved or occurs in the ordinary course of unrestricted secondary market trading, such

COMMERCE DEPARTMENT—Continued Page
Economic Development Administration—Continued
Loan guarantees—Continued
Public Works and Economic Development Act—Continued
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Scope of applicability—Continued
purchase would violate statutory requirement that EDA can only guarantee loans made by private lending institutions 517

COMMISSIONS (*See* BOARDS, COMMITTEES, AND COMMISSIONS)

COMMUNICATION FACILITIES
Contracts
Automatic call distributing systems
Restrictive specifications
Reasonableness
Regulated carrier's protest
General Accounting Office (GAO) has no basis to conclude that provisions in solicitation for an automatic call distributing system do not reflect agency's legitimate needs where protester, a regulated public utility offering telephone services, complains that provisions make it impossible for a regulated carrier to bid, but does not show that the agency's rationale for including the provisions is unreasonable 35

COMMUNITY SERVICES ADMINISTRATION
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COMPENSATION
Aggregate limitation
Senior Executive Service. (*See* OFFICERS AND EMPLOYEES, Senior Executive Service, Compensation, Aggregate limitation)
Backpay
Copyright Royalty Tribunal
Commissioners
Appropriation availability
Funding gap
Upon passage of a supplemental appropriation, Commissioners of the Copyright Royalty Tribunal may be paid for the interim where the agency was without sufficient funds to pay them. Under 17 U.S.C. 802, the Commissioners are presidential appointees. They are also exempt from the provisions of the Annual and Sick Leave Act, 5 U.S.C. 6301 *et seq.* As such, they are entitled to compensation simply by virtue of their status as officers, regardless of the availability of funds. In other words, for the purposes of the Antideficiency Act, the Tribunal is authorized by law to incur Commissioners' salary expenses even in the absence of available adequate appropriations to liquidate the obligation 586
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Retroactive promotions
Detailed employees
Agency regulations
Mandatory provisions
Where agency asserts that its regulation was intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, that regulation may provide the basis for backpay under the Back Pay Act, 5 U.S.C. 5596. While other interpretations of the regulation could be made, under the circumstances of this case the agency's interpretation is a reasonable one 492
Union agreements
As basis for backpay
Where the parties to a collective bargaining agreement agree that the provisions in the negotiated agreement were intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, those contract provisions may provide the basis for backpay. While other interpretations of the negotiated agreement could be made, the interpretation of the parties is a reasonable one 403
Where the parties to a collective bargaining agreement agree that the provisions in the negotiated agreement were intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, those provisions may provide the basis for backpay under the Back Pay Act, 5 U.S.C. 5596. While other interpretations of the negotiated agreement could be made, the interpretation of the parties is a reasonable one under the circumstances of this case 492
Wilson case
Our *Turner-Caldwell* decisions granting retroactive temporary promotions for overlong details are reconsidered in light of Court of Claims decision in *Wilson* v. *United States* which reaches opposite result. Although General Accounting Office is not bound by decisions of Court of Claims, the *Wilson* decision is a reasonable interpretation of law and regulation, it follows a clear line of precedent by the court, and it is consistent with the views of the Department of Justice and the Office of Personnel Management. Therefore, we will follow the *Wilson* decision and deny all pending and future claims under our *Turner-Caldwell* line of decisions. 56 Comp. Gen. 427, 55 *id.* 785 and 55 *id.* 539 are overruled in whole or in part 408
Boards, committees, and commissions
Boards of contract appeals
Supergrade positions
Contract Disputes Act of 1978
Appointments prior to enactment
Individuals designated to serve on Department of Agriculture's board of contract appeals prior to Mar. 1, 1979, the effective date of the Contract Disputes Act of 1978, claim backpay from Mar. 1 through Aug. 12, 1979, when they were promoted to supergrade positions. While subsection 8(b)(1) of Disputes Act provides that members of agency boards are to be compensated at supergrade rates, that

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Boards, committees, and commissions—Continued
Boards of contract appeals—Continued
Supergrade positions—Continued
Contract Disputes Act of 1978—Continued
Appointments prior to enactment—Continued
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Double
Concurrent military retired and civilian service pay
Maximum limitation
Applicability
Intermittent employment
Subsection 5532(c) of title 5, U.S. Code, requires that combined military retired pay plus Federal civilain salary not exceed the rate of basic pay for Level V of the Executive Schedule for any "pay period." The term "pay period" means the biweekly pay period fixed under title 5 for civilian employees, whether employed full time or intermittently. Hence, the military retired pay of a retired Army officer employed intermittently as a civilian consultant is subject to reduction each biweekly pay period in which the amount of his combined retired pay and civilian salary exceeds the biweekly rate of pay prescribed for Level V of the Executive Schedule 604
Computation
Pay-periods basis
5 U.S.C. 5532(c) requires that combined military retired pay plus Federal civilian salary not exceed the rate of pay for Level V of the Executive Schedule for any "pay period." Hence, the amount of the retired pay reduction required for any given pay period may not be refunded to a retiree even though the retiree's combined retired pay and civilian salary for the entire year may be less than the annual pay prescribed for Level V of the Executive Schedule 221
Reduction in retired pay
Not required
Survivor, etc. benefit costs
The reduction of military retired pay required under the dual compensation restriction imposed by 5 U.S.C. 5532(c) involves a determination of the amount by which the combined rate of retired pay plus Federal civilian salary exceeds the rate of basic pay prescribed for Level V of the Executive Schedule. The retired pay is reduced by that amount, subject to a proviso that the remainder must at least be equal to the cost of the retiree's participation in any survivor's benefits program or veterans insurance program 221
Downgrading
Appeals
Attorney fees
Denial
Air Force employee was downgraded, but was later restored retroactively by Air Force following decision of Merit Systems Protection Board (MSPB) regarding personnel actions related to "unacceptable performance." Claim for attorney fees was denied by Air Force and

COMPENSATION—Continued Page
Downgrading—Continued
Appeals—Continued
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Denial—Continued
MSPB. Our Office has no authority to review decisions of MSPB under 5 U.S.C. 7701. In addition, under regulations implementing Back Pay Act amendments, such claim for attorney fees is subject to review only if provided for by statute or regulation. Since no review by General Accounting Office of claim presented here is authorized by statute or regulation, we may not review the prior denials..... 289
Saved compensation
Effect of Civil Service Reform Act of 1978
Employee who held a GS-13 position with the Department of the Air Force transferred to a GS-12 position with the Department of Energy after receiving notice that his GS-13 position would be transferred from Colorado to Virginia incident to a transfer of function. He is not entitled to grade and pay retention under 5 CFR 536.202(a), since he was not placed in a lower-grade position as a result of declining to transfer with his function but, rather, as a result of his voluntary action based on his belief that he might be separated..... 51
Dual. (*See* COMPENSATION, Double)
Experts and consultants. (*See* EXPERTS AND CONSULTANTS, Compensation)
Increases
Judicial branch positions. (*See* COURTS, Administrative matters, Employees, Judicial officials)
Military pay. (*See* PAY)
Negotiation
Arbitration decisions, etc.
Finality
Employees of Library of Congress asserting claims for retroactive temporary promotion and backpay in connection with overlong details filed grievances under collective bargaining agreement. After receipt of agency decision at step two of grievance procedure, union filed claims with General Accounting Office (GAO) pursuant to 4 C.F.R. Part 31, seeking to extend the remedy granted by the agency. The agency objects to submission of the matter to GAO. In instances where a claimant has filed a grievance with the employing agency, GAO will not assert jurisdiction if a party to the agreement objects since to do so would be disruptive to the grievance procedures authorized by 5 U.S.C. 7101-7135. Moreover, the issue of the timeliness of the grievances is primarily a question of contract interpretation which is best resolved pursuant to grievance-arbitration procedures.... 15
The jurisdictional policies established in this case for claims filed with GAO under 4 C.F.R. Part 31 involving matters of mutual concern to agencies and labor organizations differ from those established in 4 C.F.R. Part 22 (1981). The differences are based upon differences in the respective procedures and are designed to achieve a balance between GAO's statutory obligations under title 31 of the United States Code and the smooth functioning of the procedures authorized by the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135..... 20

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Negotiation—Continued

Arbitration decisions, etc.—Continued

Finality—Continued

Overpayments

Waiver

Senior Executive Service. (*See* OFFICERS AND EMPLOYEES, Senior Executive Service, Compensation, Overpayments, Waiver)

Overtime

Fair Labor Standards Act

Early reporting and/or delayed departure

Duty-free lunch period

Setoff

Civilian nurses who received 30-minute duty-free lunch break during 8-hour and 15-minute shift are not entitled to overtime compensation under either title 5 or the Fair Labor Standards Act. The duty-free lunch period should be set off against the shift schedule resulting in an actual working time of 7 hours and 45 minutes 174

Lunch period not duty-free

Nurses

Civilian nurses are entitled to overtime compensation under either title 5 or the Fair Labor Standards Act, whichever is applicable, on those occasions when they reported 15 minutes early and worked through lunch without receiving any prior overtime compensation..... 174

Evidence sufficiency

Fact that official time and attendance records reflect only standard 8-hour day with occasional overtime would not necessarily defeat employee's claim for overtime compensation. Where accurate records have not been maintained, it is sufficient for employee to prove she has in fact performed overtime work for which she was not compensated under the FLSA, and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Other forms of evidence or documentation are also acceptable. Here, it is undisputed that the work schedules required the nurses to regularly report 15 minutes early and their schedule either began or ended on a Sunday 174

Fair Labor Standards Act *v.* other pay laws

Fact that employees are not entitled under 5 U.S.C. 5542 to overtime compensation for certain traveltime has no bearing on whether they are entitled to overtime under the Fair Labor Standards Act, FLSA. Where FLSA provides an employee with a greater pay benefit than that to which he is entitled under 5 U.S.C. 5542, the employee is entitled to the FLSA benefit 115

Retroactive benefits

Exemption status

Erroneous agency determination

Department of Energy (DOE) questions retroactive entitlement of Power Systems Dispatchers to overtime under Fair Labor Standards Act (FLSA). Employees were considered exempt by prior agency (Interior) but determined to be nonexempt by DOE in 1979. Retroactive payments based on DOE's determination of nonexempt status may be made to the extent Office of Personnel Management (OPM) deter-

COMPENSATION—Continued Page
Overtime—Continued
Fair Labor Standards Act—Continued
Retroactive benefits—Continued
Exemption status—Continued
Erroneous agency determination—Continued
mines duties of dispatchers were nonexempt throughout retroactive period. *Meat Graders*, B-163450.12, Sept. 20, 1978, modified 152
Standby, etc. time
Criteria for entitlement
Claim denied
Employee at dam reservation claims overtime compensation for standby duty. Although he was required to live in Government-owned housing on the dam reservation the agency determined that effective Jan. 10, 1971, he would not be required to remain at the dam reservation after the end of his regular duty hours. Under the circumstances, he is not entitled to overtime compensation under 5 U.S.C. 5544(a) since his off-duty movements and activities were not severely restricted. In addition, such off-duty time is not compensable as hours of work under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq* 301
Statute of limitations
Retroactive payments
Prior decision in *Meat Graders*, B-163450.12, Sept. 20, 1978, is modified to remove bar to retroactive payments of FLSA overtime where employee was erroneously classified as exempt by employing agency and should properly have been nonexempt under published OPM guidance. However, where employing agency raises issue that there was a possible change in employees' duties over 5-year period, OPM should determine status of employees for all of the retroactive period in question and employees are entitled to retroactive pay only for such period they are properly in nonexempt status. Claims for retroactive payment are subject to 6-year statute of limitations. See 31 U.S.C. 71a and 237 152
Traveltime
Nonworkday travel
Employee *v.* agency scheduling
Two Army employees, nonexempt under the Fair Labor Standards Act (FLSA), were authorized privately owned vehicle use as advantageous to the Government. They drove to temporary duty station on a Sunday and returned on a Saturday, their nonworkdays. The employees are entitled to credit for hours of work under FLSA for time they spent driving. The Army allowed employees to schedule travel and may not subsequently defeat employees' entitlement to overtime compensation by stating that travel should not have been scheduled in the manner the employees chose 115
Inspectional service employees
Customs inspectors
Sunday and holiday compensation
Additional overtime compensation entitlement
Under Customs overtime provision at 19 U.S.C. 267 Customs inspector who worked 8¼ hours on Sunday was paid 2 days' extra compensation for Sunday work of up to 8 hours. He is not entitled to ad-

COMPENSATION—Continued Page

Overtime—Continued

Inspectional service employees—Continued

Customs inspectors—Continued

Sunday and holiday compensation—Continued

Additional overtime compensation entitlement—Continued

ditional overtime compensation under 19 U.S.C. 267 for 15-minute period he worked in excess of 8 hours on a Sunday. Regulations at 19 C.F.R. 24.16(g) require employee to perform overtime services of at least 1 hour to be entitled to overtime compensation under 19 U.S.C. 267 33

Holidays

Executive order, etc.

Federal Communications Commission employee performed ship inspection duties on Monday, Dec. 24, 1979, which was considered a holiday by Executive order for purposes of pay and leave of specified Federal employees. Express limitation of Executive order to executive branch employees precludes consideration of Monday, Dec. 24, 1979, as a holiday within the meaning of 47 C.F.R. 83.74(a)(4) (1979), and 5 U.S.C. 6103, which limit the term "holiday" to Government recognized legal *public* holidays and other designated *national holidays.* We conclude for purposes of applying the ship inspection overtime provisions that days which are declared to be holidays for Government employees by Executive order are not to be considered holidays which would entitle the employee to the special pay. 26 Comp. Gen. 848 (1947) 3

Rate

Ship radio inspectors

Federal Communications Commission employee performed ship inspection duties on Saturday, Nov. 11, 1978 (Veterans Day)—a holiday. Pursuant to 5 U.S.C. 6103(b)(1) (1976), employee had received Friday, Nov. 10, 1978, as a paid holiday off. Employee is not entitled to 2 days' additional holiday pay for work on Saturday because meaning of term "holiday" in controlling agency regulation requires reference to 5 U.S.C. 6103 to determine established legal public holidays and section 6103(b)(1) provides that instead of a holiday that occurs on Saturday, the Friday immediately before is a legal public holiday 3

Premium pay. (*See* **COMPENSATION, Premium pay**)

Standby, etc. time

Hours outside normal tour of duty

Occupancy of Govt. quarters

Criteria for entitlement

Employee is not entitled to overtime compensation under 5 U.S.C. 5544(a) during period he was restricted to dam site since he has not shown that he was in effect required to be on "ready alert" as in *Hyde* v. *United States,* 209 Ct. Cl. 746 (1976). There is nothing in the record to indicate that claimant's activities were often interrupted by an emergency or other work situation requiring prompt attention..... 301

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Overtime—Continued
Traveltime
Air safety investigators
Access-to-aircraft authority
Emergencies *v.* non-emergency conditions
Travel to and from accident sites by air safety investigators on commercial airlines, performed under access-to-aircraft (cost free) authority in emergent situations, is compensable work for the purposes of 5 U.S.C. 911 and 912b. The investigators are entitled to overtime pay for such travel outside normal duty hours. Where, however, access-to-aircraft travel was utilized in non-emergent situations and no work was performed or was required during the travel, such travel only served the purpose of transporting the investigator and is not compensable overtime work. 52 Comp. Gen. 702 is overruled..... 626
Automobile, etc. travel
Emergency *v.* non-emergency
Air safety investigators who travel by means other than aircraft, usually by automobile, to and from accident sites, and who are found to perform their investigative function while traveling under emergent conditions, are performing compensable overtime work under 5 U.S.C. 911 and 912b. Likewise, air safety investigators who pilot planes under the same circumstances may be paid overtime compensation for such travel. 52 Comp. Gen. 702 is overruled 626
Fare-paying air travel
Emergency *v.* non-emergency
Air safety investigators traveling as fare-paying customers on commercial aircraft while proceeding to and from aircraft accidents and while in furtherance of ongoing investigations of aircraft accidents and who perform their investigative function while traveling under emergent conditions are performing work under 5 U.S.C. 911 and 912b. However, routine fare-paying air travel not under emergent conditions is not compensable. 52 Comp. Gen. 702 is overruled 626
Work performance
Special transportation of documents, etc. required
Air safety investigator who is ordered to transport documents, equipment and exhibits and who is required to personally travel with the items in order to protect their integrity or to ensure they are not damaged, lost, or tampered with, may have such traveltime considered work for the purposes of overtime under 5 U.S.C. 911, 912b. If, however, an investigator incidentally transports these items when the main purpose of his travel is for other reasons, then such travel is not compensable as overtime work under 5 U.S.C. 911 and 912b. 52 Comp. Gen. 702 is overruled..... 626
Fair Labor Standards Act. (*See* COMPENSATION, Overtime, Fair Labor Standards Act, Traveltime)
Inseparable from work
Federal Aviation Administration employees assigned to remote radar site at Sawtelle Peak, Idaho, are entitled to be compensated for traveltime to and from Ashton, Idaho, where employees are required to pick up and return Government vehicles and other special purpose vehicles necessary to negotiate route to radar site. This duty is an

COMPENSATION—Continued Page

Overtime—Continued

Traveltime—Continued

Inseparable from work—Continued

inherent part of and inseparable from their work and is compensable as hours of work under 5 U.S.C. 5542(b)(2) 27

Periodic step-increases

Leave without pay effect

Nonpay status in excess of 52 weeks

Employee sustained a disabling injury as the result of a household accident. He had served approximately 20 months at the GS-14, step 4, grade level and under normal circumstances, would have been eligible to receive a within-grade increase to step 5 on Oct. 22, 1978, after a waiting period of 104 calendar weeks. At his request, he was granted leave without pay (LWOP) and placed in a nonpay status from July 11, 1978, to Aug. 7, 1979. The approximate 20 months of service prior to the period the employee was in a nonpay status, a period in excess of 52 calendar weeks, does not constitute creditable service for purposes of eligibility to receive a within-grade increase and a new waiting period is required to begin effective Aug. 8, 1979. 5 CFR 531.403(b)(2) and 531.405(b) 255

Premium pay

Evidence

Fact that official time and attendance records reflect only standard 8-hour day with occasional overtime would not necessarily defeat employee's claim for overtime compensation. Where accurate records have not been maintained, it is sufficient for employee to prove she has in fact performed overtime work for which she was not compensated under the FLSA, and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Other forms of evidence or documentation are also acceptable. Here, it is undisputed that the work schedules required the nurses to regularly report 15 minutes early and their schedule either began or ended on a Sunday 174

Sunday work regularly scheduled

Not overtime duty

Civilian nurses who worked a part of Sunday during their regularly scheduled 8-hour period of service on each of 2 scheduled working days are entitled to premium pay for both shifts under 5 U.S.C. 5546(a). However, the nurses are entitled to premium pay for only 1 day when the part worked on the second scheduled workday is considered overtime 174

Promotions

Temporary

Detailed employees

Higher grade duties assignment. (*See* **DETAILS, Compensation, Higher grade duties assignment**)

Removals, suspensions, etc.

Backpay

Back Pay Act of 1966

Erroneous appointment

Individual was terminated from employment with the Forest Service after appointment was found to be erroneous, was reemployed

COMPENSATION—Continued Page
Removals, suspensions, etc.—Continued
Backpay—Continued
Back Pay Act of 1966—Continued
Erroneous appointment—Continued
temporarily in lower-graded position after break in service, and was then properly appointed to original position. He claims compensation and other benefits. For period of employment prior to termination claimant is entitled to compensation earned, lump-sum payment for accrued annual leave, service credit for annual leave accrual purposes, recredit of accrued sick leave to his leave account and payment for retirement deductions withheld. No entitlement exists to backpay for period after termination of original appointment since neither termination nor appointment to temporary lower-graded position constitutes unwarranted or unjustified personnel action under Back Pay Act, 5 U.S.C. 5596. Entitlement to service credit for retirement is for determination by Office of Personnel Management. 58 Comp. Gen. 734 is extended 127
Damages, loss, etc. other than back pay
Relocation expenses
Employee's claim for relocation expenses which he would have received but for an improper personnel action may be paid under the Back Pay Act, 5 U.S.C. 5596. Therefore, he may be paid travel expenses of his dependent and transportation of household goods to his new official station. He may also be paid temporary quarters subsistence allowance at the new station which is within the United States, but he is not entitled to a house-hunting trip or expenses of purchase and sale of residences because his old station is not within the United States, its territories or possessions, Puerto Rico, or the Canal Zone 57
An employee who successfully appealed his separation from the National Endowment for the Arts before the Merit Systems Protection Board (MSPB) contests the resulting backpay award. He contends he is entitled to reimbursement of moving and storage expenses associated with his separation and subsequent reinstatement, interest on the backpay, and, as compensatory damages, the severance pay which was deducted from his backpay award. Neither the Back Pay Act, 5 U.S.C. 5596 (Supp. III, 1979), nor any other authority provides for payment of interest or compensatory damages. Similarly, there is no provision for payment of incidental expenses such as moving and storage expenses, incurred by an employee as a consequence of an unjustified or unwarranted personnel action. The severance pay was properly deducted from the backpay award 578
Severance pay
Rate payable
Temporary promotions
Termination
One day prior to separation
Under 5 U.S.C. 5595(c), severance pay is computed on the basis of the rate of pay received immediately before an employee's separation. Thus, an employee whose temporary promotion to a higher position was terminated 1 day prior to the day of his separation from Government service is entitled to have his severance pay computed

COMPENSATION—Continued Page
Severance pay—Continued
Rate payable—Continued
Temporary promotions—Continued
Termination—Continued
One day prior to separation—Continued
on the basis of the rate of pay received in his permanent position, not on the basis of the rate of pay received in his temporary promotion 529
Step-increases
Periodic. (*See* COMPENSATION, Periodic step-increases)
Traveltime
Hours of work under FLSA
Driver of privately owned vehicle
Two Army employees, nonexempt under the Fair Labor Standards Act (FLSA), were authorized privately owned vehicle use as advantageous to the Government. They drove to temporary duty station on a Sunday and returned on a Saturday, their nonworkdays. The employees are entitled to credit for hours of work under FLSA for time they spent driving. The Army allowed employees to schedule travel and may not subsequently defeat employees' entitlement to overtime compensation by stating that travel should not have been scheduled in the manner the employees chose 115
Passenger in privately owned vehicle
Employees who travel as passengers on their nonworkdays during hours which correspond to their regular working hours are entitled to have such traveltime credited as hours of work under FLSA 115
Overtime compensation status. (*See* COMPENSATION, Overtime, Traveltime)
Withholding
Insurance premiums. (*See* OFFICERS AND EMPLOYEES, Life insurance, Premiums)
Retirement fund
Erroneous deductions
Refund
Applicable regulations
An adjustment to an employee's pay to correct erroneously withheld deductions is a matter cognizable by the General Accounting Office and the Act of Oct. 9, 1940, 54 Stat. 1061, as amended, 31 U.S.C. 71a, bars refunds beyond 6 years 295

COMPREHENSIVE EMPLOYMENT AND TRAINING ACT (CETA). (*See* GRANTS, Comprehensive Employment and Training Act (CETA))

CONGRESS
Resolutions
Continuing
Funding level
Funding level for the National Commission for Student Financial Assistance, under the continuing resolution for fiscal year 1982, is $960,000. In fiscal year 1981 funds for the Commission were first appropriated in supplemental appropriation act enacted June 5, 1981, and were apportioned for use only in the fourth quarter of the fiscal year. Therefore, to determine the current rate of operations for the

CONGRESS—Continued Page
Resolutions—Continued
Continuing—Continued
Funding level—Continued
Commission it is necessary to annualize the partial-year amount over the full fiscal year. Annualizing the $250,000 appropriation over the full year results in a figure of $1 million. Reducing this amount by the 4 percent reduction required by the continuing resolution gives a funding level of $960,000 473

CONSTITUTIONALITY
Administrative actions
Procurement matters
Due process right
Small business set-asides
Allegation that set-aside resulted in large business protester being excluded from the procurement without a hearing in violation of its constitutional right to due process is without merit since large business does not have constitutional right to a hearing 596
Hearings right
Small business set-asides
Small Business Act, 15 U.S.C. 631, 644, and implementing regulations, Federal Procurement Regulations 1-1.706-5 (1964 ed. amend. 192) grant contracting officers broad discretion to set aside particular procurements for small business. Fact that particular large business firm received contract for many years does not give firm property right to subsequent contracts. Since constitutional protection of procedural due process applies only if a right is being taken away, a hearing was not required prior to the decision to set aside the subsequent year's contract 596

CONTRACT DISPUTES ACT OF 1978
Boards of contract appeals
Compensation. (*See* COMPENSATION, Boards, committees, and commissions, Boards of contract appeals)
General Accounting Office jurisdiction
Resolution of contract disputes or claims. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Disputes, Contract Disputes Act of 1978)

CONTRACTING OFFICERS
Authority
Contract Disputes Act of 1978
Finality of settlement decisions
A claim by a real estate broker for damages arising from the Federal Communications Commission's failure to enter into a lease for office space located by the broker may be settled by the contracting officer under the Contract Disputes Act 568

CONTRACTORS
Government civilian and military personnel
Prohibition
Agency did not act improperly in rejecting low bid from concern owned by employee of Federal Government because, while such contracts are not expressly prohibited by statute, except in certain situa-

CONTRACTORS—Continued Page

Government civilian and military personnel—Continued

Prohibition—Continued

tions not present here, they are undesirable and should not be authorized except where Government cannot otherwise be reasonably supplied. Fact that service would be more expensive from other sources provides no support for determination that service cannot be reasonably obtained except from concern owned by employee of the Government 65

Responsibility

Administrative determination

Nonresponsibility finding

Propriety of determination

Based on supplier's nonresponsibility

General Accounting Office (GAO) disagrees with the Small Business Administration's (SBA) and the protester's conclusion that, under the circumstances of this procurement, a contract award to the low priced offeror would have made that offeror the Government's agent so that the offeror's proposed supplier would have essentially been the prime contractor and, thus, entitled to consideration under SBA's certificate of competency (COC) procedure. Rather, GAO agrees with contracting agency that the COC procedure was not applicable because no contract relationship would have existed between the supplier and the agency in the event of award. 47 Comp. Gen. 223 is distinguished 379

Determination

Burden of proof

Protest that agency improperly awarded contracts to firm as a labor surplus area (LSA) concern and failed to consider evidence that it lacked ability to meet LSA concern performance requirements is sustained to the extent that the agency had not placed the burden on the firm to demonstrate affirmatively its ability to meet those requirements as a matter of responsibility, but instead assumed the agency had the burden of showing the firm intended to evade the requirements 385

CONTRACTS

Affirmative action requirements. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination, Affirmative action requirements**)

Amendments

Appropriation availability beyond fiscal year. (*See* **APPROPRIATIONS, Fiscal year, Availability beyond, Contracts, Modification**)

Modification. (*See* **CONTRACTS, Modification**)

Annual contributions contract-funded procurements

Complaints

General Accounting Office review

Indian low-income housing projects

Annual contributions contract (ACC) between Department of Housing and Urban Development (HUD) and Indian housing authority pursuant to section 5 of the United States Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.*, is encompassed by GAO Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), since agreement results

CONTRACTS—Continued Page
Annual contributions contract-funded procurements—Continued
Complaints—Continued
General Accounting Office review—Continued
Indian low-income housing projects—Continued
in substantial transfer of Federal funds to housing authority and since ACC required housing authority to use competitive bidding in awarding contracts 85
Indian low-income housing
Federal competitive bidding principles
Applicability
Ambiguous bid
Basic principles of Federal competitive bidding require that all bidders be treated fairly and equally and that bidder be precluded from deciding after bid opening whether to assert that its lump-sum price or its inconsistent individual item prices are correct. Thus, Indian housing authority which was required to adhere to Federal competitive bidding principles acted improperly in accepting bid based on bidder's post-bid opening explanation of intended bid where bid was subject to two reasonable interpretations and was low only under interpretation proffered by bidder 85
Preference to Indian concerns
Housing authority's failure to make award to Indian-owned enterprise whose bid was eight percent higher than low bid from non-Indian owned firm was proper since solicitation required award to low bidder and neither it nor HUD regulations or Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450e(b), required preference be granted to Indian-owned firm in particular procurement 85
Architect, engineering, etc. services
Procurement practices
Brooks Bill applicability
Procurement not restricted to A.E. firms
Research contracts
Brooks Act provides a procedure which must be used when an agency is selecting an architectural or engineering (A-E) firm to perform A-E services. This procedure is not applicable in procuring a research contract, even though the contractor is expected to use engineers, where it is unnecessary for the contractor itself to be a professional engineering firm to successfully perform the contract 377
Protect timeliness
Postaward protest that procurement should have been conducted under Brooks Bill procedures for procuring architect-engineering services is untimely since solicitation indicated that procurement was not to be conducted as one for these services and alleged improprieties apparent from solicitation must be filed before closing date for receipt of initial proposals. B-199548, Sept. 15, 1980, and B-192578, Feb. 5, 1979, are distinguished 370
Awards
Delayed awards
Awardee no longer low bidder
Where award date was unavoidably delayed so as to shorten contract performance period by one month, award to bidder evaluated as

CONTRACTS—Continued Page
Awards—Continued
Delayed awards—Continued
Awardee no longer low bidder—Continued
low under performance period specified in solicitation is not improper even though awardee would not be low under evaluation based on shorter actual performance period, since competition was fair, prices had been exposed, and probable cost of resolicitation would exceed difference in prices bid by protester and awardee 48
Federal aid, grants, etc. (*See* CONTRACTS, Grant-funded procurements)
Labor surplus areas. (*See* CONTRACTS, Labor surplus areas)
Multiple
Contrary to solicitation's terms
Protest sustained
Protest against multiple contract awards under a solicitation containing the "Additive and Deductive Items" clause, which clearly advises that award will be made to the low aggregate bidder, is sustained. Award must be made on the same terms offered to all bidders and multiple awards were improper even though the aggregate award would be more costly to the Government 317
Protest pending
Legality of award
Effect of agency regulations
Even if the award was contrary to regulation providing for withholding of award while protest is pending, legality of the award would not be affected 247
Small business concerns. (*See* CONTRACTS, Small business concerns, Awards)
Bonds. (*See* BONDS)
Buy American Act. (*See* BUY AMERICAN ACT)
Conflict of interest prohibitions
Awardee manufacturer of equipment it evaluates
General Accounting Office concludes that procuring agency imposed appropriate conditions in awardee's contract to avoid any conflict that might arise from the awardee having to evaluate any military equipment manufactured either in whole or part by it. Clause in awardee's contract required awardee to make an immediate and full disclosure to the contracting officer of any potential organizational conflict of interest discovered by the awardee during performance of the contract. If the awardee does not disclose potential conflict, the Government may terminate the contract for default 194
Contract Disputes Act
Applicability
Express and implied contracts
A claim by a real estate broker for damages arising from the Federal Communications Commission's failure to enter into a lease for office space located by the broker may be settled by the contracting officer under the Contract Disputes Act 568

CONTRACTS—Continued Page

Contract Disputes Act—Continued

Effect

Claims settlement by General Accounting Office. (*See* **CLAIMS, Settlement by General Accounting Office, Contract Disputes Act of 1978 effect)**

General Accounting Office jurisdiction. (*See* **GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Disputes, Contract Disputes Act of 1978)**

Cost-plus

Fees

Profit exclusion

American Chemical Society charter

Prohibition in Federal incorporation charter regarding compensation prevents American Chemical Society (ACS) from receiving normal cost-plus-fixed-fee contract to give ACS *reasonable return* on work for Government. In view of Court of Claims decision in *American Chemical Society* v. *United States,* 438 F.2d 597 (1971), prior decisions (45 Comp. Gen. 638, B-157802, Feb. 24, 1967 and July 7, 1967) holding that ACS could not be paid mortgage interest under Federal contracts will no longer be followed 146

Cost-type

Cost overruns, etc.

Appropriation chargeable

Under *v.* over contract ceiling amount

Discretionary costs

Discretionary cost increases in cost reimbursement contracts which exceed contractually stipulated ceilings set forth in Limitation of Cost clauses and which are not enforceable by contractor are properly chargeable to funds available when the discretionary increase is granted by the contracting officer. 59 Comp. Gen. 518 and other prior inconsistent decisions are modified accordingly 610

Discounts

Payment date determination

Rule in *FOSTER* case

Applicability to late payment cases. (*See* **CONTRACTS, Payments, Past due accounts, Payment date determination, Rule in *FOSTER* case)**

Transportation charges

Discount period

Commencement date

Under carrier's tender which allows Government a discount from charges billed by carrier when bill is paid within 15 days of date of voucher, the Government is not entitled to a discount when payment is made more than 15 days after the date of the voucher. For billing purposes, the date placed on the voucher by the carrier is the voucher date 323

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Disputes

Finality of administrative findings

Under disputes clause

Fact issues

Constructive change claim

Even though Army alleges that constructive change claim filed at GAO is time-barred, allegation does not entitle GAO to decide legal validity of defense. Fact remains that claim, on its face, is not for GAO's review since claim involves a question of fact; moreover, Armed Services Board of Contract Appeals (or Court of Claims) may ultimately decide legal validity of defense under all relevant factual circumstances 1

Federal Supply Schedule

Purchases elsewhere

Award combining FSS and non-FSS items

Full FSS coverage determination

Missing items' significance

Where Federal Supply Schedule (FSS) contractor had all but one of the items required by the contracting agency on its FSS contract and the missing item was not of major importance or its price a significant portion of the contractor's overall price, the contractor had, in effect, 100-percent FSS coverage and should have received the award. However, in view of the contracting officer's good-faith determination to award the order to another FSS contractor and the fact that the delivery order has already been filled, no corrective action is recommended. B–204565, March 9, 1982, distinguished 414

Nonmandatory accessory items

Protester's claim of greater FSS coverage than awardee under second solicitation is incorrect. Although protester had required accessory item on its FSS contract, item is not considered part of mandatory Federal Supply Schedule. Therefore, protester and awardee had identical FSS coverage, and award was properly made to awardee as contractor with lowest aggregate price for FSS items and one open market item. B–204565, March 9, 1982, distinguished 414

Multiple-award schedule contracts

Evaluation

Delivery costs

General Service Administration is not required to evaluate delivery costs when offers for multiple-award Federal Supply Schedule contracts are made on f.o.b. origin basis since such costs can only be evaluated by ordering agencies at time of placing order against Schedule contract 503

Fixed-price *v.* cost-type

Agency determination

General Accounting Office (GAO) has no basis to conclude that provisions in solicitation for an automatic call distributing system do not reflect agency's legitimate needs where protester, a regulated public utility offering telephone services, complains that provisions make it impossible for a regulated carrier to bid, but does not show that the agency's rationale for including the provisions is unreasonable 35

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Foreign military sales items

Bid evaluation. (*See* **BIDS, Evaluation, Foreign military sales items**)

Grant-funded procurements

Bid preparation costs

Recovery criteria

When complainant has not shown what actual bid price would have been under revised specifications, complainant has not shown that it had substantial chance for award, entitling it to bid preparation costs. This decision extends 60 Comp. Gen. 414 6

Competitive system

Compliance

Award with intent to materially modify contract performance conditions

Contracting officer may not make award which he knows is not based on conditions under which performance will occur, since such action undermines integrity of competitive procurement system and deprives Government of lower or better terms which it might otherwise obtain. This decision extends 60 Comp. Gen. 414 6

Scope of General Accounting Office review

Grantor-agency decisions

General Accounting Office review of grantor agency decision on complaint regarding grantee procurement will be limited to whether decision was reasonable, in light of agency regulations encouraging free and open competition. This decision extends 60 Comp. Gen. 414 ... 6

General Accounting Office review

Exhaustion of administrative remedies requirement

General Accounting Office will review complaints regarding procurements under EPA construction grants, provided complainant has exhausted administrative remedies by seeking review by grantor agency. This decision extends 60 Comp. Gen. 414 6

Finality of administrative determinations

Grant administration matters

Minority subcontracting goals

General Accounting Office (GAO) will not review the merits of a potential subcontractor's complaint against a grantee's determination that the complaintant was not an eligible minority business enterprise. This is a matter of grant administration cognizable by the grantor agency, not GAO. 60 Comp. Gen. 606 is extended 131

Modification of contract

Scope of modification

General Accounting Office will consider complaint regarding contract modification when it is alleged that modification changed scope of contract and therefore should have been subject of new procurement. This decision extends 60 Comp. Gen. 414 6

Prices

Reduction by low bidder after bid opening

Unreasonably high bid price

Bid determined to be unreasonably high cannot be said to be that of otherwise successful bidder which is entitled to voluntarily reduce its price after bid opening 211

CONTRACTS—Continued Page
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Prices—Continued
Reduction by low bidder after bid opening—Continued
Voluntary action requirement
Only purely voluntary and unsolicited price reductions may be accepted from otherwise successful low bidder; negotiation or solicitation of lower offers is not permissible. Consequently, Housing Authority acted reasonably by not negotiating with any low bidder on various schedules contained in solicitation in effort to reduce bidders' prices 211
Statautory limitations
Waiver
There is no discretion or authority in officers or agents of the Government to waive provisions of statute 211
Protest timeliness
Non-solicitation improperiety allegations
Reasonable-time standard
In future, grant complaints regarding matters other than alleged solication deficiencies must be filed with GAO within reasonable time, and 4 months after adverse decision by grantor agency will not be considered reasonable time. This decision extends 60 Comp. Gen 414 6
Grants-in-aid. (*See* CONTRACTS, Grant-funded procurements)
In-house performance *v.* contracting out
Cost comparison
GOCO *v.* COCO bids
Evaluation
Cost elements for inclusion
Protest against inclusion of two cost elements from OMB Circular A–76 Cost Comparison Handbook in evaluation of bids is denied where protester has not shown that their inclusion was unreasonable or that the amount represented under those elements were inaccurate 233
Implied criteria
Solicitation called for bids on two methods of contracting out work being performed in-house by Government personnel. While solicitation explicitly provided for a cost comparison of the cost of performance in-house with cost of contracting out, solicitation was silent on exact method of making award between the low bidder on each of the two methods of contracting out. However, General Accounting Office finds that solicitation implied that cost principles in OMB Circular A–76 Cost Comparison Handbook would be used in the evaluation and that the two low bidders understood that such principles would be used 233
Injunctive relief
Not available through General Accounting Office
General Accounting Office does not have authority to restrain award of Federal contracts 417

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Davis-Bacon Act
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Subcontractor partnerships
Prior decision, 59 Comp. Gen. 422, holding that individual members of a partnership, serving as a subcontractor, who perform the work of laborers or merchancis on a project subject to the Davis-Bacon Act are covered thereunder, will not be followed pending action by Department of Labor 231
Minimum wage determinations
Service Contract Act of 1965. (*See* CONTRACTS, Labor stipulations, Service Contract Act of 1965, Minimum wage, etc. determinations)
Nondiscrimination
Affirmative action requirements
Responsiveness *v.* responsibility
Specific commitment in bid requirement
When affirmative action requirements are imposed on a bidder as a matter of contract performance, and a specific commitment to them must be reflected in the bid, such requirements may be treated as involving responsiveness, rather then responsibility 581
Affirmative action requirements
Waiver
Failure to qualify
When grantee solicitation provides that bidders may seek to qualify for a waiver of minority business enterprise utilization goal by providing with the bid a narrative of positive efforts and an explanataion of why the goal connot be met, and low bidder neither commits itself to the goal nor provides a narrative, while second-low bidder unequivocally offers to meet the goal at a reasonable price, grantee may presume that low bidder has not made sufficient effort and properly may reject the bid 581
Service Contract Act of 1965
Minimum wage, etc. determinations
Revision
Cancellation *v.* amendment of solicitation
Where initial incorrect wage determination was deleted from solicitation after the receipt of initial proposals and new wage determinations were added, the contracting agency was not required to cancel the solicitation and resolicit to include firm that protested initial wage determination, but did not submit a proposal, where the initial wage determination was not void *ab initio.* where the change resulting from the new determination was not so substantial as to require a complete revision of the solicitation, and whether the protester had not shown that it was reasonably prevented from submitting a competitive proposal 614

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Where the first-tier subcontractor is a "converter" of fabric (one who arranges for the production of gray goods into finished cloth), the costs of the converter's manufacturers rather than the administrative costs of the converter are required to be used by the clause in the invitation for bids to determine whether the bidder is eligible as a labor surplus area concern 333
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Responsibility matter
Protest that agency improperly awarded contracts to firm as a labor surplus area (LSA) concern and failed to consider evidence that it lacked ability to meet LSA concern performance requirements is sustained to the extent that the agency had not placed the burden on the firm to demonstrate affirmatively its ability to meet those requirements as a matter of responsibility, but instead assumed the agency had the burden of showing the firm intended to evade the requirements 385
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Appropriation availability beyond fiscal yer. (*See* **APPROPRIATIONS, Fiscal year, Availability beyond, Contracts, Modification**)
Beyond scope of contract
Options exercised
Purchase changed to lease
New competition recommended
A modification which converts a contract for the acquisition of disk drives from a purchase, with virtually no post-acquisition Government right to assure equipment performance, to a 5-year lease-to-ownership plan, with expansive rights in the Government to enforce newly added performance requirements over the full term of the lease, so substantially alters the rights of the parties as to be beyond the scope of the original contract and results in a contract substantially different from that for which the competition was held. Therefore, a new competition should be conducted 42
Scope of contract requirement
Department of Interior entered into contract for necessary facilities and staff to operate nonresidential project camps for youth. In last month of fiscal year 1980, Interior executed modifications to this contract extending period of performance of contract from Oct. 1, 1980, to May 31, 1981, and providing for a new service to be performed by contractor during extension period. As Interior did not have a *bona fide* need for services provided by modifications until they were performed in fiscal 1981, they are chargeable to Interior's 1981 appropriation. 31 U.S.C. 712a permits use of annual appropriations only for expenses serving the needs of the year for which the appropriation was made. Fact that supplemental agreements modified basic contract which itself was properly charged to 1980 appro-

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priation does not change this result. Only modifications within scope of original contract may be charged to same appropriation as original contract 184
Increased costs
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Discretionary cost increases in cost reimbursement contracts which exceed contractually stipulated ceilings set forth in Limitation of Cost clauses and which are not enforceable by contractor are properly chargeable to funds available when the disretionary increase is granted by the contracting officer. 59 Comp. Gen. 518 and other prior inconsistent decisions are modified accordingly 610
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Small Business Act, as amended. (*See* SMALL BUSINESS ADMINISTRATION, Small Business Act, Amendment, Public Law 95-507, Section 211, Subcontracting plans in negotiated procurements)
Best advantage to Government
Exclusion from competitive range unjustified
Corrective action recommended
Where a solicitation clearly places primary emphasis on technical factors, the elimination from the competitive range of an offeror who is rated 10 percent higher technically but has proposed costs 40 percent higher than the offeror ranked second technically, on the basis that the cost proposal is so out of line that meaningful negotiations are precluded, resulting in a competitive range of one, is inconsistent with the use of negotiation procedures to obtain the most advantageous contract for the Government 347
Competition
Competitive range formula
Technical *v.* cost consideration
Technically superior offer excluded
The principle that price or cost may become determinative where two proposals are essentially equal technically, notwithstanding the fact that in the overall evaluation scheme cost was of less importance than other evaluation criteria, does not justify elimination of the highest technically rated proposal from the competitive range resulting in a competitive range of one. Moreover, the record does not support a finding that the proposals were regarded as essentially equal technically 347
Technical acceptability
Chance for award possibility
While discussions generally are held with all offerors whose proposals are either technically acceptable or capable of being made acceptable, even technically acceptable proposal may be eliminated from competitive range if there is no reasonable chance it will be selected 202
Discussion with all offerors requirement. (*See* CONTRACTS, Negotiation, Offers or proposals, Discussion with all offerors require-

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ment)
Equality of competition
Lacking
Evaluation of proposals improper
Offerors are not evaluated on equal basis where request for proposals requested cost proposals to provide fixed level-of-effort based on direct professional productive hours but awardee is permitted to count nonproductive professional time and thus submits a cost proposal based on a lesser amount of work than others were required to price 560
Maximum possible extent
In negotiated procurements, both statute and regulations require that proposals be solicited from the maximum number of qualified sources consistent with the nature and requirements of supplies or services being procured. For this reason, General Accounting Office (GAO) closely scutinizes sole-source procurements, although it will uphold them if they are reasonably or rationally based 388
Debriefing conference
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Protest of agency refusal to consider offer sent by regular mail and received after due date for receipt of offers is denied where circumstances of late delivery do not fall within any of solicitation's late offer clause exceptions 596
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Date basis of protest made known to protester

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Protest that evaluation was improper, filed within 10 working days from the time the protester was informed by the agency that another bidder had been awarded the contract, is timely even though protester could possibly have discovered grounds of protest earlier since doubts as to timeliness are resolved in favor of protester and timeliness is measured from the time protester learns of agency action or intended action which protester believes to be inimical to its interests 48

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Protest based on grounds that were revealed in debriefing must be filed within 10 days of that debriefing. Protest filed 10 days after post-debriefing meeting at which same grounds were discussed is untimely even as to ground which protester states was not discussed until post-debriefing meeting. Under circumstances, agency's position that ground was discussed at debriefing is accepted. B-199548, Sept. 15, 1980, and B-192578, Feb. 5, 1979, are distinguished 370

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Protests initially filed with contracting agency must be subsequently filed with GAO within ten working days of protester's receipt of agency's denial or they will be dismissed as untimely and protester's attempt to continue protest with agency does not toll the period for filing with GAO 118

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Prior decision is affirmed because protester has not shown any errors of law or fact in conclusion that the initial adverse agency action occurs when the agency proceeds with the closing, as scheduled, instead of taking the corrective action suggested by the protester 109

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Decision to overrule *Turner-Cadwell* decisions is prospectively effective and affects only pending and future claims. Prior decisions or claim settlements issued before date of this decision pursuant to *Turner-Caldwell* line of decisions will not be disturbed. 56 Comp. Gen. 427, 55 *id.* 785 and 55 *id.* 539 are overruled in whole or in part... 408
Decisions
Wilson, A. Leon v. *United States,* Ct. Cl. 324-81C, 10/23/81. (*See* OFFICERS AND EMPLOYEES, Promotions, Temporary, Detailed employees, Higher grade duties assignment)
District of Columbia
Superior Court
Criminal Justice Act application
Adequate representation of indigents
Expert witness services at sentincing
The District of Columbia (DC) Criminal Justice Act, D.C. Code Ann. 11-2605 (1981), provides funding for expert and other services necessary for "an adequate defense" for eligible defendants. The purpose of the Act is to assure adequate representation of indigent defendants in the local courts at all stages of the proceedings. We construe the statutory phrase "an adequate defense" to include sentencing. Moreover, the Act plan, which has been implemented as required under D.C. Code Ann. 11-2601, as well as the DC Superior Court Criminal Rules, contemplates defense of the contents of the presentence report and presentation of mitigating factors, at the time of sentencing. Therefore, we would not object if the Superior Court authorizes or approves expert and other services necessary for an adequate defense at the time of sentencing 507
State
Jurisdiction
Garnishment proceedings
Alimony and child support payments
The Air Force, which had been complying with a Florida state court order garnishing the pay of one of its members from June 1976 through May 1980 for child support, incurred no obligation to reimburse the member when the granishment was later set aside by the court. The original court order was reviewed by the Air Force which found it appeared valid on its face. Therefore, pursuant to 42 U.S.C. 659, the Air Force was required to comply with it, and by doing so incurred no liability. Also, 42 U.S.C. 659(f) (Supp. III, 1979) currently

COURTS—Continued Page
State—Continued
Jurisdiction—Continued
Garnishment proceedings—Continued
Alimony and child support payments—Continued
provides that no agency or disbursing officer will be held liable for making payments when the legal process appears valid on its face..... 229

CUSTOMS
Employees
Overtime services
Reimbursement
Customs Service inspectional employees. (*See* COMPENSATION, Overtime, Inspectional service employees, Customs inspectors)

DEBT COLLECTIONS
Officers and employees of U.S.
Debts to Government. (*See* OFFICERS AND EMPLOYEES, Debts to U.S., Liquidation)
Set-off. (*See* SET-OFF)
Waiver
Civilian employees
Compensation overpayments
Overtime
Waiver *v.* setoff
Although the practice was stopped in November 1978, civilian nurses received compensation for 30 minutes of overtime when they worked through their lunch breaks. In actuality, they worked only 8 hours and 15 minutes and therefore would have been entitled to only 15 minutes of overtime. If the amounts now payable to the nurses by way of additional overtime compensation and Sunday premium pay exceed the overpayments to the nurses, collection of the indebtedness by way of offset would not be against equity or good conscience or against the best interests of the United States. However, if the indebtedness exceeds the amounts now payable, any such overpayments should be considered for waiver under 5 U.S.C. 5584 174
Legal training, etc.
Reimbursement unauthorized
Law school tuition and bar review course tuition are similarly necessary expenses incurred in order to qualify for a legal position. Therefore they, like bar admission fees, are personal to the employees and are not payable from appropriated funds. The Board should make no further payments under its bar assistance program and should recover tuition and fees already paid to its employees unless waiver is granted pursuant to 5 U.S.C. 5584. B-187525, Oct. 15, 1976, is distinguished 357
Physicians Comparability Allowances
Waiver denied
Physician who voluntarily terminated his service under a Federal Physicians Comparability Allowance Agreement prior to completing 1 year of service under that agreement is required to refund the comparability allowance payments he received pursuant to his agreement. The obligation to repay the allowance received may not be waived since the payments were proper when issued, even though

DEBT COLLECTIONS—Continued Page
Waiver—Continued
Civilian employees—Continued
Physicians Comparability Allowances—Continued
Waiver denied—Continued
the physician may have signed the agreement on the basis of the erroneous advice from a Government employee. Nor may the debt be reduced by tax or other deductions since those deductions constitute constructive payments, the refund of which is for the consideration of revenue authorities concerned 292
Senior Executive Service. (*See* OFFICERS AND EMPLOYEES, Senior Executive Service, Compensation, Overpayments, Waiver)

DEFENSE ACQUISITION REGULATION
Buy American Act implementation
Bid responsiveness
Foreign product proposed
Buy American Act, as implemented by the Defense Acquisition Regulation, provides a preference for suppliers of domestic end products, but does not require that bidders offering foreign end products be rejected as nonresponsive 431
Cancellation of invitation after bid opening
Justification
Additional *v.* stated quantity needs
Availability of funds
Stipulation in DAR 2-404.1(a) that an IFB should not be canceled after opening solely because of increased requirements for items being procured does not apply where the agency is unable to award a contract for the stated quantity because of insufficient funds. Rather, the stipulation applies where the stated quantity can be awarded in its entirety and additional quantities can be obtained separately under a new procurement 281
Small business concerns
Set-asides
Labor surplus areas
Eligibility of bidders
Subcontractors' status
Where the first-tier subcontractor is a "converter" of fabric (one who arranges for the production of gray goods into finished cloth), the costs of the converter's manufacturers rather than the administrative costs of the converter are required to be used by the clause in the invitation for bids to determine whether the bidder is eligible as a labor surplus area concern 333

DEFENSE OFFICER PERSONNEL MANAGEMENT ACT
Repeal of constructive service credit
Medical/dental officers. (*See* PAY, Service credits, Constructive, Medical/dental officer education)

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DEPARTMENTS AND ESTABLISHMENTS
Commercial activities
Private *v.* Government performance
Cost comparison
Protest against inclusion of two cost elements from OMB Circular A-76 Cost Comparison Handbook in evaluation of bids is denied where protester has not shown that their inclusion was unreasonable or that the amounts represented under those elements were inaccurate 233

Services between
Reimbursement
Merit Systems Protection Board services
Travel expenses of hearing officers
In view of the Merit Systems Protection Board's (MSPB) statutory responsibility to provide appeals hearings, and absent any specific authority to the contrary, there is no authority for the MSPB to accept reimbursement for the travel expenses of its hearing officers, nor is there any authority for the employing agencies to use their appropriations for this purpose. 59 Comp. Gen. 415 (1980), which held that MSPB may not accept payments from other agencies or augment its appropriations by accepting donations from employees or unions, is affirmed 419

DETAILS
Compensation
Higher grade duties assignment
Back Pay Act applicability
Wilson case effect
Our *Turner-Caldwell* decisions granting retroactive temporary promotions for overlong details are reconsidered in light of Court of Claims decision in *Wilson* v. *United States* which reaches opposite result. Although General Accounting Office is not bound by decisions of Court of Claims, the *Wilson* decision is a reasonable interpretation of law and regulation, it follows a clear line of precedent by the court, and it is consistent with the views of the Department of Justice and the Office of Personnel Management. Therefore, we will follow the *Wilson* decision and deny all pending and future claims under our *Turner-Caldwell* line of decisions. 56 Comp. Gen. 427, 55 *id.* 785 and 55 *id.* 539 are overruled in whole or in part 408

Excessive period
Back Pay Act applicability
Union agreements
Where the parties to a collective bargaining agreement agree that the provisions in the negotiated agreement were intended to make temporary promotion for details to higher grade positions mandatory after 60 days thereby establishing a nondiscretionary agency policy, those provisions may provide the basis for backpay under the Back Pay Act, 5 U.S.C. 5596. While other interpretations of the negotiated agreement could be made, the interpretation of the parties is a reasonable one under the circumstances of this case 492

DETAILS—Continued Page
Compensation—Continued
Higher grade duties assignment—Continued
Labor-management cases
Employees of Library of Congress asserting claims for retroactive temporary promotion and backpay in connection with overlong details filed grievances under collective bargaining agreement. After receipt of agency decision at step two of grievance procedure, union filed claims with General Accounting Office (GAO) pursuant to 4 C.F.R. Part 31, seeking to extend the remedy granted by the agency. The agency objects to submission of the matter to GAO. In instances where a claimant has filed a grievance with the employing agency, GAO will not assert jurisdiction if a party to the agreement objects since to do so would be disruptive to the grievance procedures authorized by 5 U.S.C. 7101–7135. Moreover, the issue of the timeliness of the grievances is primarily a question of contract interpretation which is best resolved pursuant to grievance-arbitration procedures.... 15
Civilian employee of Dept. of Army was detailed to higher-grade position for period of 42 days. Collective bargaining agreement provided for temporary promotion with backpay for details beyond 30 days. Agency objects to submission of the matter to GAO since same collective bargaining agreement provides that employees must use negotiated grievance procedures to resolve grievable issues. GAO will not assume jurisdiction over claims filed under 4 C.F.R. Part 31 where the right relied upon arises solely under the collective bargaining agreement and one of the parties to the agreement objects to submission of the matter to GAO. However, if otherwise appropriate, GAO will consider, under 4 C.F.R. Part 31, matters subject to a negotiated grievance procedure, despite the objection of a party, where the right relied upon is based on a law or regulation or other authority which exists independently from the collective bargaining agreement and no grievance has been filed..... 20
The question of whether the temporary promotion provisions in a collective bargaining agreement apply to unit employees temporarily serving in nonunit positions is an issue of contract interpretation which is customarily adjudicated solely under grievance-arbitration provisions, and is therefore not appropriate for resolution by General Accounting Office (GAO). Accordingly, this Office will defer to labor-management procedures established under 5 U.S.C. Chapter 71 274
Higher grade duties assignment
Excessive period
Temporary, retroactive promotions. (*See* OFFICERS AND EMPLOYEES, Promotions, Temporary, Detailed employees)

DISBURSING OFFICERS
Liability
Foreign currency accommodation exchanges
Losses
Army regulations
Exchange rate formula propriety
Treasury Department calls for agencies making accommodations exchanges and exchange transactions to use an estimated, rather than the actual, foreign exchange rate. Army Regulations call for the

DISBURSING OFFICERS—Continued Page
Liability—Continued
Foreign currency accommodation exchanges—Continued
Losses—Continued
Army regulations—Continued
Exchange rate formula propriety—Continued
use of an "average rate formula." The Army has decided to test the "pegged rate formula" in Europe as, in effect, a deviation from the average rate formula. The Treasury Department, which under the statute has overall responsibility for these transactions, has no objection to this method. We also have no legal objection to this method of estimating the exchange rate. In our view, an Accounting and Finance Officer in Europe may use this method, as long as it is properly authorized by the Army, without concern about being held liable for losses resulting from foreign currency exchanges. However, the Army should take action to rectify certain areas of concern, such as the potential for abuse by individual officers who may be permitted to vary the pegged rate to lessen their gains and losses 649

DISCRIMINATION
Civil Rights Act, Title VII. (*See* CIVIL RIGHTS ACT, Title VII, Discrimination complaints)

DISTRICT OF COLUMBIA
Courts
Superior Court. (*See* COURTS, District of Columbia, Superior Court)
Federal payments
Set-off
St. Elizabeths Hospital claims
Services to District residents
When the Federal payment to the District of Columbia has been appropriated and apportioned it becomes due and payable to the District. At this time, before payment to the District, it is available for offset for claims of St. Elizabeths Hospital for services provided District residents 661

DIVORCE (*See* HUSBAND AND WIFE, Divorce)

DONATIONS
Private funds
Usage
Conferences, entertainment, etc.
Official agency purpose requirement
Funds donated to the Cooperating Association Fund of the National Park Service may be used to fund a breakfast given by the wife of the Secretary of the Interior for the wives of high-level Government officials and a Christmas party given by the Secretary of the Interior for high-level Government officials and their guests only if the Secretary sustains the burden of showing that the receptions were given in connection with or to further official Park Service purposes. In this instance, from the information provided, the parties appear to be primarily social in nature 260

ECONOMIC DEVELOPMENT ADMINISTRATION (*See* COMMERCE DEPARTMENT, Economic Development Administration)

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ENERGY
Department of Energy
Fossil energy research activities
Termination costs
Appropriation availability
Funds appropriated for fossil energy research and development activities of the Department of Energy (DOE) may be used for expenses pertaining to the termination of various fossil energy research and devleopment programs and projects, where those programs and projects are not specifically mandated in either the appropriation act or authorizing legislation, where the Secretary of Energy is given considerable discretion in formulating and executing a comprehensive nonnuclear energy research and development program, and where the proposed terminations and reductions would not leave the remaining overall program inconsistent with the statutory scheme..... 482

ENTERTAINMENT
Appropriation availability
Specific statutory authorization requirement
Funds appropriated to the Dept. of the Interior for salaries and expenses may not be used to pay for any portion of the expenses of a breakfast given by the wife of the Secretary of the Interior for the wives of high-level Government officials, or for a Christmas party given by the Secretary of the Interior for high-level Government officials and their guests. Entertainment expenses, unless specifically authorized by statute, are not properly chargeable to appropriated funds. 43 Comp. Gen. 305 and 47 *id* 657 260

EQUAL EMPLOYMENT OPPORTUNITY
Commission
Administrative proceedings
Hearings
Discrimination complaints. (*See* CIVIL RIGHTS ACT, Title VII, Discrimination complaints, Equal Employment Opportunity Commission hearings)

EQUIPMENT
Automatic Data Processing Systems
Acquisition, etc.
Where request for reconsideration of decision denying bid protest provides no basis to alter that decision, decision is affirmed 437
Prior decision, which sustained a protest against award of a contract under the Small Business Administration's section 8(a) program to a firm determined by the SBA Size Appeals Board not to be small, is affirmed where it has not been established that the decision was based on an error of law or fact 545
Lease payments
Assignments
Validity
Although assignment did not comply with requirements of the Assignment of Claims Act, the record establishes that the Government was aware of, assented to and recognized the assignment of a con-

EQUIPMENT—Continued Page
Automatic Data Processing Systems—Continued
Lease payments—Continued
Assignments—Continued
Validity—Continued
tract. Therefore, the Government should pay money owed under contract to assignee 53
Lease-purchase agreements
Acquisition of equipment
Options to be exercised
Notice requirements for schedule items
Federal Procurement Regulation sec. 1-4.1109-6 requirement that agency publish Commerce Business Daily announcement of agency's intent to convert Automated Data Processing Equipment from lease to purchase under General Services Administration schedule contract is a necessary prerequisite to the exercise of a purchase option for such equipment 111
Service contracts
Teleprocessing services
Subcontractor selection
Agency's instruction to its prime contractor that it select another source besides the protester is inconsistent with the Federal norm requirement for competition to the maximum practicable extent, which was incorporated into the prime contract, where the record does not show that the protester was unavailable as a source of supply or unable to provide the services within the required timeframe 328
Communication systems
Automatic
Telephone call distributing systems. (*See* COMMUNICATION FACILITIES, Contracts, Automatic call distributing systems)

ESTOPPEL
Transportation claims
Where statute permits filing of transportation claims within a 3-year statute of limitation period, carrier cannot be estopped from filing such claims within this period by its acceptance of initial payment of bill submitted 323

EVIDENCE
Reports of existence
Subsequent to payment
The furnishing of reports of existence by military retirees and survivor annuitants whose checks are mailed to a foreign address and delivered through foreign postal channels may be changed to a semi-annual basis from the current "one month behind" basis. This change is approved in view of the potential for administrative cost savings while still providing a reasonable protection to the Government against erroneous payments 505

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EXPERTS AND CONSULTANTS

Compensation

Aggregate limitation

Not for application

Independent contractor's services

Since contract U.S. Advisory Commission on Public Diplomacy entered into with private law firm was on independent contractor basis, statutory limitation in 22 U.S.C. 1469, which only applies when services are procured from individuals as employees, was not applicable and did not limit amount of compensation that could be paid to law firm 69

Status

Contractor or employee

Contract entered into by the United States Advisory Commission on Public Diplomacy with private law firm for legal services concerning authority of the Advisory Commission and extent of its independence does not constitute illegal personal services contract, since law firm was hired on an independent contract basis requiring no more than minimal supervision and not on employer-employee basis. Furthermore, type of legal services required, involving legal analysis of authority and independence of Advisory Commission, was not related to litigation within jurisdiction of Department of Justice. Also, Advisory Commission's need for second legal opinion, unencumbered by conflict of interest, was not unreasonable under circumstances 69

FAIR LABOR STANDARDS ACT

General Accounting Office

Jurisdiction

National Federation of Federal Employees requests a determination from this Office on the exempt/nonexempt status under the Fair Labor Standards Act of civilian aircraft pilots. Under 29 U.S.C. 204, the Office of Personnel Management is authorized to administer FLSA with respect to Federal employees. In B-51325, Oct. 7, 1976, we stated that the role granted to OPM in administering FLSA necessarily carries with it the authority to make final determinations as to whether employees are covered by its various provisions. Accordingly, since OPM has in fact reviewed the claims of the employees and has determined them to be exempt from FLSA as administrative employees, this Office will not consider the claims 191

Overtime

Compensation. (*See* **COMPENSATION, Overtime, Fair Labor Standards Act)**

Fair Labor Standards Act *v.* other pay laws

An employee's entitlement to overtime compensation may be based on either title 5, U.S. Code, or the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, or both. Employees to whom both laws apply are entitled to overtime compensation under whichever one of the laws provides the greater benefit 174

Traveltime. (*See* **COMPENSATION, Overtime, Fair Labor Standards Act, Traveltime)**

FAIR LABOR STANDARDS ACT—Continued Page
Traveltime compensation. (*See* COMPENSATION, Traveltime, Hours of work under FLSA)

FARM CREDIT ADMINISTRATION
District retirement plans
Examination and audit requirements
Employee Retirement Income Security Act of 1974
Applicability
Since Farm Credit district retirement plans must be submitted for prior approval of Farm Credit Administration, FCA employees cannot thereafter be viewed as independent for purposes of performing audits required by section 103 of the Employee Retirement Income Security Act of 1974, as amended 170

FEDERAL AID, GRANTS, ETC.
Bids. (*See* CONTRACTS, Grant-funded procurements)

FEDERAL COMMUNICATIONS COMMISSION
Ship radio inspectors
Holiday *v.* regular overtime compensation
Federal Communications Commission employee performed ship inspection duties on Saturday, Nov. 11, 1978 (Veterans Day)—a holiday. Pursuant to 5 U.S.C. 6103(b)(1) (1976), employee had received Friday, Nov. 10, 1978, as a paid holiday off. Employee is not entitled to 2 days' additional holiday pay for work on Saturday because meaning of term "holiday" in controlling agency regulation requires reference to 5 U.S.C. 6103 to determine established legal public holidays and section 6103(b)(1) provides that instead of a holiday that occurs on Saturday, the Friday immediately before is a legal public holiday 3

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977
Compliance
Cooperative agreements
Procurement *v.* cooperative agreement
Administrative discretion
Federal Grant and Cooperative Agreement Act gives agencies considerable discretion in determining whether to use a contract, grant, or cooperative agreement, and GAO will not question determinations unless it appears that an agency has disregarded statutory and regulatory guidance or lacked program authority to enter into a particular relationship. 58 Comp. Gen. 785 and B-194229, Sept. 20, 1979, are distinguished 638
Criteria for determining
A complaint that the Department of Energy's use of a cooperative agreement, rather than a procurement, was improper is dismissed because the complainant has failed to establish that the project in question should have been the subject of a procurement 428

FEDERAL GRANTS, ETC.
Grantee contracts. (*See* CONTRACTS, Grant-funded procurements)

FEDERAL LAND POLICY AND MANAGEMENT ACT
Appropriation availability
Refunds of erroneous collections. (*See* APPROPRIATIONS, Availability,

FEDERAL LAND POLICY AND MANAGEMENT ACT—Continued Page
Appropriation availability—Continued
Refunds of erroneous collections)

FEDERAL PROCUREMENT REGULATIONS
Orders under ADP Schedule
Synopsis in *Commerce Business Daily*
Options to be exercised
Lease-purchase agreements
Federal Procurement Regulation sec. 1-4.1109-6 requirement that agency publish Commerce Business Daily announcement of agency's intent to convert Automated Data Processing Equipment from lease to purchase under General Services Administration schedule contract is a necessary prerequisite to the exercise of a purchase option for such equipment 111

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT
Occupancy of Government buildings
Maintenance, etc. services
Procurement authority
Since Treasury Department lacks specific statutory authorization or a delegation of authority from General Services Administration (GSA), Treasury department may not itself procure building services by entering into a service contract with an independent third party contractor. Any building services Treasury Department desires would have to be provided or otherwise arranged by GSA which has the statutory authority and responsibility to make repairs, etc., to public buildings 658

FEES
Attorneys. (*See* ATTORNEYS, Fees)
License, permit, etc. fees
Incidental to training programs
Appropriation availability
Instructor training
Department of Defense
Prohibition of 5 U.S.C. 5946 does not apply to payments authorized by 5 U.S.C. 4109. Payment of licensing fee is necessary expense directly related to training since, without payment of the membership fee, AMETA instructors will not have access to training materials, nor will their trainees be eligible for certification as practitioners 162
Membership
Employee *v.* agency
Use of appropriated funds to pay an agency's membership fees in a private organization is not prohibited by 5 U.S.C. 5946 where the membership is to be purchased in the agency's name rather than that of an individual. Prior to its use of appropriated funds for such a purpose, an agency must make an administrative determination that the payment of fees is necessary for the agency to carry out its authorized activities. In addition, the proposed membership must primarily benefit the agency involved, not its individual employees 542

FEES—Continued Page
Services to the public
Charges
Collection and disposition
Agency record duplication, etc.
Federal Election Commission
Federal Election Commission (FEC) proposal to have members of public who request microfilm copies of reports and statements filed with FEC pay firms which make copies is not legally objectionable. Procedure whereby FEC specifies schedule of fees in contract with duplicating firm, rather than reviewing each bill individually, would also be acceptable 285

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES
Cost-of-living allowances
Nonforeign areas
Computation
Federal housing category
Applicability
Air traffic controllers request that cost-of-living allowance (COLA) in Molokai, Hawaii, be computed under private housing category, since, although they occupy Federal housing, they do not do so as a condition of their civilian employment. Even though Federal Personnel Manual (FPM) Letter 591-29, Oct. 30, 1978, defines Federal housing category as applying only to those who occupy Federal housing as a condition of their employment, the FPM Letter's interpretation is erroneous since it misinterprets Executive Order 12070, as amended, which refers to Federal housing as that occupied as a result of civilian employment. Therefore, the manner in which the Federal Aviation Administration has been computing the COLA is correct 266

FOREIGN GOVERNMENTS
American citizens
Employment
Military retirees
Congress has authorized retired Regular officers of uniformed services to accept compensation for employment by a foreign government if Secretary concerned and Secretary of State approve. In decision B-198557, July 17, 1980, we held that a retiree who accepts foreign employment after receiving Secretary of the Air Force's approval, but before Secretary of State's, is subject to the rule in B-178538, Oct. 13, 1977, that he must repay the United States an amount equal to compensation received from foreign government. However, we also held that when final approval is given, withholding of retired pay is to be discontinued except to the extent that retired pay was paid for the period of unauthorized employment by a foreign government. B-193562, Dec. 4, 1979, is overruled to the extent it is inconsistent with these decisions; B-198557, July 17, 1980, is clarified 306
Defense articles and services
Foreign military sales
Bid evaluation. (*See* BIDS, Evaluation, Foreign military sales items)

FOREIGN GOVERNMENTS—Continued Page

Israel

Agreements with U.S.

Defense procurements

Buy American Act is concerned with the place of manufacture, mining, or production, and not with the nationality of bidders. When determination and findings to waive the Act refers to items that are "produced" in a particular country, the waiver also will depend upon the place of production, not ownership or control of the firms bidding 431

FOREIGN SERVICE ACT

Amendments

Creditable service

Prior non-Federal service

Radio Free Europe

Effective Feb. 15, 1981, section 2313 of the Foreign Service Act of 1980 amended 5 U.S.C. 8332 to allow civil service retirement credit for employment with Radio Free Europe. Since 5 U.S.C. 6303(a) provides that service creditable under section 8332 shall be used in determining annual leave earning category, employee's leave accrual category should be adjusted effective Feb. 15, 1981, to credit service with Radio Free Europe. Enactment of section 2313 does not entitle employee to annual leave benefits under 5 U.S.C. 6301, *et seq.,* for period of non-Federal service with Radio Free Europe or to additional leave for periods of covered service prior to Feb. 15, 1981 279

FRAUD

False claims

Burden of proof

The burden of establishing fraud rests upon the party alleging the same and must be proven by evidence sufficient to overcome the existing presumption of honesty and fair dealing. Circumstantial evidence is competent for this purpose, provided it affords a clear inference of fraud and amounts to more than a suspicion or conjecture. If, in any case, the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is required to be drawn. Accordingly, a mere discrepancy or inaccuracy, in itself, cannot be equated with an intent to defraud the Government..... 399

Debt collection

On April 7, 1981, after deciding certain legal issues, General Accounting Office remanded this case to the Department of the Air Force for a recalculation of the amount of suspected fraud and a determination of number of days for which fraudulent information was submitted on a temporary duty voucher by a civilian employee. The parties have raised several issues concerning the recalculation. Accordingly, we will set forth the governing legal principles and procedures and return the case to the Air Force for appropriate action consistent with this and our previous decision..... 399

Per diem

"Lodgings-plus" basis

Average cost computation

In calculating the average cost of lodging under lodgings-plus method of the Federal Travel Regulations, the term "total amount paid for lodgings" does not include amounts paid by claimants for

FRAUD—Continued Page
False claims—Continued
Per diem—Continued
"Lodgings-plus" basis—Continued
Average cost computation—Continued
days when fraud in any amount was committed, and the term "number of nights for which lodgings were or would have been required" does not include those nights tainted by fraud in any amount. 60 Comp. Gen. 181 (1981) and 60 *id.* 53 (1981) are distinguished 399
Evidence establishing fraud
Sufficiency
The framework for the recalculation necessary in the present case is the lodgings-plus method of determining per diem expenses. Under this method, fraud cannot be established merely because claimant's claimed daily cost for lodging on any one day is more than the average cost of lodging. Thus, fraud cannot be established merely by showing a deviation from an average or estimated figure 399

FUNDS
Foreign
Exchange rate
Losses
Foreign currency accommodation exchanges
Army Department
Treasury Department calls for agencies making accommodations exchanges and exchange transactions to use an estimated, rather than the actual, foreign exchange rate. Army Regulations call for the use of an "average rate formula." The Army has decided to test the "pegged rated formula" in Europe as, in effect, a deviation from the average rate formula. The Treasury Department, which under the statute has overall responsibility for these transactions, has no objection to this method. We also have no legal objection to this method of estimating the exchange rate. In our view, an Accounting and Finance Officer in Europe may use this method, as long as it is properly authorized by the army, without concern about being held liable for losses resulting from foreign currency exchanges. However, the Army should take action to rectify certain areas of concern, such as the potential for abuse by individual officers who may be permitted to vary the pegged rate to lessen their gains and losses 649
United States-owned currencies
Losses
Vietnam evacuation
Loss of approximately $1,070,000 of piaster currency abandoned in Vietnam may be charged to Gains and Deficiencies Account, 31 U.S.C. 492b, since piasters were acquired and held for exchange transaction operations and became worthless when South Vietnamese Government fell. To extent inconsistent, 56 Comp. Gen. 791 (1977) is overruled 132

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GARNISHMENT
Military pay, etc.
Alimony or child support
State court order
Regular on its face
Government's compliance
The Air Force, which had been complying with a Florida state court order garnishing the pay of one of its members from June 1976 through May 1980 for child support, incurred no obligation to reimburse the member when the garnishment was later set aside by the court. The original court order was reviewed by the Air Force which found it appeared valid on its face. Therefore, pursuant to 42 U.S.C. 659, the Air Force was required to comply with it, and by doing so incurred no liability. Also, 42 U.S.C. 659(f) (Supp. III, 1979) currently provides that no agency or disbursing officer will be held liable for making payments when the legal process appears valid on its face 229

GENERAL ACCOUNTING OFFICE
Audits
Access to non-Government records. (*See* **RECORDS, Access to non-Government records by GAO)**
Authority
Bonneville Power Administration
Payments to non-Federal regional council
General Accounting Office may scrutinize funding and functions and responsibilities of Pacific Northwest Electric Power and Conservation Planning Council through its authority to audit BPA's financial payments to Council under Pub. L. 96-501 and governmental programs and activities under 31 U.S.C. 1154(a) and to obtain access to Council's records. Also, BPA might work out with the Council some procedures short of direct audit to provide additional oversight of Council's use of funds 477
Decisions
Overruled or modified
Prospective application
***Turner-Caldwell* decision**
Decision to overrule *Turner-Caldwell* decisions is prosectively effective and affects only pending and future claims. Prior decisions or claim settlements issued before date of this decision pursuant to *Turner-Caldwell* line of decisions will not be disturbed. 56 Comp. Gen. 427, 55 *id.* 785 and 55 *id.* 539 are overruled in whole or in part... 408
Jurisdiction
Attorney fee claims
Discrimination complaint cases
Employee filed discrimination complaint and was awarded retroactive promotion in 1979. Claim for attorney fees is denied since General Accounting Office (GAO) is without authority under Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(k) and 2000e-16, to consider discrimination complaints or claims for attorney fees incident to such complaints. Regulations authorizing payment of attorney fees in discrimination cases were issued subsequent to this employee's case and are not retroactively effective 326

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Civil service matters
Erroneous deductions from compensation
Time limitation on claims. (*See* STATUTES OF LIMITATION, Claims, Claims settlement by GAO, Erroneous deductions from salary)
Civil Service Reform Act of 1978
Attorney fees. (*See* ATTORNEYS, Fees, Civil Service Reform Act of 1978)
Claims
Settlement
Authority
Contract Disputes Act of 1978 effect. (*See* CLAIMS, Settlement by General Accounting Office, Contract Disputes Act of 1978 effect)
Contracts
Disputes
Contract Disputes Act of 1978
Applicability to assignees' claims
Contracting officer forwarded assignee's claim to General Accounting Office (GAO) for resolution because he lacked jurisdiction to resolve it. Claimant then appealed that decision to the agency's board of contract appeals, but nevertheless requested and received suspension of board proceedings pending GAO decision, reserving the right to pursue the appeal if GAO denies the claim. GAO, however, will not consider the claim unless the board first affirms the contracting officer's conclusion, since otherwise the claimant inappropriately would have two chances at a favorable administrative resolution..... 125
Criteria of GAO review
GAO will not review procedures leading to award of contract to the terminated contractor where claimant has not requested review and there is no possibility of corrective action by way of reinstating terminated contract since contract requirement has been fully performed..... 114
Election effect
Contractor under pre-March 1, 1979, contracts has filed "constructive change" claim originally made to contracting officer in March 1980. If, regardless of filing, contractor has made conscious election to proceed under Contract Disputes Act of 1978, General Accounting Office (GAO) may not consider claim since consideration would give contractor a forum it would not otherwise have under Act. Alternatively, if contractor has elected to proceed under disputes clause of its contracts, GAO may not consider claim because claim involves a question of fact..... 1
Money damage claims
Claim for money damages arising out of agency cancellation of post-March 1, 1979, contract on basis that award was erroneous is for resolution under Contract Disputes Act of 1978 and, therefore, cannot be considered by General Accounting Office (GAO)..... 114

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Contracts—Continued
Disputes—Continued
Under disputes clause
Fact questions
Even though Army alleges that constructive change claim filed at GAO is time-barred, allegation does not entitle GAO to decide legal validity of defense. Fact remains that claim, on its face, is not for GAO's review since claim involves a question of fact; moreover, Armed Services Board of Contract Appeals (or Court of Claims) may ultimately decide legal validity of defense under all relevant factual circumstances 1
Firm fixed-price
Agency determination to use
Conclusiveness
General Accounting Office (GAO) has no basis to conclude that provisions in solicitation for an automatic call distributing system do not reflect agency's legitimate needs where protester, a regulated public utility offering telephone services, complains that provisions make it impossible for a regulated carrier to bid, but does not show that the agency's rationale for including the provisions is unreasonable 35
Grants-in-aid. (*See* CONTRACTS, Grant-funded procurements, General Accounting Office review)
Cooperative agreements. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Cooperative agreements)
In-house performance *v.* contracting out
Cost comparison *v.* contractor selection
Exhaustion of administrative remedies
Protester may protest directly to General Accounting Office without first exhausting administrative appeals process under OMB Circular A-76 in cases where question does not concern determination between contract and in-house performance 205
Issues not raised in protest
In resolving a bid protest, General Accounting Office (GAO) is not confined to address only those issues or arguments raised by the parties to the protest. The purpose of GAO's bid protest function is to insure compliance with the rules and regulations governing the expenditure of public funds. Accordingly, where GAO is aware of a regulation that is relevant to a particular situation, GAO will apply it appropriately, whether or not the parties have taken notice of it 238
Modification
Although protests against contract modifications usually are matters of contract administration which we will not review, we will consider protests which contend that a modification went beyond the scope of the contract and should have been the subject of a new procurement 42
Performance
Contract administration matter
Whether bidder will use more Government property to perform contract than it listed in its bid goes to contract compliance and is a

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
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Performance—Continued
Contract administration matter—Continued
matter for the contracting agency in the administration of the contract and does not affect the validity of the award 247
Cooperative agreements
Complaints against agency use
Criteria for review
A complaint that the Department of Energy's use of a cooperative agreement, rather than a procurement, was improper is dismissed because the complainant has failed to establish that the project in question should have been the subject of a procurement..... 428
General Accounting Office (GAO) will review propriety of assistance awards when there appears to be a conflict of interest or when there is a showing that an agency is using a grant or cooperative agreement to avoid statutory and regulatory requirements for competition. 58 Comp. Gen. 785 and B-194229, Sept. 20, 1979, are distinguished 638
Fair Labor Standards Act. (*See* FAIR LABOR STANDARDS ACT, General Accounting Office, Jurisdiction)
Labor-management relations
Civil Service Reform Act effect
Grievance *v.* claims' settlement
Claims jointly submitted
Claims involving matters of mutual concern to agencies and labor organizations submitted under 4 C.F.R. Part 31 are considered joint submissions where both parties to the agreement have notice of the submission to GAO and neither party objects to our consideration of the claim. See also 4 C.F.R. 22.7(b) (1981)..... 274
Jurisdictional policy differences
The jurisdictional policies established in this case for claims filed with GAO under 4 C.F.R. Part 31 involving matters of mutual concern to agencies and labor organizations differ from those established in 4 C.F.R. Part 22 (1981). The differences are based upon differences in the respective procedures and are designed to achieve a balance between GAO's statutory obligations under title 31 of the United States Code and the smooth functioning of the procedures authorized by the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135..... 20
Grievance not filed
Rights not solely based on agreement
Civilian employee of Dept. of Army was detailed to higher-grade position for period of 42 days. Collective bargaining agreement provided for temporary promotion with backpay for details beyond 30 days. Agency objects to submission of the matter to GAO since same collective bargaining agreement provides that employees must use negotiated grievance procedures to resolve grievable issues. GAO will not assume jurisdiction over claims filed under 4 C.F.R. Part 31 where the right relied upon arises solely under the collective bargaining agreement and one of the parties to the agreement objects to submission of the matter to GAO. However, if otherwise appropriate,

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Labor-management relations—Continued
Civil Service Reform Act effect—Continued
Grievance not filed—Continued
Rights not solely based on agreement—Continued
GAO will consider, under 4 C.F.R. Part 31, matters subject to a negotiated grievance procedure, despite the objection of a party, where the right relied upon is based on a law or regulation or other authority which exists independently from the collective bargaining agreement and no grievance has been filed 20
Grievance procedure elected
Party objection to GAO review
Employees of Library of Congress asserting claims for retroactive temporary promotion and backpay in connection with overlong details filed grievances under collective bargaining agreement. After receipt of agency decision at step two of grievance procedure, union filed claims with General Accounting Office (GAO) pursuant to 4 C.F.R. Part 31, seeking to extend the remedy granted by the agency. The agency objects to submission of the matter to GAO. In instances where a claimant has filed a grievance with the employing agency, GAO will not assert jurisdiction if a party to the agreement objects since to do so would be disruptive to the grievance procedures authorized by 5 U.S.C. 7101-7135. Moreover, the issue of the timeliness of the grievances is primarily a question of contract interpretation which is best resolved pursuant to grievance-arbitration procedures.... 15
Collective bargaining agreements
Interpretation. (*See* UNIONS, Federal service, Collective bargaining agreements, Interpretation)
Requests for decisions
Comments from other party
Timeliness
General Accounting Office (GAO) will not take jurisdiction of an agency request filed under 4 CFR Part 22, even though the union's objection to GAO consideration of the claim, because it was the subject of a pending grievance, was submitted more than 20 days after the union was served with agency request. The 20-day period for submission of written comments guarantees consideration of comments received within that period but does not nullify GAO's discretion to consider comments received after that time period has expired. To consider a claim subject to a negotiated grievance procedure after one of the parties objects would conflict with jurisdictional limits set forth in 4 CFR Part 22, which are intended to ensure smooth functioning of the procedures of the Federal Service Labor Management Relations statute 513
Relief authority
Accountable officers
Drug enforcement cases
Drug Enforcement Administration is not required to seek relief under 31 U.S.C. 82a-1 for special agents who lose funds advanced to purchase controlled substances when potential seller absconds with Government's money. General Accounting Office's view that relief for such agents must be sought under the relief statute because they

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Relief authority—Continued
Accountable officers—Continued
Drug enforcement cases—Continued
have custody of funds at time of the loss is modified. Although agents are accountable for funds advanced to them for controlled substance purchase, Administration may record loss occurring while funds were being used for purpose for which they were entrusted—investigation of sale of controlled substances—as investigative expense under authority of 21 U.S.C. 886, provided that the loss is not attributable to officer's negligence. Moreover, agency must still seek relief under 31 U.S.C. 82a-1 for funds lost under circumstances unrelated to purposes for which funds were entrusted. Modifies 59 Comp. Gen. 113; B-188894, Sept. 29, 1977; B-192010, Aug. 14, 1978; B-191891, June 16, 1980 313
Erroneous payments
Monetary limit established by General Accounting Office (GAO) (currently $500) for administrative resolution of irregularities in the accounts of accountable officers applies only to the physical loss or deficiency of Government funds, and not to illegal or improper payments. Accordingly, request for relief under 31 U.S.C. 82a-2 was properly submitted to GAO where deficiency of $102 resulted from improper payment based on fraudulently altered travel orders 646
Subcontracts
General Accounting Office will consider a protest of a subcontract award where the agency instructs its prime contractor not to select the protester and where the agency participates in selecting the subcontract awardee 328
Transportation charges
Payment
Discount deductions
Recovery claim
Carrier's claim to recover monies deducted by agencies on the basis of a tender's prompt-payment discount provision constitutes a claim for transportation charges under 31 U.S.C. 244(a) (Supp. III, 1979), since the claim involves a discount taken by the agencies based on application of a tender, and the 3-year statute of limitation for the filing of claims is applicable 323
Recommendations
Contracts
Termination
Erroneous award
Award to protester if otherwise eligible
Prior decision—in which General Accounting Office held a bid to be ambiguous and nonresponsive where bidder designated responsive qualified products list product by manufacturer's designation but a nonresponsive product by superseded qualified products list test number—is affirmed. Recommendation is made to terminate contract for convenience of Government, particularly where this is second recent procurement where protester has been deprived of contracts improperly awarded to another firm 571

GENERAL ACCOUNTING OFFICE—Continued Page
Recommendations—Continued
Contracts—Continued
Termination—Continued
Erroneous award—Continued
Reevaluation of other offers
Offerors are not evaluated on equal basis where request for proposals requested cost proposals to provide fixed level-of-effort based on direct professional productive hours but awardee is permitted to count nonproductive professional time and thus submits a cost proposal based on a lesser amount of work than others were required to price 560

GENERAL SERVICES ADMINISTRATION
Spaces for other agencies, etc.
Space assignment
Maintenance, etc. services
Delegation of procurement authority
Absence
Since Treasury Department lacks specific statutory authorization or a delegation of authority from General Services Administration (GSA), Treasury Department may not itself procure building services by entering into a service contract with an independent third party contractor. Any building services Treasury Department desires would have to be provided or otherwise arranged by GSA which has the statutory authority and responsibility to make repairs, etc., to public buildings 658

GRANTS
Comprehensive Employment and Training Act (CETA)
Participating agencies
Appropriation availability
Retirement contributions for CETA-assigned employees
Reimbursement
General Services Administration does not have authority to pay retirement contributions to state retirement system for Comprehensive Employment and Training Act (CETA) employee assigned to it by the Metropolitan Community Colleges District, Kansas City, Missouri, a CETA subgrantee. 46 Comp. Gen. 115, distinguished 242
Grant-funded procurements. (*See* **CONTRACTS, Grant-funded procurements**)

HEALTH AND HUMAN SERVICES DEPARTMENT
Successor to Community Services Administration
Grants
Crisis Intervention Program
Appropriation obligation
Litigation pending
Department of Health and Human Services, as successor to Community Services Administration (CSA), should not recover funds expended pursuant to Stipulation and Agreed Order entered to resolve court action alleging CSA improperly withheld payments due plaintiffs under fiscal year 1979 Crisis Intervention Program. Although Order was subsequently vacated, grant fund appropriation was valid-

HEALTH AND HUMAN SERVICES DEPARTMENT—Continued Page
Successor to Community Services Administration—Continued
Grants—Continued
Crisis Intervention Program—Continued
Appropriation obligation—Continued
Litigation pending—Continued
ly obligated prior to close of fiscal year 1979 by filing evidence of potential liability because of pending litigation, pursuant to 31 U.S.C. 200(a)(6). Funds were therefore still available when grants were made in fiscal year 1980 509

HIGHWAYS
State roads
Traffic lights
Special benefit to Government
General Accounting Office will no longer object to use of appropriations to finance installation of traffic signals at or near Federal installations where such installation is not a service which the State or local jurisdiction is required to provide for all residents of the area free of charge, and the charge does not discriminate against the United States. Previous Comptroller General decisions to the contrary (36 Comp. Gen. 286, 51 *id.* 135, and similar cases) are hereby modified 501

HOLIDAYS
Created by Executive Order
Inspectional services
Compensation rate
Ship radio inspectors
Federal Communications Commission employee performed ship inspection duties on Monday, Dec. 24, 1979, which was considered a holiday by Executive order for purposes of pay and leave of specified Federal employees. Express limitation of Executive order to executive branch employees precludes consideration of Monday, Dec. 24, 1979, as a holiday within the meaning of 47 CFR 83.74(a)(4) (1979), and 5 U.S.C. 6103, which limit the term "holiday" to Government recognized legal *public* holidays and other designated *national holidays.* We conclude for purposes of applying the ship inspection overtime provisions that days which are declared to be holidays for Government employees by Executive order are not to be considered holidays which would entitle the employee to the special pay. 26 Comp. Gen. 848 (1947) 3

HOUSING
Loans
Property improvement and mobile home loans
By lending institutions
Insured by Government, (*See* HOUSING AND URBAN DEVELOPMENT DEPARTMENT, Title I insured loans)

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Housing assistance programs
Indian low-income projects
Annual contributions contract (ACC) between Department of Housing and Urban Development (HUD) and Indian housing authority

HOUSING AND URBAN DEVELOPMENT DEPARTMENT—Continued Page

Housing assistance programs—Continued

Indian low-income projects—Continued

pursuant to section 5 of the United States Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.*, is encompassed by GAO Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), since agreement results in substantial transfer of Federal funds to housing authority and since ACC required housing authority to use competitive bidding in awarding contracts 85

Title I insured loans

Lender's loss reserve account

Annual adjustment

Commencement date

Regulation in 24 CFR 201.12(c) which provides that annual downward adjustments in a lender's loss reserve account, out of which all insured loan claims are paid, should begin 5 years after an insurance contract is issued to the lender is based on assumption that during initial 5-year period the lender will be actively engaged in making title I insured loans. Since the insurance reserve does not even come into existence until the insured lender actually begins to make loans and report them to Housing and Urban Development (HUD) for insurance, HUD should not interpret the regulations as requiring adjustments in the reserve of a lender to commence until 5 years after the lender begins to make insured loans 308

Waiver of regulations

Even if regulation in 24 CFR 201.12(c) is interpreted as requiring the annual adjustments in a lender's loss reserve account to commence 5 years after the contract of insurance is approved, whether or not the lender has actually been making insured loans during that period, HUD is authorized under 12 U.S.C. 1703(e) to waive that regulatory provision where, as here, such an interpretation would be unfair to a lender that has substantially complied with the regulations in good faith 308

HUSBAND AND WIFE

Divorce

Military personnel

Transportation of stored property

Husband's elections

Overseas assignment

The permanent change-of-station transportation and storage of household goods entitlements are personal to the member of the uniformed services. Whether to release household goods in storage to a divorced ex-spouse or to use his transportation entitlement to ship household goods to his divorced spouse at an alternate location are matters primarily for the member to decide, considering any property settlement agreement or court order 180

Real estate expenses incident to transfer. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses, Husband and wife divorced, etc.**)

HUSBAND AND WIFE—Continued Page
Divorce—Continued
Validity
Foriegn
Acceptance criteria
Military pay and allowances
The General Accounting Office will not question the validity of the divorce and subsesquent remarriage of a Navy petty officer, notwithstanding that the divorce was rendered by a foreign court, where it appeared that the petty officer had long resided in the foreign country on a permanent duty assignment; the foreign court had jurisdiction over the subject matter of the divorce; and the foreign divorce decree would be recognized as valid by American State courts 104

INDIAN AFFAIRS
Contracting with Government
Preference to Indian concerns
Housing authority's failure to make award to Indian-owned enterprise whose bid was eight percent higher than low bid from non-Indian owned firm was proper since solicitation required award to low bidder and neither it nor HUD regulations or Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450e(b), required preference be granted to Indian-owned firm in particular procurement 85
Indian housing
Federally assisted
Low-income projects
Basic principles of Federal competitive bidding require that all bidders be treated fairly and equally and that bidder be precluded from deciding after bid opening whether to assert that its lump-sum price or its inconsistent individual item prices are correct. Thus, Indian housing authority which was required to adhere to Federal competitive bidding principles acted improperly in accepting bid based on bidder's post-bid opening explanation of intended bid where bid was subject to two reasonable interpretations and was low only under interpretation proffered by bidder 85

INSURANCE
Department of Housing and Urban Development
Property improvement and mobile home loans by lending institutions. (*See* HOUSING AND URBAN DEVELOPMENT DEPARTMENT, Title I insured loans)

INTEREST
Backpay
Statutory authority required
An employee who successfully appealed his separation from the National Endowment for the Arts before the Merit Systems Protection Board (MSPB) contest the resulting backpay award. He contends he is entitled to reimbursement of moving and storage expenses associated with his separation and subsequent reinstatement, interest on the backpay, and as compensatory damages, the severance pay which was deducted from his backpay award. Neither the Back Pay Act, 5 U.S.C. 5596 (Supp. III 1979), nor any other authority provides for pay-

INTEREST—Continued Page
Backpay—Continued
Statutory authority required—Continued
ment of interest or compensatory damages. Similarly, there is no provision for payment of incidental expenses such as moving and storage expenses, incurred by an employee as a consequence of an unjustified or unwarranted personnel action. The severance pay was properly deducted from the backpay award..... 578

INTERIOR DEPARTMENT
Appropriations. (*See* APPROPRIATIONS, Interior Department)
Bureau of Reclamation. (*See* BUREAU OF RECLAMATION)
National Park Service
Private party donations
Funds donated to the Cooperating Association Fund of the National Park service may be used to fund a breakfast given by the wife of the Secretary of the Interior for the wives of high-level Government officials and a Christmas party given by the Secretary of the Interior for high-level Government officials and their guests only if the Secretary sustains the burden of showing that the receptions were given in connection with or to further official Park Service purposes. In this instance, from the information provided, the parties appear to be primarily social in nature..... 260

JOINT TRAVEL REGULATIONS
Proposed amendments
Military personnel
Overseas
Return transportation of ex-family members
Time limitation extension
Proposed amendment to the Joint Travel Regulations, to increase from 6 months to 1 year after relief of uniformed services member from his overseas duty station during which transporatation of ex-family members must take place, should not be implemented. Any extension of time for travel beyond that currently allowed may be authorized only if justified on an individual case basis when it can be shown that the return took place as soon as reasonably possible after the divorce and departure of the member from the overseas station.... 62

JUDGES (*See* COURTS, Judges)

LABOR-MANAGEMENT RELATIONS
Federal service
Requests for GAO decisions, etc.
Employees of Library of Congress asserting claims for retroactive temporary promotion and backpay in connection with overlong details filed grievances under collective bargaining agreement. After receipt of agency decision at step two of grievance procedure, union filed claims with General Accounting Office (GAO) pursuant to 4 CFR Part 31, seeking to extend the remedy granted by the agency. The agency objects to submission of the matter to GAO. In instances where a claimant has filed a grievance with the employing agency, GAO will not assert jurisdiction if a party to the agreement objects since to do so would be disruptive to the grievance procedures authorized by 5 U.S.C. 7101-7135. Moreover, the issue of the timeliness

LABOR-MANAGEMENT RELATIONS—Continued Page
Federal service—Continued
Requests for GAO decisions, etc.—Continued
of the grievances is primarily a question of contract interpretation which is best resolved pursuant to grievance-arbitration procedures.... 15
The jurisdictional policies established in this case for claims filed with GAO under 4 CFR Part 31 involving matters of mutual concern to agencies and labor organizations differ from those established in 4 CFR Part 22 (1981). The differences are based upon differences in the respective procedures and are designed to achieve a balance between GAO's statutory obligations under title 31 of the United States Code and the smooth functioning of the procedures authorized by the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101–7135 20
National Federation of Federal Employees requests a determination from this Office on the exempt/nonexempt status under the Fair Labor Standards Act of civilian aircraft pilots. Under 29 U.S.C. 204, the Office of Personnel Management is authorized to administer FLSA with respect to Federal employees. In B–51325, Oct. 7, 1976, we stated that the role granted to OPM in administering FLSA necessarily carries with it the authority to make final determinations as to whether employees are covered by its various provisions. Accordingly, since OPM has in fact reviewed the claims of the employees and has determined them to be exempt from FLSA as administrative employees, this Office will not consider the claims 191
Agency erroneously continued to deduct union dues from three employees who were promoted out of bargaining unit and remitted amounts to union. Upon discovering the error, the agency refunded the deductions to the employees and collected the amounts erroneously paid from the union. Since the record shows that the union was not at fault in receiving these payments, repayment is waived pursuant to 5 U.S.C. 5584 218
The question of whether the temporary promotion provisions in a collective bargaining agreement apply to unit employees temporarily serving in nonunit positions is an issue of contract interpretation which is customarily adjudicated solely under grievance-arbitration provisions, and is therefore not appropriate for resolution by General Accounting Office (GAO). Accordingly, this Office will defer to labor-management procedures established under 5 U.S.C. Chapter 71 274
Although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for General Accounting Office (GAO) to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office 404
Although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for General Accounting Office (GAO) to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, the parties are in agreement as to the intent of the negotiated provi-

LABOR-MANAGEMENT RELATIONS—Continued Page
Federal service—Continued
Requests for GAO decisions, etc.—Continued
sions, there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office 492
General Accounting Office (GAO) will not take jurisdiction of an agency request filed under 4 CFR Part 22, even though the union's objection to GAO consideration of the claim, because it was the subject of a pending grievance, was submitted more than 20 days after the union was served with agency request. The 20-day period for submission of written comments guarantees consideration of comments received within that period but does not nullify GAO's discretion to consider comments received after that time period has expired. To consider a claim subject to a negotiated grievance procedure after one of the parties objects would conflict with jurisdictional limits set forth in 4 CFR Part 22, which are intended to ensure smooth functioning of the procedures of the Federal Service Labor Management Relations statute 513
Advance party of several civilian employees of Carswell Air Force Base were issued two sets of orders for active military duty: one set of orders was for advance duty on Thursday and Friday, June 5–6, 1980, and the other set was for regular summer camp duty on June 7–21, 1980. However, after an audit, the Air Force computed military leave for those employees as if there was only one period of active duty and charged 1 day's annual leave in addition to 15 days' military leave. The union claims that military leave should have been computed for each tour of duty separately and no annual leave charged. Since the absence for military leave was continuous and the weekend of June 7–8 fell wholly within the period of absence, military leave must be charged for those days. The union's claim on behalf of its employees is denied 558

LEAVES OF ABSENCE
Administrative leave
Attorneys representing indigent defendants
Attorneys in non-attorney Government positions. (*See* **ATTORNEYS, Indigent defendant representation, Leave, etc., Attorneys in non-attorney positions**)
Brief, determinable period requirement
Activities not in furtherance of Federal functions
An employee of the Veterans Administration who is licensed as an attorney in New Jersey was involuntarily summoned to represent an indigent defendant. He may not be excused from duty since he is not entitled to court leave and may not be granted administrative leave under these circumstances. See 44 Comp. Gen. 643 653
Annual
Accrual
Credit basis
Service creditable under Civil Service Retirement Act
Radio Free Europe employees
Effective Feb. 15, 1981, section 2313 of the Foreign Service Act of 1980 amended 5 U.S.C. 8332 to allow civil service retirement credit

LEAVES OF ABSENCE—Continued Page
Annual—Continued
Accrual—Continued
Credit basis—Continued
Service creditable under Civil Service Retirement Act—Continued
Radio Free Europe employees—Continued
for employment with Radio Free Europe. Since 5 U.S.C. 6303(a) provides that service creditable under section 8332 shall be used in determining annual leave earning category, employee's leave accrual category should be adjusted effective Feb. 15, 1981, to credit service with Radio Free Europe. Enactment of section 2313 does not entitle employee to annual leave benefits under 5 U.S.C. 6301, *et seq.*, for period of non-Federal service with Radio Free Europe or to additional leave for periods of covered service prior to Feb. 15, 1981 279
Civilians on military duty
Charging
Nonwork days
Within continuous duty period
More than one order
Advance party of several civilian employees of Carswell Air Force Base were issued two sets of orders for active military duty: one set of orders was for advance duty on Thursday and Friday, June 5–6, 1980, and the other set was for regular summer camp duty on June 7–21, 1980. However, after an audit, the Air Force computed military leave for those employees as if there was only one period of active duty and charged 1 day's annual leave in addition to 15 days' military leave. The union claims that military leave should have been computed for each tour of duty separately and no annual leave charged. Since the absence for military leave was continuous and the weekend of June 7–8 fell wholly within the period of absence, military leave must be charged for those days. The union's claim on behalf of its employees is denied 558
Court
Indigent defendant representation. (*See* **ATTORNEYS, Indigent defendant representation, Leave, etc.**)
***De facto* employees**
Leave accrual. (*See* **OFFICERS AND EMPLOYEES, *De facto*, Leave, Accrual**)
Lump-sum payments
***De facto* employees**
Individual was terminated from employment with the Forest Service after appointment was found to be erroneous, was reemployed temporarily in lower-graded position after break in service, and was then properly appointed to original position. He claims compensation and other benefits. For period of employment prior to termination claimant is entitled to compensation earned, lump-sum payment for accrued annual leave, service credit for annual leave accrual purposes, recredit of accrued sick leave to his leave account and payment for retirement deductions withheld. No entitlement exists to backpay for period after termination of original appointment since neither termination nor appointment to temporary lower-graded position constitutes unwarranted or unjustified personnel action under

LEAVES OF ABSENCE—Continued Page
Lump-sum payments—Continued
De facto employees—Continued
Back Pay Act, 5 U.S.C. 5596. Entitlement to service credit for retirement is for determination by Office of Personnel Management. 58 Comp. Gen. 734 is extended 127
Holidays
After separation date
Omnibus Reconciliation Act of 1980
An employee on sick leave at the time his disability retirement was approved should be afforded the opportunity to select a separation date which is most advantageous to him in accordance with Office of Personnel Management regulations. He is also entitled to be credited with sick and annual leave accrued while on sick leave prior to his separation date. Section 402 of Public Law 96-499 does not affect an employee's right to holiday pay before his separation date.... 363
Rate at which payable
Increases
Prevailing rate employees
Separation after effective date of increase
Lump-sum annual leave payments made to prevailing rate employees may be adjusted to reflect the increase in new rates of pay commencing after the effective date of Public Law 96-369 only if the employee performed service after the effective date of the act as required by subsection 114(c) of the act 94
Sick
Recredit of prior leave
Break in service
What constitutes
Service with Federally funded private, etc. organizations
Employee who had a break in Federal service of over 3 years seeks recredit of sick leave on basis that he was employed by various organizations and instrumentalities that receive Federal funding. Employee contends that such employment avoids a break in service in excess of 3 years. Under 5 C.F.R. 630.502(b)(1), a recredit of sick leave is permitted when an employee's break in service does not exceed 3 years. Since service with private organizations or state instrumentalities that receive Federal funding does not constitute Federal service, employee may not have sich leave recredited 83

LEGISLATION
Construction. (*See* STATUTORY CONSTRUCTION)

LOANS
Government insured
Property improvement and mobile home loans
Title I of the National Housing Act. (*See* HOUSING AND URBAN DEVELOPMENT DEPARTMENT, Title I insured loans)
Loan guarantees
Economic Development Administration
Public Works and Economic Development Act. (*See* COMMERCE DEPARTMENT, Economic Development Administration, Loan guarantees, Public Works and Economic Development Act)

Page

MARRIAGE
Divorce. (*See* HUSBAND AND WIFE, Divorce)

MERIT SYSTEMS PROTECTION BOARD
Appropriations
Reimbursement
Travel expenses of hearing officers. (*See* DEPARTMENTS AND ESTABLISHMENTS, Services between, Reimbursement, Merit Systems Protection Board services)
Review authority
Removal, etc. actions
Attorney fees. (*See* ATTORNEYS, Fees, Civil Service Reform Act of 1978, Merit Systems Protection Board decisions)
Special Counsel
Authority under Civil Service Reform Act of 1978
Filing complaints
Against supervisors

Chairman, International Trade Commission, requests decision on whether Commission may use appropriated funds to furnish legal representation to employees brought before Merit Systems Protection Board on complaint of the Board's Special Counsel. Commission funds are available to provide counsel in cases in which supervisor performed the conduct which is the subject of the Special Counsel's complaint within the scope of employment and the agency determines that it is in its interest to provide representation. Conduct is within the scope of a supervisor's employment if it is in furtherance of, or incident to, the carrying out of official duties. Because such conduct is in furtherance of an agency function, the cost of counsel may be considered a necessary expense incurred in performing that function 515

MILEAGE
In lieu of lodging costs
Temporary duty
At headquarters
Prior to reporting to new station

Employee who traveled to his new duty station on a house-hunting trip prior to the date scheduled for his transfer, and on the day before his scheduled transfer date received temporary duty orders for duty at his old station, may not be paid per diem and mileage at the old duty station unless it is determined that he did, in fact, report for duty at the new duty station before returning to the old duty station. 54 Comp Gen. 679 is distinguished 339
Travel by privately owned automobile
Administrative approval
Official business
Driving, etc. services
Employee injured on temporary duty

An employee was informed that another employee on temporary duty was in the hospital due to an automobile accident. The employee called her supervisor who told her to drive the injured employee back to her residence 90 miles away. Employee is entitled to mileage allowance since we hold that travel which is authorized or approved

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Travel by privately owned automobile—Continued
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Official business—Continued
Driving, etc. services—Continued
Employee injured on temporary duty—Continued
in order to return an injured employee on temporary duty to his or her home should be treated as necessary to carry out the agency's duty and therefore such travel is on official business. B-176128, Aug. 30, 1972, is overruled; 59 Comp. Gen. 57 is amplified; B-198299, Oct. 28, 1980, is distinguished..... 373

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Congress has authorized retired Regular officers of uniformed services to accept compensation for employment by a foreign government if Secretary concerned and Secretary of State approve. In a decision B-198557, July 17, 1980, we held that a retiree who accepts foreign employment after receiving Secretary of the Air Force's approval, but before Secretary of State's, is subject to the rule in B-178538, Oct. 13, 1977, that he must repay the United States an amount equal to compensation received from foreign government. However, we also held that when final approval is given, withholding of retired pay is to be discontinued except to the extent that retired pay was paid for the period of unauthorized employment by a foreign government. B-193562, Dec. 4, 1979, is overruled to the extent it is inconsistent with these decisions; B-198557, July 17, 1980, is clarified..... 306
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Agency appropriation *v.* miscellaneous receipts
Insurance, etc., collection
Prior reimbursement by agency
Refunds
Personal property loss/damage
Department of Justice may deposit funds received from carriers or insurers for damage to or loss of employee's personal property while in transit, for which agency has paid claim pursuant to 31 U.S.C. 241, in appropriation from which payment was made, and not in miscellaneous receipts in the Treasury, since amount received from carrier or insurer constitutes refund of payment made to employee. B-170663, Jan. 21, 1971, is overruled in part 537

NATIONAL COMMISSION FOR STUDENT FINANCIAL ASSISTANCE
Funding level
Fiscal year 1982
Funding level for the National Commission for Student Financial Assistance, under the continuing resolution for fiscal year 1982, is $960,000. In fiscal year 1981 funds for the Commission were first appropriated in supplemental appropriation act enacted June 5, 1981, and were apportioned for use only in the fourth quarter of the fiscal year. Therefore, to determine the current rate of operations for the Commission it is necessary to annualize the partial-year amount over the full fiscal year. Annualizing the $250,000 appropriation over the full year results in a figure of $1 million. Reducing this amount by the 4 percent reduction required by the continuing resolution gives a funding level of $960,000 473

NAVAL PETROLEUM RESERVES PRODUCTION ACT
Natural gas sales
Erroneous award
Corrective action recommended
Recommendation is made that Department of Energy conduct a new lottery, which includes the prior unsuccessful bidders who are still interested in obtaining an award under the solicitation, but only one of the two subsidiaries of parent corporation which participated in the previous lottery. If the previously successful subsidiary is not selected, its contract should be terminated for the convenience of the Government. Distinguished by B-204821, March 16, 1982 121

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Circulars
No. A-76
Cost Comparison Handbook (Supp. No. 1)
Solicitation called for bids on two methods of contracting out work being performed in-house by Government personnel. While solicitation explicitly provided for a cost comparison of the cost of performance in-house with cost of contracting out, solicitation was silent on exact method of making award between the low bidder on each of the two methods of contracting out. However, General Accounting Office finds that solicitation implied that cost principles in OMB Circular A-76 Cost Comparison Handbook would be used in the evaluation and that the two low bidders understood that such principles would be used 233
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National Federation of Federal Employees requests a determination from this Office on the exempt/nonexempt status under the Fair Labor Standards Act of civilian aircraft pilots. Under 29 U.S.C. 204, the Office of Personnel Management is authorized to administer FLSA with respect to Federal employees. In B-51325, Oct. 7, 1976, we stated that the role granted to OPM in administering FLSA necessarily carries with it the authority to make final determinations as to whether employees are covered by its various provisions. Accordingly, since OPM has in fact reviewed the claims of the employees and has determined them to be exempt from FLSA as administrative employees, this Office will not consider the claims 191
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Legality
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Air traffic controllers request that cost-of-living allowance (COLA) in Molokai, Hawaii, be computed under private housing category, since, although they occupy Federal housing, they do not do so as a condition of their civilian employment. Even though Federal Personnel Manual (FPM) Letter 591-29, Oct. 30, 1978, defines Federal housing category as applying only to those who occupy Federal housing as a condition of their employment, the FPM Letter's interpretation is erroneous since it misinterprets Executive Order 12070, as amended, which refers to Federal housing as that occupied as a result of civilian employment. Therefore, the manner in which the Federal Aviation Administration has been computing the COLA is correct 266

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Allowances

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Nonforeign areas. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES, Cost-of-living allowances, Nonforeign areas**)

Physicians Comparability Allowances. (*See* **ALLOWANCES, Physicians comparability Allowances**)

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Back Pay Act

Applicability

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Transfer from overseas station

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Employee's claim for relocation expenses which he would have received but for an improper personnel action may be paid under the Back Pay Act, 5 U.S.C. 5596. Therefore, he may be paid travel expenses of his dependent and transportation of household goods to his new official station. He may also be paid temporary quarters subsistence allowance at the new station which is within the United States, but he is not entitled to a house-hunting trip or expenses of purchase and sale of residences because his old station is not within the United States, its territories or possessions, Puerto Rico, or the Canal Zone 57

Retroactive promotions. (*See* **OFFICERS AND EMPLOYEES, Promotions, Retroactive, Back Pay Act applicability**)

Back Pay Act

Attorney fees

Air Force employee was downgraded, but was later restored retroactively by Air Force following decision of Merit Systems Protection Board (MSPB) regarding personnel actions related to "unacceptable performance." Claim for attorney fees was denied by Air Force and MSPB. Our Office has no authority to review decisions of MSPB under 5 U.S.C. 7701. In addition, under regulations implementing Back Pay Act amendments, such claim for attorney fees is subject to review only if provided for by statute or regulation. Since no review by General Accounting Office of claim presented here is authorized by statute or regulation, we may not review the prior denials..... 289

Removals, suspensions, etc.

Compensation. (*See* **COMPENSATION, Removals, suspensions, etc., Backpay, Back Pay Act of 1966**)

Backpay

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

Retroactive promotions

Detailed employees. (*See* **COMPENSATION, Backpay, Retroactive promotions, Detailed employees**)

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Public policy objectionability
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Agency did not act improperly in rejecting low bid from concern owned by employee of Federal Government because, while such contracts are not expressly prohibited by statute, except in certain situations not present here, they are undesirable and should not be authorized except where Government cannot otherwise be reeasonably supplied. Fact that service would be more expensive from other sources provides no support for determination that service cannot be reasonably obtained except from concern owned by employee of the Government 65
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Individual was terminated from employment with the Forest Service after appointment was found to be erroneous, was reemployed temporarily in lower-graded position after break in service, and was then properly appointed to original position. He claims compensation and other benefits. For period of employment prior to termination claimant is entitled to compensation earned, lump-sum payment for accrued annual leave, service credit for annual leave accural purposes, recredit of accrued sick leave to his leave account and payment for retirement deductions withheld. No entitlement exists to backpay for period after termination of original appointment since neither termination nor appointment to temporary lower-graded position constitutes unwarranted or unjustified personnel action under Back Pay Act, 5 U.S.C. 5596. Entitlement to service credit for retirement is for determination by Office of Personnel Management. 58 Comp. Gen. 734 is extended 127
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Fees for membership in organizations. (*See* **FEES, Membership**)

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Travel inseparable from work

Federal Aviation Administration employees

Uncommon tours of duty

Federal Aviation Administration employees assigned to remote radar site at Sawtelle Peak, Idaho, are entitled to be compensated for travel time to and from Ashton, Idaho, where employees are required to pick up and return Government vehicles and other special purpose vehicles necessary to negotiate route to radar site. This duty is an inherent part of and inseparable from their work and is compensable as hours of work under 5 U.S.C. 5542(b)(2) 27

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An adjustment to an employee's pay to correct erroneously withheld deductions is a matter cognizable by the General Accounting Office and the Act of Oct 9, 1940, 54 Stat. 1061, as amended, 31 U.S.C. 71a, bars refunds beyond 6 years 295

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Promotions

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Back Pay Act applicability

Detailed employees

Where agency asserts that its regulation was intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency

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policy, that regulation may provide the basis for backpay under the Back Pay Act, 5 U.S.C. 5596. While other interpretations of the regulation could be made, under the circumstances of this case the agency's interpretation is a reasonable one 492
Temporary
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Agency regulations
Where agency asserts that its regulation was intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, that regulation may provide the basis for backpay. While other interpretations of the regulation could be made, the agency's interpretation is a reasonable one 403
In *Wilson* v. *United States,* the Court of Claims ruled that no statute or provision of the Federal Personnel Manual requires a temporary promotion for an overlong detail. We followed *Wilson* in *Turner-Caldwell III,* 61 Comp. Gen. 408, and overruled our prior *Turner-Caldwell* decisions. Nevertheless, we hold that an agency, by regulation or collective bargaining agreement, may establish a policy under which it becomes mandatory to promote employees detailed to higher grade positions. The violation of such a mandatory provision in a regulation or agreement may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. 5596..... 492
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In accordance with 5 C.F.R. 335.102(f)(1) an agency may terminate an employee's temporary promotion in its discretion at any time prior to the scheduled expiration date. Also, there is no requirement that the employee should receive express notice of the termination..... 529
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Removals, suspensions, etc.
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Employees who are members of the Senior Executive Service (SES) who were awarded bonuses under 5 U.S.C. 5384 in December 1981, and whose base pay and physician comparability allowance if received in full during the remainder of the fiscal year will cause them to be paid in excess of the Executive Schedule level I pay rate, are not entitled to any pay in excess of the rate for level I. Subsection 5383(b) of title 5 specifically precludes such payment during a fiscal year if it exceeds the rate of pay for level I at the end of such fiscal year 555
Overpayments
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Employees who are members of the SES who were awarded bonuses under 5 U.S.C. 5384 in December 1981, and whose base pay, bonuses, and physician comparability allowance if received in full during the remainder of fiscal year 1982 will exceed the maximum amount they are authorized to be paid (level I of the Executive Schedule) prescribed by 5 U.S.C. 5383(b), are not entitled to waiver of the excess under 5 U.S.C. 5584, since only erroneous payments may be waived and the payments involved here were proper when made ... 555
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The Federal Bureau of Investigation (FBI) may require that an employee posted overseas sign a service agreement which obligates the employee to repay the Government the cost of his transfer to the overseas post, if he elects to retire prior to the completion of the 12-month term of the service agreement. Likewise, the FBI may require that if an employee transferred overseas voluntarily retires within a period of not less than 1 nor more than 3 years, prescribed in advance by the Director of the FBI, then the employee's return expenses shall not be allowed. It is within the FBI's discretion to make

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Law school tuition and bar review course tuition are similarly necessary expenses incurred in order to qualify for a legal position. Therefore they, like bar admission fees, are personal to the employees and are not payable from appropriated funds. The Board should make no further payments under its bar assistance program and should recover tuition and fees already paid to its employees unless waiver is granted pursuant to 5 U.S.C. 5584. B-187525, Oct. 15, 1976, is distinguished 357
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Employee's claim for relocation expenses which he would have received but for an improper personnel action may be paid under the Back Pay Act, 5 U.S.C. 5596. Therefore, he may be paid travel expenses of his dependent and transportation of household goods to his new official station. He may also be paid temporary quarters subsistence allowance at the new station which is within the United States, but he is not entitled to a house-hunting trip or expenses of purchase and sale of residences because his old station is not within the United States, its territories or possessions, Puerto Rico, or the Canal Zone 57
Government *v.* employee interest
Merit promotion transfers
Relocation expense reimbursement
Absence of agency regulations
Eugene R. Platt, 59 Comp. Gen. 699 (1980), held that when an agency issues a vacancy announcement under its Merit Promotion Program such action is a recruitment action and when an employee transfers pursuant to such action the transfer should normally be regarded as being in the interest of the Government in the absence of agency regulations to the contrary. The Commission on Civil Rights requested a review of this decision. On reconsideration, we affirm *Eugene R. Platt.* The Commission did not have regulations on this

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Merit promotion transfers—Continued
Relocation expense reimbursement—Continued
Absence of agency regulations—Continued
subject and the job vacancy announcement was unrestricted as to reimbursement, contained no limitations on geographic areas of consideration, and did not differentiate between Commission employees and others as to entitlements 156
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Eugene R. Platt, 59 Comp. Gen. 699 (1980) was silent on the question of how agencies may effecutate a policy as to when to authorize reimbursement of relocation expenses pursuant to merit promotion transfers. However, our decision does not preclude the General Services Administration, the Office of Personnel Management, or the employing agency from issuing regulations on relocation expenses and merit promotions stating conditions and factors to be considered in determining whether a transfer is in the interest of the Government. Payment of relocation expenses need not automatically be tied to the existence of a vacancy announcement issued pursuant to a Merit Promotion Program 156
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Employee of Department of Housing and Urban Development who transferred from New York to Washington, D.C., in July 1978 is not entitled to reimbusement of school tuition deposit for his child's education which he forfeited when the child withdrew from school because of employee's change of permanent station. Tuition forfeiture is not within "miscellaneous expenses" reimbursable under the Federal Travel Regulations (FTR). This decision was extended by 61 Comp. Gen. 352 136
Real estate expenses
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Purchase of ownership interest
Employee transferred from Cincinnati, Ohio, to Detroit, Michigan, in May 1981, claims certain real estate transaction expenses in connection with the purchase of a cooperative apartment at the new duty station. Following the rule established in *Zera B. Taylor,* 61 Comp. Gen. 136 (1981), in the absence of evidence clearly establishing a different arrangement, we will consider an interest in a cooperatively owned apartment building to be a form of ownership in a residence for which real estate expenses may be reimbursed as provided under the Federal Travel Regulations (FTR). This decision extends 61 Comp. Gen. 136 and distinguishes, in part, 60 Comp. Gen. 451 .....

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Transfers—Continued
Real estate expenses—Continued
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Purchase of ownership interest—Continued

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"Application fee"

In *Herbert W. Everett,* 60 Comp. Gen. 451 (1981), we held that membership fees in cooperatively owned apartments are part of the purchase price, having no relationship to any expense required for the purchase of the property. In the present case "application fee" and "lottery (unit selection) fee" may be distinguishable as incidental charges made for required services in connection with the purchase of a cooperative for which reimbursement may be further considered under para. 2-6.2f of the FTR. However, $200 claimed as an application fee must be further explained to adequately differentiate it from a membership fee. This decision extends 61 Comp. Gen. 136 and distinguishes, in part, 60 Comp. Gen. 451 352

Costs includable in purchase price

Transferred employee claims his "10% downpayment" and "security deposit" as reimbursable expenses incurred in the purchase of his cooperative apartment. Both of these monetary outlays are credited against the purchase price of the residence. Neither 5 U.S.C. 5724a nor the FTRs contemplate the Government's taking a real property interest in an employee's new residence. As the downpayment and security deposit are part of the purchase price and not a part of the cost or expenses of purchasing, they are not reimbursable as relocation expenses. This decision extends 61 Comp. Gen. 136 and distinguishes, in part, 60 Comp. Gen. 451 352

Mortgage services

Claims for expenses of "mortgage service," "insurance," and "legal service" in connection with employee's purchase of a cooperative apartment at the new official station be further explained and itemized to enable the agency to ascertain qualifying mortgage expense and insurance entitlements under para. 2-6.2d of the FTR, and qualifying legal expenses under para. 2-6.2c of the FTR. Expenses for "marketing and advertising" extend only to the sale of a residence at the old duty station under para. 2-6.2b of the FTR and may not be reimbursed in connection with the purchase of a residence at the new duty station. Expenses for "real estate tax" and "operating reserve" are specifically precluded from reimbursement under para. 2-6.2d of the FTR. This decision extends 61 Comp. Gen. 136 and distinguishes, in part, 60 Comp. Gen. 451 352

Sale of ownership interest

Carrying charge reimbursement

Employee who transferred from New York to Washington, D.C. in July 1978 claims relocation expenses in the form of carrying charges deducted from his equity refund in connection with the sale of his cooperative apartment. In the absence of evidence clearly establishing different arrangement, we will consider an interest in a cooperatively owned apartment building to be a form of ownership in a residence for which real estate expenses may be reimbursed as provided under the FTR. Since carrying charges in a cooperative usually con-

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Condominium dwelling—Continued
Sale of ownership interest—Continued
Carrying charge reimbursement—Continued
tain items such as interest and principal payments on the mortgage, insurance, utilities, cost of management and maintenance, they cannot be considered a cost incident to the sale of a residence for which reimbursement is authorized under the FTR. This decision was extended by 61 Comp. Gen. 352 136
Foreclosure sale
Litigation expenses
Employee of the Forest Service sold residence within 1 year of transfer in a sheriff's sale under court order following foreclosure. Employee may not be reimbursed under 5 U.S.C. 5724a(a)(4) for costs assessed by the court in connection with foreclosure and sale since Federal Travel Regulations para. 2-6.2c specifically precludes reimbusement for costs of litigation 112
Husband and wife divorced, etc.
House sale
Transferred employee sold her interest in residence to former husband. Although sale of interest in residence constitutes residence transaction within meaning of 5 U.S.C. 5724a(a)(4) and Federal Travel Regulations (FTR) para. 2-6.1, broker's fee paid may not be reimbursed absent showing that employee was legally obligated to make such payment to brokerage firm under law of state where residence was located. Employee may be reimbursed legal and advertising costs, but since she held title of residence with person not a member of immediate family at the time of the sale, as defined in FTR para. 2-1.4d, reimbursement is limited to extent of her interest in residence 96
Interim financing loans
House purchase
Deeds of trust pending mortgage execution
Employee executed four deeds of trust to secure interim financing for purchase of residence pending execution of first mortgage 6 months later. Mortgage was used to pay off deeds of trust. Since deeds of trust and first mortgage were secured by employee's conveyance of security interest in the property, both sets of transactions may be regarded as part of total financial package essential to purchase of residence. Consistent with 60 Comp. Gen. 650, employee may be reimbursed escrow fee charged in connection with both transactions. 55 Comp. Gen. 679 is overruled in part 607
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Transportation of household effects. (*See* TRANSPORTATION, Household effects, Time limitation)

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Failure to fulfill
Overseas employees. (*See* **OFFICERS AND EMPLOYEES, Service agreements, Overseas employees, Failure to fulfill contract)**
Temporary quarters
Absences
Effect on subsistence expenses reimbursement
After reporting to his new duty station in Albuqerque, New Mexico, and beginning occupancy of temporary quarters, employee and family moved to Aberdeen, South Dakota, for balance of authorized 30-day period. Employee was also on temporary duty and annual leave for several days during this period. The fact that the employee was away from both his old and new duty stations and that he was on annual leave is not determinative of his entitlement. He may be paid temporary quarters expenses for the days he was on annual leave, provided the agency determines that his taking leave did not cause an unwarranted extension of the period of his occupancy of temporary quarters 46
Sharing commercial lodging quarters
***Pro rata* reimbursement**
Propriety
Transferred employee reclaims amount of temporary quarters subsistence expenses administratively reduced to 50 percent pro rata share based solely on the fact that the quarters were shared by another employee during period of TQSE claim. Since employee actually incurred the expense, and in the absence of any evidence that occupancy by a second person increased the rental cost or that the amount claimed was otherwise unreasonable, the full amount of the claim is allowable 274
Sharing leased quarters
***Pro rata* expense reimbursement**
An employee shared a private residence leased by another Government employee and the employee's daughter shared an apartment with a fellow college student during the period for which temporary quarters subsistence expenses are claimed. The shared apartment arrangement involves considerations different from the rules which pertain to lodgings furnished by a friend or relative where it is difficult to place a value on the services furnished. An employee who shares responsibility for private quarters with another individual generally shares expenses on a pro rata basis at a fixed monthly amount. Therefore, he need not supply evidence that additional expense resulted from his lodging 540
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OMNIBUS RECONCILIATION ACT OF 1980
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Leaves of absence
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Holiday pay. (*See* LEAVES OF ABSENCE, Lump-sum payments, Holidays, After separation date)

PANAMA CANAL COMMISSION
Administrator
Residene maintenance expenses
Regulations governing official residences in foreign areas
For application
Expenditures for operation and maintenance of residence of Administrator of Panama Canal Commission are subject to regulations issued under 5 U.S.C. 5913, applicable to official residences in foreign areas. Under Panama Canal Act, Pub. L. No. 96-70, areas and installations in Republic of Panama made available to United States pursuant to Panama Canal Treaty and related agreements, formerly in Canal Zone, are foreign. Report ID-81-57, Aug. 5, 1981, is modified to the extent that it is inconsistent with this decision 520
Appropriations. (*See* APPROPRIATIONS, Panama Canal Commission)

PANAMA CANAL ZONE
Status. (*See* CANAL ZONE, Status)

PAY
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Training assemblies
Reserves and National Guard
Nonprior service personnel
Period awaiting initial active duty training
Army Reserve member awaiting assignment to initial active duty for training attended 22 training assemblies after termination of 180-day period following his enlistment. The member's claim for training pay may not be allowed since Army Regulation 140-1 provides that a nonprior service member is not eligible for inactive duty training pay (drill pay) for assemblies attended after the expiration of 180 days while awaiting initial active duty for training 332
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Promotions
Saved pay. (*See* PAY, Saved, Promotions)
Readjustment payment to reservists on involuntary release
Recoupment
Retirement
Bankruptcy effect
An Air Force officer who received readjustment pay upon discharge subsequently enlisted and completed 20 years of active duty for retirement. Upon retirement, the member's retired pay was withheld until an amount equal to 75 percent of his readjustment pay was recouped as is required under 10 U.S.C. 687(f). Although the

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Readjustment payment to reservists on involuntary release—Continued
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Retirement—Continued
Bankruptcy effect—Continued
member received a discharge in bankruptcy effective shortly after he retired, this did not entitle him to receive the retired pay withheld under section 687. Deduction from retired pay in the amount of 75 percent of readjustment pay is not a debt and, therefore, it is not discharged by an adjudication of personal bankruptcy 67
Retired
Certificates of existence
Procedural changes
The furnishing of reports of existence by military retirees and survivor annuitants whose checks are mailed to a foreign address and delivered through foreign postal channels may be changed to a semiannual basis from the current "one month behind" basis. This change is approved in view of the potential for administrative cost savings while still providing a reasonable protection to the Government against erroneous payments 505
Concurrent military retired and civilian service pay
Reduction in retired pay
The reduction of military retired pay required under the dual compensation restriction imposed by 5 U.S.C. 5532(c) involves a determination of the amount by which the combined rate of retired pay plus Federal civilian salary exceeds the rate of basic pay prescribed for level V of the Executive Schedule. The retired pay is reduced by that amount, subject to a proviso that the remainder must at least be equal to the cost of the retiree's participation in any survivor's benefits program or veterans insurance program 221
Foreign employment
Congressional consent
Pub. L. 95-105
Discontinuance of pay withholding
Congress has authorized retired Regular officers of uniformed services to accept compensation for employment by a foreign government if Secretary concerned and Secretary of State approve. In decision B-198557, July 17, 1980, we held that a retiree who accepts foreign employment after receiving Secretary of the Air Force's approval, but before Secretary of State's, is subject to the rule in B-178538, Oct. 13, 1977, that he must repay the United States an amount equal to compensation received from foreign government. However, we also held that when final approval is given, withholding of retired pay is to be discontinued except to the extent that retired pay was paid for the period of unauthorized employment by a foreign government. B-193562, Dec. 4, 1979, is overruled to the extent it is inconsistent with these decisions; B-198557, July 17, 1980, is clarified 306
Reports of existence. (*See* PAY, Retired, Certificates of existence)
Survivor Benefit Plan
Beneficiary payments
Bankruptcy court orders. (*See* BANKRUPTCY, Chapter 13 proceeding, Bankrupt annuitants, etc., Survivor Benefit Plan)

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Dependency and indemnity compensation
Offset
Children's benefit apportionment effect
A Survivor Benefit Plan (SBP) participant died, leaving a widow and dependent child by a former marriage. Both widow and child became entitled to separate monthly Veterans Administration Dependency and Indemnity Compensation (DIC), but since the child was living with the former spouse, the widow's DIC was reduced below the rates set by 38 U.S.C. 411(a) because of 38 U.S.C. 3107(b) under which a portion of the DIC is paid to the child. The widow's DIC must be deducted from her monthly SBP annuity; however, in a case where a portion of the DIC is paid to the child, the annuity is to be reduced only by the actual DIC payment the widow receives 298
Refund of contributions
When upon a service member's death the surviving spouse is eligible for both a Survivor Benefit Plan (SBP) annuity and Veterans Administration Dependency and Indemnity Compensation (DIC), the amount of the SBP payment is reduced by the amount of the DIC and a corresponding refund of the member's SBP contributions is due the spouse. If DIC entitlement is subsequently lost due to remarriage of the spouse, SBP may be reinstated provided the refund is returned. However, no refund is payable once the benefit of the plan has been derived. Accordingly, when a refund is repaid and SBP payments are thereafter made, no additional refund is authorized should the spouse again become eligible for DIC 287
Refund entitlement
Children's benefit apportionment effect
Where a widow's Survivor Benefit Plan annuity is reduced pursuant to 10 U.S.C. 1450(c) by the award of Dependency and Indemnity Compensation (DIC), the computation of the cost of the recalculated annuity for refund of cost of participation is to be predicated on the actual monthly DIC payment the widow receives in her own right under 38 U.S.C. 411(a), as reduced by apportionment to a child under 38 U.S.C. 3107(b) 298
Non-Regular service
Retired pay eligibility loss
Effect on SBP coverage prior to retirement
An Air Force Reserve officer elected Survivor Benefit Plan coverage for his children under new provisions added by Pub. L. 95-397 when he was notified of his eligibility (except that he had not reached age 60) for non-Regular retired pay under 10 U.S.C. chapter 67. Subsequently he became eligible for retirement under 10 U.S.C. 8911 but was not retired. Later he was killed while on active duty for training. Although he lost eligibility for retired pay under chapter 67 upon becoming eligible for retirement under section 8911, his original election of coverage for his children continued in effect since he had not retired under section 8911 when he died. Therefore, the children are entitled to a Survivor Benefit Plan annuity under that election 441

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Non-Regular service—Continued
Retired pay eligibility loss—Continued
Reelection of SBP coverage after retirement
Under provisions added to the Survivor Benefit Plan by Pub. L. 95-397, members notified of their eligibility (except for not having reached age 60) for non-Regular retired pay under 10 U.S.C. chapter 67 may elect immediate coverage for dependents. If such a member becomes entitled to retired pay under another law the member loses eligibility for chapter 67 retired pay, but the Survivor Benefit Plan election remains effective until the member actually retires. He is then covered by other provisions of the Plan and may make a new election 441
Withholding
Foreign employment. (*See* **PAY, Retired, Foreign employment**)
Saved
Promotions
Warrant officer to commissioned officer
Public Law 96-343 applicability
Intervening enlisted status
Army warrant officer accepted an appointment as a commissioned officer in the Air Force following his completion of training at the Air Force Officer Training School. Under the revised language of 37 U.S.C. 907 he is entitled to saved pay as a warrant officer, notwithstanding the fact that he began officer training 6 days after he was released from active duty in the Army and the fact that he was paid as a staff sergeant while attending Officer Training School 296
Service credits
Constructive
Medical/dental officer education
Statutory repeal
Effect on statutory contract entitlements
Participants in the National Health Service Corps Scholarship Program enter into a "written contract" prescribed by 42 U.S.C. 294t(f) in which they become eligible for a scholarship in return for their agreement to serve after their graduation from professional school with the Dept. of Health and Human Services "in a health manpower shortage area," either as civilians, or as officers of the Public Health Service if they elect to apply for a commission and are accepted. The terms of this statutory contract do not give rise to an entitlement for program participants commissioned as medical and dental officers of the Public Health Service after Sept. 15, 1981, to constructive service credit under the provisions of 37 U.S.C. 205(a)(7) and (8) which were repealed on that date 461
Saving clause interpretation
The Defense Officer Personnel Management Act repealed constructive longevity of service credit for medical and dental officers of the uniformed services effective Sept. 15, 1981, and it contained a saving clause with plain and unambiguous language specifically preserving the credit only for service members who on that date were already medical and dental officers, or were enrolled in the Uniformed Serv-

PAY—Continued Page
Service credits—Continued
Constructive—Continued
Medical/dental officer education—Continued
Statutory repeal—Continued
Saving clause interpretation—Continued
ices University of the Health Sciences or the Armed Forces Health Professions Scholarship Program (10 U.S.C. ch. 104 and 105). The saving clause may not be extended to participants in the National Health Service Corps Scholarship Program or the Senior Commissioned Officer Student Training and Extern Program (42 U.S.C. 294t, 218a), since there is no justification for a conclusion that their omission was clearly inadvertent and would lead to an absurd result 461
Scope of applicability
The Defense Officer Personnel Management Act, Pub. L. 96-513, repealed 37 U.S.C. 205(a)(7) and (8), which had authorized constructive longevity of service credit for medical and dental officers of the uniformed services based on their years of professional education. The constructive service credit was terminated because the Congress had concluded that it resulted in an anomalous receipt of elevated basic and retired pay by medical and dental officers, and inaptly encouraged their early retirement. Also, the Congress had developed a special pay system for all uniformed health professionals to increase their current income, and it was concluded that the constructive service credit for medical and dental officers was therefore no longer appropriate 461
Public Health Service
Constructive longevity of service
Statutory repeal effect
Participants in the National Health Service Corps Scholarship Program and the Senior Commissioned Officer Student Training and Extern Program (42 U.S.C. 294t, 218a) were advised by the Public Health Service prior to 1981 that persons it commissioned as medical and dental officers received constructive service credit for their years of professional education under 37 U.S.C. 205(a)(7) and (8). That advice was accurate when given, but 37 U.S.C. 205(a)(7) and (8) were repealed in 1981. The program participants should have realized that the advice they received was subject to future changes in the law, but even if they were misled in the matter payments to them under the repealed law may not be made 461
Training
Assemblies. (*See* **PAY, Drill, Training assemblies**)
Withholding
Debt collection
Alimony and child support
Garnishment order overturned
Reclaim denied
The Air Force, which had been complying with a Florida state court order granishing the pay of one of its members from June 1976 through May 1980 for child support, incurred no obligation to reimburse the member when the garnishment was later set aside by the court. The original court order was reviewed by the Air Force which found it appeared valid on its face. Therefore, pursuant to 42 U.S.C.

PAY—Continued Page
Withholding—Continued
Debt collection—Continued
Alimony and child support—Continued
Garnishment order overturned—Continued
Reclaim denied—Continued
659, the Air Force was required to comply with it, and by doing so incurred no liability. Also, 42 U.S.C. 659(f) (Supp. III, 1979) currently provides that no agency or disbursing officer will be held liable for making payments when the legal process appears valid on its face..... 229

PAYMENTS
Erroneous
Accountable officer's liability
Relief authority
Monetary limit established by General Accounting Office (GAO) (currently $500) for administrative resolution of irregularities in the accounts of accountable officers applies only to the physical loss or deficiency of Government funds, and not to illegal or improper payments. Accordingly, request for relief under 31 U.S.C. 82a-2 was properly submitted to GAO where deficiency of $102 resulted from improper payment based on fraudulently altered travel orders..... 646
In lieu of taxes. (*See* TAXES, Federal payments in lieu of taxes)
Late charges
Government liability. (*See* CONTRACTS, Payments, Past due accounts, Late charges)
Voluntary
No basis for valid claim
Exception
Urgent/unforeseen circumstances
Payment in Government's interest
No officer or employee of the Government can create a valid claim in his favor by paying obligations of the United States from his personal funds which he is neither legally required nor authorized to pay. Employee reimbursement will not be authorized for such voluntary payments of Government obligations from personal funds. The only recognized exception to this voluntary creditor rule is where the personal expenditures were in the Government's interest and arose under urgent and unforeseen circumstances. *See* 60 Comp. Gen. 379 (1981) and B-195002, May 27, 1980 575
Reimbursement approved
Internal Revenue Service
Tax lien filing
Recording, etc. fees
An employee of the Internal Revenue Service (IRS), Southwest Region, as part of his official duties, is required to pay recording fees associated with filing and releasing Federal tax liens against the property of delinquent taxpayers. Although these fees are undoubtedly obligations of the Government, the employee expended $236 of his personal funds on Federal tax lien fees. However, since formal IRS policy authorized payment of such fees with an employee's personal funds and comtemplates that the employee will be reimbursed from agency appropriations, payment of these fees with personal funds did

PAYMENTS—Continued Page
Voluntary—Continued
Reimbursement approved—Continued
Internal Revenue Service—Continued
Tax lien filing—Continued
Recording, etc. fees—Continued
not render the employee a voluntary creditor. Accordingly, employee's claim for Federal tax lien fees may be properly certified for payment 575
Reimbursement not approved
Internal Revenue Service
Tax lien filing
Check-printing charges
An employee of the IRS, Southwest Region, as part of his official duties, is required to pay recording fees associated with filing and releasing Federal tax liens against the property of delinquent taxpayers. Although alternative payment procedures were authorized, the employee effected payment by use of personal checks drawn on a special personal bank account for which he incurred $35.13 in check printing charges. IRS neither authorized nor approved reimbursement of its employees for expenses incurred for the printing of checks. Moreover, the evidence of record is that IRS would not have approved such expenses if the employee had sought advance agency approval, and does not demonstrate either urgent or unforeseen circumstances. Consequently, the employee acted as a volunteer. Under the voluntary creditor rule his claim for printing of these personal checks may not be properly certified for payment 575

PERSONAL FURNISHINGS (*See* **CLOTHING AND PERSONAL FURNISHINGS, Special clothing and equipment**)

PERSONAL SERVICES
Contracts
Compliance with Federal procurement, etc. statutes
When agency contracts under authority of 5 U.S.C. 3109 with consultant on independent contractor basis, it is still required to follow formal contracting procedures and otherwise comply with the applicable statutory and regulatory provisions governing Federal procurements and the recording of obligations. Although the U.S. Advisory Commission on Public Diplomacy did not follow proper procedures in this respect in contract it entered into with private law firm we do not object to payment of contract claim in this case because the Advisory Commission has authority to contract and because the law firm satisfactorily performed its obligations under the contract. Also, the parent agency—the International Communication Agency—has indicated its willingness to pay the claim 69
Private contract *v.* Government personnel
Legal services
Contract entered into by the United States Advisory Commission on Public Diplomacy with private law firm for legal services concerning authority of the Advisory Commission and extent of its independence does not constitute illegal personal services contract, since law firm was hired on an independent contract basis requiring no more than minimal supervision and not on employer-employee basis. Fur-

PERSONAL SERVICES—Continued Page
Private contract *v.* Government personnel—Continued
Legal services—Continued
thermore, type of legal services required, involving legal analysis of authority and independence of Advisory Commission, was not related to litigation within jurisdiction of Department of Justice. Also, Advisory Commission's need for second legal opinion, unencumbered by conflict of interest, was not unreasonable under circumstances 69

PRESIDENT
Former
Transition period funds
Availability
Inauguration Day
Travel expenses of invited guests
General Accounting Office does not object to the General Services Administration (GSA) proposal to recognize ceremonial nature of Inauguration Day departure flights of outgoing President and his guests as traditional and necessary part of Presidential transition. Accordingly, GSA may use funds available under the Presidential Transition Act of 1963, as amended, 3 U.S.C. 102 note, to pay expenses of former President's guests without determining for each one the type of role each played in the transition. Of course, GSA must assure Inauguration Day travel with the former President is not subject to abuse 613

PRESIDENTIAL TRANSITION ACT
Transition period funds
Availability
Former Presidents. (*See* PRESIDENT, Former, Transition period funds, Availability)

PROPERTY
Private
Damage, loss, etc.
Personal property
Claims Act of 1964
Third party liability
Department of Justice may deposit funds received from carriers or insurers for damage to or loss of employee's personal property while in transit, for which agency has paid claim pursuant to 31 U.S.C. 241, in appropriation from which payment was made, and not in miscellaneous receipts in the Treasury, since amount received from carrier or insurer constitutes refund of payment made to employee. B-170663, Jan. 21, 1971, is overruled in part 537

PURCHASES
Purchase orders
Federal Supply Schedule
Combining FSS and non-FSS items in one order. (*See* CONTRACTS, Federal Supply Schedule, Purchases elsewhere, Award combining FSS and non-FSS items)

PURCHASES—Continued Page
Small
Competition
Adequacy
Since small purchases do not require maximum competition, General Accounting Office (GAO) will review a contracting agency's approach to defining the field of competition only in a case of fraud or intentional misconduct, or where it appears that there has not been a reasonable effort to secure price quotations from a representative number of responsible firms. Once the field of competition is defined, however, GAO will review the procurement to insure that it is conducted and concluded consistent with the small purchase selection procedures and the concern for a fair and equitable competition that is inherent in any procurement 320
Requests for quotations
Misplaced lower offer
Effect on award
In view of the need for the orderly and expeditious fulfillment of an agency's requirements, GAO will not disturb a small purchase contract where after award the contracting agency discovers a lower priced offer that had been timely received but misplaced before it could be recorded, absent evidence of a conscious or deliberate effort to prevent award to that offeror 320

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Occupancy of private quarters
Pay grade basis of entitlement
Pub. L. 96-579
Temporary duty on shipboard prior to permanent duty
A member in pay grade E-7 and above may elect not to occupy Government quarters and receive a basic allowance for quarters and a variable housing allowance instead, while performing temporary duty at his permanent duty station, a ship and its home port, prior to reporting to his permanent assignment on the ship, since Pub. L. 96-579, Dec. 23, 1980, amended 37 U.S.C. 403 to authorize such election 602

RECORDS
Access to non-Government records by GAO
Pacific Northwest Electric Power and Conservation Planning Council
General Accounting Office may scrutinize funding and functions and responsibilities of Pacific Northwest Electric Power and Conservation Planning Council through its authority to audit BPA's financial payments to Council under Pub. L. 96-501 and governmental programs and activities under 31 U.S.C. 1154(a) and to obtain access to Council's records. Also, BPA might work out with the Council some procedures short of direct audit to provide additional oversight of Council's use of funds 477

RECLAMATION SERVICE. (*See* BUREAU OF RECLAMATION)

REGULATIONS
Army Department. (*See* ARMY DEPARTMENT, Regulations)

REGULATIONS—Continued Page
Joint Travel. (*See* JOINT TRAVEL REGULATIONS)
Promotion procedures
Agency's interpretation
Acceptance
Where agency asserts that its regulation was intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, that regulation may provide the basis for backpay. While other interpretations of the regulation could be made, the agency's interpretation is a reasonable one 403
Travel
Federal
Transportation of household effects
Containerized shipments
Net weight computation
Civilian employee of Dept. of the Army had household goods shipped from McLean, Va., to the Canal Zone (now Republic of Panama) incident to an official change of duty station in 1975. Employee was authorized shipment of maximum household goods at a net weight of 3,750 pounds, but he exceeded that weight and now owes the Government the difference between the authorized net weight and the actual net weight. The issue considered is how to determine actual net weight under para. 2-8.2b(3) of the Federal Travel Regulations. We conclude that net weight under para. 2-8.2b(3) is determined by subtracting the container weight from the gross weight of the goods shipped and multiplying the resulting figure by 0.85. Stated as an equation: n = .85(g-c). The computational method applied in our decision *Wayne I. Tucker,* 60 Comp. Gen. 300 will no longer be followed 452
Joint. (*See* JOINT TRAVEL REGULATIONS)

RELEASES
Proper release or acquittance
Bankrupt Survivor Benefit Plan annuitant
Although 10 U.S.C. 1450(i) provides that a Survivor Benefit Plan (SBP) annuity is not subject to assignment, attachment, garnishment, or other legal process, the annuity may be paid to a trustee in bankruptcy pursuant to the order of a bankruptcy court in a proceeding under Chapter 13 of the Bankruptcy Code (11 U.S.C. 1301-1330 (Supp. III, 1979)), since such proceeding is completely voluntary on the part of the debtor and court could order the annuitant to pay the trustee. Thus, Government receives a good acquittance when the annuity is paid to the trustee at the request of the annuitant 245

RETIREMENT
Civilian
Disability
Sick leave status on approval date
Separation date
Right to select
An employee on sick leave at the time his disability retirement was approved should be afforded the opportunity to select a separation date which is most advantageous to him in accordance with

RETIREMENT—Continued Page
Civilian—Continued
Disability—Continued
Sick leave status on approval date—Continued
Separation date—Continued
Right to select—Continued
Office of Personnel Management regulations. He is also entitled to be credited with sick and annual leave accrued while on sick leave prior to his separation date. Section 402 of Public Law 96-499 does not affect an employee's right to holiday pay before his separation date.... 363
Refund of deductions
Erroneous appointments
Individual was terminated from employment with the Forest Service after appointment was found to be erroneous, was reemployed temporarily in lower-graded position after break in service, and was then properly appointed to original position. He claims compensation and other benefits. For period of employment prior to termination claimant is entitled to compensation earned, lump-sum payment for accrued annual leave, service credit for annual leave accrual purposes, recredit of accrued sick leave to his leave account and payment for retirement deductions withheld. No entitlement exists to backpay for period after termination of original appointment since neither termination nor appointment to temporary lower-graded position constitutes unwarranted or unjustified personnel action under Back Pay Act, 5 U.S.C. 5596. Entitlement to service credit for retirement is for determination by Office of Personnel Management. 58 Comp. Gen. 734 is extended..... 127
Service credits
Prior non-Government service
Radio Free Europe
Foreign Service Act amendments
Effective Feb. 15, 1981, section 2313 of the Foreign Service Act of 1980 amended 5 U.S.C. 8332 to allow civil service retirement credit for employment with Radio Free Europe. Since 5 U.S.C. 6303(a) provides that service creditable under section 8332 shall be used in determining annual leave earning category, employee's leave accrual category should be adjusted effective Feb. 15, 1981, to credit service with Radio Free Europe. Enactment of section 2313 does not entitle employee to annual leave benefits under 5 U.S.C. 6301, *et seq.*, for period of non-Federal service with Radio Free Europe or to additional leave for periods of covered service prior to Feb. 15, 1981 279
Farm Credit district plans
Examination and audit requirements. (*See* **FARM CREDIT ADMINISTRATION**)

ST. ELIZABETHS HOSPITAL
Appropriations
Deficiencies
Anti-Deficiency Act
Services to District of Columbia
Reimbursement shortages
Where current appropriation to St. Elizabeths Hospital is limited in amount, Hospital will violate Antideficiency Act, 31 U.S.C. 665(a),

ST. ELIZABETHS HOSPITAL—Continued Page
Appropriations—Continued
Deficiencies—Continued
Anti-Deficiency Act—Continued
Services to District of Columbia—Continued
Reimbursement shortages—Continued
if obligations exceed this amount even though Hospital is entitled to, but has not received, reimbursement from the District of Columbia for services provided District residents 661
"Authorized by law"
Specific authority requirement
Antideficiency Act, 31 U.S.C. 665(a), phrase excepting obligations authorized by law does not provide authority for St. Elizabeths Hospital to exceed appropriation on basis of mandatory language in District of Columbia Code, 21 D.C. 501, *et seq* 661

SALES
Lottery
Multiple drawings
Subsidiary bids
New lottery recommended
Recommendation is made that Department of Energy conduct a new lottery, which includes the prior unsuccessful bidders who are still interested in obtaining an award under the solicitation, but only one of the two subsidiaries of parent corporation which participated in the previous lottery. If the previously successful subsidiary is not selected, its contract should be terminated for the convenience of the Government. Distinguished by B-204821, March 16, 1982 121
Unfair advantage consideration
Natural gas sales
Statutory requirement that all interested persons be afforded a full and equal opportunity to acquire petroleum products is not satisfied when two subsidiaries of the same parent corporation participate separately in a lottery sale. Distinguished by B-204821, March 16, 1982 121

SET-OFF
Authority
State, etc. debts to United States
District of Columbia
When the Federal payment to the District of Columbia has been appropriated and apportioned it becomes due and payable to the District. At this time, before payment to the District, it is available for offset for claims of St. Elizabeths Hospital for services provided District residents 661
Compensation, etc. due civilian employees
Availability
Erroneous payments
Employees' Compensation Fund
Interagency reimbursement effect
Payments to an Air Force employee from the Department of Labor's Employees' Compensation Fund are repaid to the Fund by the Air Force pursuant to 5 U.S.C. 8147. An overpayment by the Fund becomes an overpayment within the meaning of 5 U.S.C. 5514

SET-OFF—Continued Page
Compensation, etc. due civilian employees—Continued
Availability—Continued
Erroneous payments—Continued
Employees' Compensation Fund—Continued
Interagency reimbursement effect—Continued
when the agency is billed for the payment by the Department of Labor. Therefore, an overpayment by the Fund to the employee may be collected by the Air Force under 5 U.S.C. 5514 as if it had been made directly by the Air Force 450
Transportation
Overcharges. (*See* TRANSPORTATION, Overcharges, Set-off)

SMALL BUSINESS ACT
Amendment. (*See* SMALL BUSINESS ADMINISTRATION, Small Business Act, Amendment)

SMALL BUSINESS ADMINISTRATION
Authority
Small business concerns
Contract awards. (*See* CONTRACTS, Small business concerns, Awards, Small Business Administration's authority)
Contracts
Contracting with other Government agencies
Procurement under 8(a) program
Award validity
Adverse size determination after award
Award of 8(a) contract is not affected by adverse size determination made by SBA subsequent to award 79

Contractor eligibility
Adverse size determination by appeals board
Prior decision, which sustained a protest against award of a contract under the Small Business Administration's section 8(a) program to a firm determined by the SBA Size Appeals Board not to be small, is affirmed where it has not been established that the decision was based on an error of law or fact 545
Termination
Small Business Administration (SBA) regulations which interpret Small Business Act as requiring full hearing prior to termination from 8(a) program of firm found to be a large business are to be accorded great deference, and will be accepted where the protester has not shown interpretation to be unreasonable 79
Small Business Act
Amendment
Public Law 95-507
Section 211
Contractor eligibility
Whether management agreement between 8(a) firm and large business removes management and control over daily operations from 8(a) firm so that firm would not be eligible for 8(a) assistance under statutory criteria is matter within reasonable discretion of Small Business Administration 141

SMALL BUSINESS ADMINISTRATION—Continued Page
Small Business Act—Continued
Amendment—Continued
Public Law 95-507—Continued
Section 211—Continued
Subcontracting plans in negotiated procurements
Provision of Pub. L. 95-507 (95th Cong., 2nd. sess.), requiring the negotiation with awardee of a small business subcontracting plan prior to award, is not applicable to protested procurement because contract offered no subcontracting possibilities. Record shows that awardee maintained an in-House capability to perform the contract work 194

STATES
Federal payments for special services
Traffic lights
At/near Federal installations
Appropriation availability
Defense Department
General Accounting Office will no longer object to use of appropriations to finance installation of traffic signals at or near Federal installations where such installation is not a service which the State or local jurisdiction is required to provide for all residents of the area free of charge, and the charge does not discriminate against the United States. Previous Comptroller General decisions to the contrary (36 Comp. Gen. 286, 51 *id.* 135, and similar cases) are hereby modified 501
Federal payments in lieu of taxes
Distributions to units of local government
"Received" revenue status
Distribution to school districts
County supported
Where county is responsible for supporting schools and funds them with its own tax revenues, entire amount of Forest Service (16 U.S.C. 500) revenues expended for schools, regardless of whether such expenditure exceeds minimum required by State law, must be treated as received for purposes of computing county's payment under the Payment in Lieu of Taxes Act, 31 U.S.C. 1602. 58 Comp. Gen. 19 is amplified 365
Payments to independent school districts
Delegation of State's distribution authority
If no minimum payment is specified in State law, but instead the State delegates the right to determine the amount of the Forest Service receipts to pass on to the politically and financially independent school districts to the County Board of Supervisors, the entire payment to the schools may be regarded as the equivalent of a State-mandated minimum, and need not be deducted from the Payment in Lieu of Taxes Act payment. In case of Arizona, however, State statutes indicate that school districts are not independent of county. Definitive interpretation of status of school districts is for Arizona authorities. 58 Comp. Gen. 19 is amplified 365

STATES—Continued Page
Federal payments in lieu of taxes—Continued
Distributions to units of local government—Continued
"Received" revenue status—Continued
Payments to independent school districts—Continued
Exceeding State's minimum requirements
Where county, which is required by State law to pass a certain portion of its Forest Service receipts on to politically and financially independent school districts, chooses to pass on sum which exceeds State-mandated minimum, amount by which county's expenditure exceeds minimum must be viewed as "received" for purposes of computing the Payment in Lieu of Taxes Act payment. 58 Comp. Gen. 19 is amplified 365

STATUTES OF LIMITATION
Claims
Claims settlement by GAO
Erroneous deductions from salary
Payroll adjustment
Refunds
An adjustment to an employee's pay to correct erroneously withheld deductions is a matter cognizable by the General Accounting Office and the Act of Oct. 9, 1940, 54 Stat. 1061, as amended, 31 U.S.C. 71a, bars refunds beyond 6 years 295
Fair Labor Standards Act applicablity
Retroactive payments
Overtime
Prior decision in *Meat Graders,* B–163450.12, Sept. 20, 1978, is modified to remove bar to retroactive payments of FLSA overtime where employee was erroneously classified as exempt by employing agency and should properly have been nonexempt under published OPM guidance. However, where employing agency raises issue that there was a possible change in employees' duties over 5-year period, OPM should determine status of employees for all of the retroactive period in question and employees are entitled to retroactive pay only for such period they are properly in nonexempt status. Claims for retroactive payment are subject to 6-year statute of limitations. See 31 U.S.C. 71a and 237 152
Date of accrual
Relocation expenses
Erroneous separation
Back Pay Act applicability
Employee was mistakenly returned to California from Vietnam in 1973 for separation. About 1½ months later he was reemployed in Washington State. After a timely appeal of the separation the Civil Service Commission, in 1978, found that he had been improperly separated. The separation action was canceled and he was retroactively shown in a pay status during the 1½ month interim period. His claim for relocation expenses from California to Washington did not accrue until the CSC determination was made; therefore, it was not barred by the 6-year time limit on filing claims (31 U.S.C. 71a) when filed in GAO in 1980 57

STATUTES OF LIMITATION—Continued Page

Claims—Continued

General Accounting Office

Submission date of original claim

Subsequent law suit

Time-barred claim revival

The National Transportation Safety Board may administratively settle overtime travel claims of air safety investigators for periods of time not time barred under 31 U.S.C. 71a, pursuant to the Court of Claims reasoning in *Russel J. Abbott, et al.* v. *United States,* Ct. Cl. No. 317-71, May 30, 1980. Decision 52 Comp. Gen. 702 will no longer be followed 626

Transportation

Discount deductions

Carrier's recovery claim

Where statute permits filing of transportation claims within a 3-year statute of limitation period, carrier cannot be estopped from filing such claims within this period by its acceptance of initial payment of bill submitted 323

STATUTORY CONSTRUCTION

Persons and things enumerated

Omissions

A statutory saving clause generally preserves rights under repealed legislation only to the extent that those rights are enumerated in its provisions. Statutory provisions with unambiguous language and specific directions may not be construed in any manner that will alter or extend their plain meaning, and if persons and things to which a statute refers are specifically and unambiguously designated, it is to be inferred that all omissions were intended. However, if giving effect to the plain meaning of words in a statute leads to an absurd result that is clearly unintended and at variance with the policy of the legislation as a whole, the purpose of the statute rather than its literal words will be followed 461

STORAGE

Household effects

Military personnel

Time limitation

Divorce effect

Property awarded to ex-wife

Nontemporary storage at Government expense of a service member's household goods should be terminated as soon as practicable after a State court awards the stored property to the member's ex-spouse and the member declines to use his transportation allowance to ship the goods to his divorced spouse. However, the goods may be retained in storage for a reasonable time, not to exceed the member's entitlement period, while the ex-spouse arranges for the disposition of the goods 180

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SUBSISTENCE

Actual expenses

Maximum rate

Reduction

Meals, etc. cost limitation

Lodging cost not incurred

Employee on temporary duty assignment questions agency's authority to issue guidelines limiting reimbursement for meals and miscellaneous expenses to 46 percent of the maximum rate for actual subsistence expenses when traveler incurs no lodging expenses. Agency may issue guideline alerting employees that the maximum amount considered reasonable under ordinary circumstances is 46 percent of the statutory maximum, but it should also provide that amounts in excess of 46 percent may be paid if adequate justification based on unusual circumstances is submitted 13

Per diem

"Lodgings-plus" basis

Computation

Fraudulent claims. (*See* **FRAUD, False claims, Per diem, "Lodgings-plus" basis)**

Overseas employees

Delays

Rest stopover

Renewal agreement travel

Employee who performed renewal agreement travel from Kwajalein, Marshall Islands, to Huntsville, Ala., arrived at Hickam Air Force Base, Hawaii, at 6:30 p.m. after 5½ hour flight and continued on to Los Angeles by flight departing from Honolulu at 11:30 p.m., 2 days later. Employee's entitlement to per diem should not be based on constructive schedule which requires him to continue on from Hawaii by flight departing at 11:30 p.m. on same night as his arrival at Hickam AFB. The fact that the employee traveled at a late hour following 2 days of rest does not warrant departure from constructive travel schedule otherwise applicable which would permit him to continue on at a reasonable hour the following morning 448

Temporary duty

At former permanent duty station

Prior to reporting to new duty station

What constitutes reporting

Employee who traveled to his new duty station on a house-hunting trip prior to the date scheduled for his transfer, and on the day before his scheduled transfer date received temporary duty orders for duty at his old station, may not be paid per diem and mileage at the old duty station unless it is determined that he did, in fact, report for duty at the new duty station before returning to the old duty station. 54 Comp. Gen. 679 is distinguished 339

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Federal payments in lieu of taxes

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Deduction propriety
Where county is responsible for supporting schools and funds them with its own tax revenues, entire amount of Forest Service (16 U.S.C. 500) revenues expended for schools, regardless of whether such expenditure exceeds minimum required by State law, must be treated as received for purposes of computing county's payment under the Payment in Lieu of Taxes Act, 31 U.S.C. 1602. 58 Comp. Gen. 19 is amplified 365
State
Government immunity
Incidence of tax on vendor
Public utility license
Commission order to bill customers effect
Veterans Administration Medical Centers are not constitutionally immune from paying Alabama public utility license tax which was added to their bills by Alabama Power Company. Legal incidence of State tax, which is levied on vendor of services to United States, and which is not required by taxing statute to be passed through to consumer, is on vendor, not the United States. United States is not constitutionally immune from such vendor tax. Utility commission order requiring utility to bill customers for tax does not transfer legal incidence of tax to customers 257

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Contract for automatic distributing system. (*See* COMMUNICATION FACILITIES, Contracts, Automatic call distributing systems)
Private residences
Prohibition
Exceptions
Federal Secure Telephone Service (FSTS) installation
National security justification
General Services Administration proposal to install Federal Secure Telephone Service (FSTS) telephones in private residences for official Government business of a sensitive nature subject to National Security Agency (NSA) guidelines does not violate 31 U.S.C. 679, which prohibits the expenditure of appropriated funds for telephone service installed in private residences. FSTS system has sufficient safeguards built in to reduce danger of abuses this statute was intended to address 214

TRANSPORTATION
Bills
Payment
Discount provisions. (*See* CONTRACTS, Discounts, Transportation charges)

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Dependents

Immediate family

Grandchildren

Legal guardianship status

State law requirements

Grandchildren who are not under the legal guardianship of an employee of the Department of Defense or of his spouse may not be considered that employee's dependents for the purposes of establishing entitlement to travel and transportation allowances under the Joint Travel Regulations or overseas allowances under the Department of State Standardized Regulations even though those grandchildren reside with the employee at his overseas station. Status of legal guardianship is determined by applicable State law 149

Military personnel

Divorce, separation, etc.

Travel completion

Proposed amendment to the Joint Travel Regulations, to increase from 6 months to 1 year after relief of uniformed services member from his overseas duty station during which transportation of ex-family members must take place, should not be implemented. Any extension of time for travel beyond that currently allowed may be authorized only if justified on an individual case basis when it can be shown that the return took place as soon as reasonably possible after the divorce and departure of the member from the overseas station 62

Household effects

Military personnel

Shipment to divorced wife

Authorization propriety

Property awarded to ex-wife

When household goods are awarded to an ex-spouse of a service member incident to their divorce, the member may authorize shipment of the ex-spouse's household goods under the member's transportation entitlement at Government expense one last time since, although legally the property would no longer be the member's or his dependent's property, it is recognized that ordinarily such property has been shipped to its present location by the Government and is often commingled with goods belonging to or to be used by the member's children 180

Dual entitlements

Supplementation agreements

It is a matter for the service member to decide whether to use his transportation entitlement to ship household goods to his divorced spouse at an alternate destination. That the ex-spouse is also a service member does not change this. While each member is allowed his transportation entitlement in his own right as a member, if one member agrees to use his entitlement to supplement the other member's entitlement incident to dividing the household goods upon divorce, he may do so 180

Excess cost liability

Any excess charges incurred by a service member as a result of using his transportation entitlement to ship household goods to his

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divorced spouse at an alternate location must be borne by the member 180

Storage. (*See* **STORAGE, Household effects**)

Time limitation

Beginning and end of period

Administrative intent

A transferred employee, whose claim for shipment of household goods was denied by the agency in accordance with para. 2-1.5a(2) of the Federal Travel Regulations because the shipment took place more than 2 years after the effective date of the transfer, may not be reimbursed. The employee reported to his new duty station before travel authorization was signed but later date may not be used for computation of 2-year period for regulations define effective date of transfer as date employee reports to new duty station (see FTR para. 2-1.4) and agency's clear intent was to transfer employee on the earlier date 164

Weight

Net

Computation formula

Containerized shipments

Civilian employee of Dept. of the Army had household goods shipped from McLean, Va., to the Canal Zone (now Republic of Panama) incident to an official change of duty station in 1975. Employee was authorized shipment of maximum household goods at a net weight of 3,750 pounds, but he exceeded that weight and now owes the Government the difference between the authorized net weight and the actual net weight. The issue considered is how to determine actual net weight under para. 2-8.2b(3) of the Federal Travel Regulations. We conclude that net weight under para. 2-8.2b(3) is determined by subtracting the container weight from the gross weight of the goods shipped and multiplying the resulting figure by 0.85. Stated as an equation: $n=.85(g-c)$. The computational method applied in our decision *Wayne I. Tucker,* 60 Comp. Gen. 300 will no longer be followed 452

Weight limitation

Excess cost liability

Actual expense shipment

Computation formula

An employee whose household goods shipment exceeds his authorized weight must reimburse the Government in accordance with paragraph 2-8.3b(5) of the Federal Travel Regulations for the cost of transportation and other charges applicable to the excess weight. Since there is no way to discern which charges are applicable to the authorized weight and which charges are on account of the excess weight, the regulation provides a formula based on a ratio of excess weight to total weight as a proportion of the total charges. Accordingly, the net amount actually paid by the Government is for use in

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Weight certificate invalid
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What constitutes
Household effects and public property items
Where Department of Defense Volume Movement Announcement invites rate offers for transportation of household goods and DOD regulations describe such service as a method of moving members' personal property, the term "household goods" does not include public property and carrier's tenders submitted in response to announcement therefore does not encompass such public property..... 526
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Merger of debtor corporation
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Assets *v.* capital stock transfer
Parent or affiliate corporation is not liable for overcharges collected by debtor corporation on theory of de facto merger where there is no evidence that corporations merged 526
Mutuality of parties, etc.
Agency relationship
Absence on date of overcharge collection
Where capital stock of debtor corporation was purchased by holding company and agency relationship with debtor's affiliate was established subsequent to collection of overcharges by debtor, latter's corporate identity cannot be disregarded to hold parent or affiliate liable for overcharges on basis of agency in absence of evidence that control was exercised over debtor at the time the act complained of took place 526
Rates
Mixed shipments
Classification mixing rule
Where tender offers Government lower rates for a Freight-all-kinds (FAK) mixed shipment, but states that the truckload FAK

TRANSPORTATION—Continued Page
Rates—Continued
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Classification mixing rule—Continued
rates will not apply to contraband such as radioactive materials, General Services Administration may apply truckload FAK rates to non-contraband portion of shipment and use other applicable less than truckload rates for the contraband. The National Motor Freight Classification Rule 645, which governs tender applicable here, does not prohibit GSA's application of the tender FAK rates under these circumstances 470
Tariffs
Incorporation by reference
Scope
Freight, all kinds shipments
Where formula for determining freight all kinds (FAK) rate offered in carrier's tender provides for taking percentage of applicable class 100 rate from appropriate tariff, there is no intention to further refer to the National Motor Freight Classification to determine each article's individual class rating because formula clearly implies a class 100 basis and to do so would defeat the obvious purpose of the tender to offer Government FAK rates which are in the nature of commodity rates and designed to bypass the classification rating process 589

TRAVEL EXPENSES
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Acceptance by agency
In view of the Merit Systems Protection Board's (MSPB) statutory responsibility to provide appeals hearings, and absent any specific authority to the contrary, there is no authority for the MSPB to accept reimbursement for the travel expenses of its hearing officers, nor is there any authority for the employing agencies to use their appropriations for this purpose. 59 Comp. Gen. 415 (1980), which held that MSPB may not accept payments from other agencies or augment its appropriations by accepting donations from employees or unions, is affirmed 419
Dependents. (*See* **TRANSPORTATION, Dependents**)
Illness
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An employee was informed that another employee on temporary duty was in the hospital due to an automobile accident. The employee called her supervisor who told her to drive the injured employee back to her residence 90 miles away. Employee is entitled to a mileage allowance since we hold that travel which is authorized or approved in order to return an injured employee on temporary duty to his or her home should be treated as necessary to carry out the agency's duty and therefore such travel is on official business. B-176128, Aug. 30, 1972, is overruled; 59 Comp. Gen. 57 is amplified; B-198299, Oct. 28, 1980, is distinguished 373

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Miscellaneous expenses
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Travel advances
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Employees seek reimbursement of fees incurred in cashing travel advance checks for travel in the United States. Although para. 1-9.1c(2) of the Federal Travel Regulations specifically allows exchange fees for cashing Government checks issued for expenses incurred for travel in foreign countries, no such allowance exists for check cashing costs incurred incident to travel within the United States. The employees' check cashing costs may not be allowed 585
Overseas employees
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Renewal agreement travel
Delays
Rest stopover
Employee who performed renewal agreement travel from Kwajalein, Marshall Islands, to Huntsville, Ala., arrived at Hickam Air Force Base, Hawaii, at 6:30 p.m. after 5½ hour flight and continued on to Los Angeles by flight departing from Honolulu at 11:30 p.m., 2 days later. Employee's entitlement to per diem should not be based on constructive schedule which requires him to continue on from Hawaii by flight departing at 11:30 p.m. on same night as his arrival at Hickam AFB. The fact that the employee traveled at a late hour following 2 days of rest does not warrant departure from constructive travel schedule otherwise applicable which would permit him to continue on at a reasonable hour the following morning 448
Prudent person rule
Employee on temporary duty assignment questions agency's authority to issue guidelines limiting reimbursement for meals and miscellaneous expenses to 46 percent of the maximum rate for actual subsistence expenses when traveler incurs no lodging expenses. Agency may issue guideline alerting employees that the maximum amount considered reasonable under ordinary circumstances is 46 percent of the statutory maximum, but it should also provide that amounts in excess of 46 percent may be paid if adequate justification based on unusual circumstances is submitted 13
Witness *v.* complainant
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UNIONS
Federal service
Collective bargaining agreements
Interpretation
Not for GAO consideration
Exceptions
Although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for General Accounting Office (GAO) to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office 404
Although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for General Accounting Office (GAO) to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, the parties are in agreement as to the intent of the negotiated provisions, there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office 492
Grievance procedures applicability
The question of whether the temporary promotion provisions in a collective bargaining agreement apply to unit employees temporarily serving in nonunit positions is an issue of contract interpretation which is customarily adjudicated solely under grievance-arbitration provisions, and is therefore not appropriate for resolution by General Accounting Office (GAO). Accordingly, this Office will defer to labor-management procedures established under 5 U.S.C. Chapter 71 274
Dues
Overpayment
Government's right to recover
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Agency erroneously continued to deduct union dues from three employees who were promoted out of bargaining unit and remitted amounts to union. Upon discovering the error, the agency refunded the deductions to the employees and collected the amounts erroneously paid from the union. Since the record shows that the union was not at fault in receiving these payments, repayment is waived pursuant to 5 U.S.C. 5584 218

UNITED STATES ADVISORY COMMISSION ON PUBLIC DIPLOMACY
Authority
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VIETNAM
Evacuation
Loss of currency, etc.
Appropriation chargeable
Piasters abandoned or left on account
Loss of approximately $1,070,000 of piaster currency abandoned in Vietnam may be charged to Gains and Deficiencies Account, 31 U.S.C. 492b, since piasters were acquired and held for exchange transaction operations and became worthless when South Vietnamese Government fell. To extent inconsistent, 56 Comp. Gen. 791 (1977) is overruled 132

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WORDS AND PHRASES
"Adequate defense" for indigent defendants
District of Columbia Criminal Justice Act
The District of Columbia (DC) Criminal Justice Act, D.C. Code Ann. 11-2605 (1981), provides funding for expert and other services necessary for "an adequate defense" for eligible defendants. The purpose of the Act is to assure adequate representation of indigent defendants in the local courts at all stages of the proceedings. We construe the statutory phrase "an adequate defense" to include sentencing. Moreover, the Act plan, which has been implemented as required under D.C. Code Ann. 11-2601, as well as the DC Superior Court Criminal Rules, contemplates defense of the contents of the presentence report and presentation of mitigating factors, at the time of sentencing. Therefore, we would not object if the Superior Court authorizes or approves expert and other services necessary for an adequate defense at the time of sentencing 507
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Annual contributions contract (ACC) between Department of Housing and Urban Development (HUD) and Indian housing authority pursuant to section 5 of the United States Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.*, is encompassed by GAO Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), since agreement results in substantial transfer of Federal funds to housing authority and since ACC required housing authority to use competitive bidding in awarding contracts 85
"As authorized by law"
Appropriation acts
Fiscal year 1978 appropriation act, Pub. L. 95-96, contained lumpsum amount, available until expended, for authorized reclamation projects "as authorized by law." Latter phrase limited use of funds so that for any project, funds may only be obligated in accord with authorization for that project. Pub. L. 95-46 authorized appropriations, to be obligated only in fiscal year 1978, to continue San Luis Unit, Central Valley Project, California, distribution systems and drains construction pending congressional reconsideration of permanent authorization increase. In accord with authorization limitation, appropriation—otherwise available until expended—was properly obligat-

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Veterans Administration Medical Centers are not constitutionally immune from paying Alabama public utility license tax which was added to their bills by Alabama Power Company. Legal incidence of state tax, which is levied on vendor of services to United States, and which is not required by taxing statute to be passed through to consumer, is on vendor, not the United States. United States is not constitutionally immune from such vendor tax. Utility commission order requiring utility to bill customers for tax does not transfer legal incidence of tax to customers 257
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Executive Schedule, Level V
Definition
Subsection 5532(c) of title 5, U.S. Code, requires that combined military retired pay plus Federal civilian salary not exceed the rate of basic pay for Level V of the Executive Schedule for any "pay period." The term "pay period" means the biweekly pay period fixed under title 5 for civilian employees, whether employed full time or intermittently. Hence, the military retired pay of a retired Army officer employed intermittently as a civilian consultant is subject to reduction each biweekly pay period in which the amount of his combined retired pay and civilian salary exceeds the biweekly rate of pay prescribed for Level V of the Executive Schedule 604
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