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Transportation—Household Effects—House Trailer Shipments, etc.—Reimbursement—Ownership at Time of Transportation Requirment

Although it is held that a boat may qualify as a mobile dwelling under 5 U.S.C. 5724(b), an employee who purchased a sailboat to be occupied as his residence incident to permanent change of station is not entitled to freight charges in transporting the boat from the place of construction to the delivery site where it was launched since the employee was not the owner of the boat at the time it was transported.

Transportation—Household Effects—House Trailer Shipments, etc.—Purchase Costs

Employee may be reimbursed, in connection with the purchase of a sailboat to be occupied as a residence upon transfer of station, those expenses which would be reimbursed in connection with the purchase of a residence on land. Expenses necessary for the operation of utilities and of launching the boat may be reimbursed as miscellaneous expenses under FTR para. 2-3.1b.

Matter of: Adam W. Mink, April 1, 1983:

The Accounting and Finance Officer, Defense Mapping Agency, requests our decision on whether a transferred employee may be reimbursed for freight and commissioning expenses incurred in the purchase of a boat used as his residence at his new duty station. Payment of freight from place of construction to delivery location is not authorized since the boat was not owned by the employee at the time it was transported, but expenses incident to the launching of the boat and for adjustments necessary in the boat's electrical system may be reimbursed as part of the miscellaneous expenses allowance.

Mr. Adam W. Mink, an employee of the Defense Mapping Agency, was transferred from St. Louis, Missouri, to Washington, D.C. In connection with his permanent change-of-station move, he purchased a sailboat to be used as his residence at his new duty station. His claim for reimbursement of expenses incurred incident to purchase of that residence includes a $4,500 freight charge for transportation from California, the place of construction, to the delivery site in Annapolis, Maryland, and $1,050 in commissioning expenses. A contract for purchase of the boat was entered into in April 1981. This contract provided that the settlement date would be on or before the date the boat arrived in Annapolis and that full payment was due at that time. The contract also provided that title would pass upon receipt by the seller of all payments due. This occurred on July 15, 1981, and from the facts given we must assume that transportation of the boat had been completed or virtually completed at that time. The commissioning expenses charged by the seller of the boat include the following:

(1) Rigging (lift mast and set-labor plus charges)	$100.00
(2) Labor on engine	130.00

(3) Labor on electrical system	160.00
(4) Shaft alignment and propeller	80.00
(5) Parts for engine	120.00
(6) Blocking fee (jack stands support to work on boat)	150.00
(7) Crane charges—$80 hr. (stepping mast)	160.00
(8) Travel lift fee (pick up boat and put in water)	150.00
Total	$1,050.00

The certifying officer asks whether the freight and commissioning charges may be reimbursed as real estate or miscellaneous expenses.

Under 5 U.S.C. 572a(a)(4) a transferred employee may be reimbursed customary and reasonable expenses required to be paid by him in connection with the purchase of a residence at his new duty station. Because neither the statute nor regulation limits the qualifying residence to a dwelling on land, we have recognized that expenses which would be reimbursed in connection with the purchase of a residence on land may be reimbursed in connection with the purchase of a houseboat which is occupied as a residence upon transfer of station. Thus, in 53 Comp. Gen. 626 (1974) we authorized reimbursement for the cost of a marine survey incurred in connection with the purchase of a houseboat. Like certain inspection costs that may be reimbursed incident to the purchase of a dwelling on land, the marine survey fee was incurred as a necessary condition to financing the purchase of the residence. See, e.g., B-194887, August 17, 1979. However, neither the transportation charges nor the commissioning expenses claimed by Mr. Mink are analogous to charges incurred incident to the purchase of a dwelling on land. Accordingly they may not be reimbursed as real estate transaction expenses under subsection 5724a(a)(4).

We recognize that similar transportation charges are incurred in transporting a mobile home to a transferred employee's new duty station. In the case of a mobile home used as a residence, an employee may be entitled to reimbursement for such transportation charges under 5 U.S.C. 5724(b). That section provides that in lieu of and limited to the amount otherwise reimbursable for transportation of household goods, an employee who transports a housetrailer or mobile home for use as a residence may be reimbursed commercial transportation charges or a mileage allowance. For the purpose of that statute, a mobile home is defined as "all types of house trailers or mobile dwellings constructed for use as residences and designed to be moved overland, either being self propelled or towed." Paragraph 2-1.4g of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973 as amended). Based on a review of the applicable statutes, we held in 48 Comp. Gen. 147 (1968) that the Department of Defense regulations governing payment of a trailer al-

lowance for military personnel could not be amended to authorize movement of a boat incident to a permanent change of station, even though the boat is actually used as a residence. Although addressed specifically to the transfer entitlements of military personnel, that decision points out that 5 U.S.C. 5724(b) applicable to civilian employees is patterned after and subject to the same construction as the trailer allowance provisions of title 37 of the United States Code. Under that rule payment of the transportation expenses involved could not be allowed.

In decision 62 Comp. Gen. 292, dated today, however, we have determined that the cost of moving a boat for use as an employee's or service member's dwelling at his new duty station may be authorized under the controlling provisions of statute. Accordingly, we have authorized the Department of Defense and the General Services Administration (because of the similarity of 5 U.S.C. 5724(b) relating to civilian employees) to clarify the Joint Travel Regulations and the Federal Travel Regulations, respectively, to provide specifically for paying appropriate costs connected with the transportation of a boat when it will be used as a residence at the employee's or service member's new duty station.

This decision represents a substantial departure from our previous interpretation of the Federal Travel Regulations. Given the reliance placed upon our prior interpretation and the extent to which retrospectivity would be disruptive of settled claims, the rule set forth above will be prospective only. Claims settled prior to date of this decision should not be reopened.

In the instant case, however, we are unable to authorize payment based on the new rule because it appears from the facts given that the boat was not the property of the employee at the time it was shipped. See paragraphs C8002-1a and C10002-5a, Volume 2, Joint Travel Regulations. B-146033, June 22, 1961. It is also noted that the file does not show that Mr. Mink did not ship household goods at Government expense, a condition precedent to payment for mobile home transportation. 5 U.S.C. 5724(b).

An employee transferred in the interest of the Government is entitled to a miscellaneous expenses allowance under 5 U.S.C. 5724a(b). For an employee with immediate family, the implementing Federal Travel Regulations (FPMR 101-7) (May 1973) at chapter 2, Part 3, provide for the reimbursement of such expenses in an amount up to 2 weeks' basic pay upon evidence that he incurred costs covered by the miscellaneous expense allowance. Paragraph 2-3.1b lists the types of costs covered and provides in pertinent part as follows:

b. *Types of costs covered.* The allowance is related to expenses that are common to living quarters, furnishings, household appliances, and to other general types of costs inherent in relocation of a place of residence. The types of costs intended to be reimbursed under the allowance include but are not limited to the following:

(1) Fees for disconnecting and connecting appliances, equipment, and utilities involved in relocation and costs of converting appliances for operation on available utilities;
(2) Fees for unblocking and blocking and related expenses in connection with relocating a mobile home * * *.

Like real estate expenses the miscellaneous expenses incurred by Mr. Mink in relocating his boat may be reimbursed to the extent they are analogous to costs that would be reimbursed as miscellaneous expenses incident to the relocation of a mobile home or other residence. See 53 Comp. Gen. 626, *supra.*

Commissioning expense items 1, 4 and 7 are costs incurred primarily to make the boat operable as a sailing vessel. They are not in the nature of those costs that are inherent in the relocation of a residence and, accordingly, may not be reimbursed as miscellaneous expenses. Although items 2, 3 and 6 are expenditures similarly related to the boat's use as a vessel, they are costs necessary to the functioning of the electrical system and to the operation of appliances while the boat is docked for use as residence. Though peculiar to the type of residence here involved, these expenses may be reimbursed as analogous to the cost of connecting appliances and utilities involved in the relocation. Since the cost of replacement or new part necessary to normal operation and maintenance may not be reimbursed as an item of miscellaneous expenses, the cost of engine parts, item number 5, is disallowed. See, e.g., B-163107, May 18, 1973. Item 8 in the amount of $150 is an expenditure necessary in launching the boat. It is similar in purpose to the type of cost involved in setting up a mobile home at a new location and may be reimbursed. *Matter of Larsen,* B-186711, January 31, 1978.

Payment may be made in accordance with this decision.

[B-209591]

Transportation—Household Effects—Military Personnel—Trailer Shipment—Residence Use Requirement

Transferred member of the Air Force may be reimbursed the cost of transporting the houseboat he uses as his dwelling under 37 U.S.C. 409, which permits the transportation at Government expense of a mobile home dwelling, because it is determined that a boat may qualify as a "mobile home dwelling" under the law. 48 Comp. Gen. 147 is overruled and regulations issued to implement that decision need not be applied so as to exclude payment for transporting boats which are used as residences.

Matter of: Lieutenant Christopher J. Donovan, USAF, April 1, 1983:

The question in this case is whether Lieutenant Christopher J. Donovan, USAF, may be reimbursed the cost of transporting the houseboat he has used as his dwelling and intends to continue to use as his dwelling after his transfer. Because we determine in this decision that a boat may qualify as a "mobile home dwelling"

within the meaning of 37 U.S.C. § 409 (Supp. IV, 1980) the claim for transportation costs is for allowance.

The accounting and finance officer at Headquarters, 354th Tactical Fighter Wing (TAC), Myrtle Beach Air Force Base, South Carolina, presented the question, which was assigned control number 82-26 by the Per Diem, Travel and Transportation Allowance Committee.

In August 1982 Lieutenant Donovan received orders transferring him from Myrtle Beach, South Carolina, to Washington, D.C., effective in November. He requested that his houseboat be moved at Government expense under 37 U.S.C. § 409. Since a prior decision of the Comptroller General (48 Comp. Gen. 147 (1968)) held that a houseboat did not qualify as a "mobile dwelling" under section 409, the accounting and finance officer transmitted his request here for an advance decision.

Lieutenant Donovan argues that his houseboat fits within the definition of a "mobile home" in Volume 1 of the Joint Travel Regulations and that he, therefore, is entitled to transportation expenses in accordance with chapter 10 of those regulations. He states that it can be moved overland, noting that there are a number of companies that routinely move large houseboats in the same manner that large house trailers are moved and at approximately the same cost. He also states that houseboat living in a marina has become a common and viable form of homeownership which does not differ significantly from living in a trailer park. The accounting and finance officer suggests that there may have been developments or changes since the Comptroller General's 1968 decision that would warrant reconsideration of that holding.

At the time of the Comptroller General's decision at 48 Comp. Gen. 147 (1968), 37 U.S.C. § 409 authorized a transferred member to transport a "house trailer" or "mobile dwelling" within the United States for use as a residence in lieu of transportation of baggage and household effects or payment of dislocation allowance. Payment for the transportation of a "mobile dwelling" was limited by a statutory maximum mileage rate. The decision noted that Congress had increased the statutory maximum mileage rate over the years in order to reflect the rate increases published in tariffs filed with the Interstate Commerce Commission (ICC) by motor carriers for movement of "house trailers." The decision also stated that the ICC rates upon which the statutory maximum rate was based did not apply to boats, including houseboats, and concluded that since reimbursement was on a mileage basis, the statute "contemplates overland travel." In that decision we held that the term "mobile dwelling" referred to those "* * * designed to be moved overland, either by being self-propelled or towed * * *" and, therefore, did not include a boat or houseboat.

However, we believe that 48 Comp. Gen. 147 may be unduly restrictive. Four years after that decision the Comptroller General

held that a privately owned Pullman rail car converted for use as a residence would qualify as a mobile dwelling for the purpose of section 409 since there was nothing in section 409 or the legislative history of the statutes from which it was derived to indicate any intent that the section was not to be applicable to a mobile dwelling transported by rail. 51 Comp. Gen. 806, 809 (1972). We did not consider it critical that the ICC rates used to establish the mileage rates under section 409 did not apply to Pullman cars or that Congress never specifically considered rail cars as mobile dwellings in its deliberations.

In 1980 Congress amended section 409 to provide for transportation of a "mobile home dwelling" and to limit reimbursement for transportation on the basis of the cost of baggage and household goods transportation, rather than on a mileage basis. Pub. L. No. 96-342, 94 Stat. 1096. Given these changes, we are of the view that the term "mobile home dwelling" as used in section 409 includes a boat.

Regarding the definition of "mobile home" in Appendix J to Volume 1 of the Joint Travel Regulations, we recognize that the phrase "designed to be moved overland" was included to implement the decision in 48 Comp. Gen. 147 which is overruled by this decision. Although that phrase would appear to exclude movement of boats, which are designed to be moved in the water, we do not find that the regulation need be so restrictively interpreted in these circumstances. The law has been changed and our view of the transportation of boats thereunder has changed. No useful purpose would be served by an interpretation of the regulations which would prevent implementation of the newly authorized benefit. We suggest, however, that the definition of "mobile home" be clarified to reflect more specifically this interpretation. As to the Federal Travel Regulations (FPMR 101-7), see our decision 62 Comp. Gen. 289 of today.

This decision represents a substantial departure from our previous interpretation of the Joint Travel Regulations. Given the reliance placed upon our prior interpretation and the extent to which retrospectivity would be disruptive of settled claims, the rule set forth above will be prospective only. Claims settled prior to the date of this decision should not be reopened. See *Matter of Lay,* 56 Comp. Gen. 561 (1977).

Accordingly, Lieutenant Donovan's claim may be allowed if otherwise proper.

[B-208855]

Medical Treatment—Officers and Employees—Travel Expenses—Limitations—Administrative Discretion

An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States

medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed.

Matter of: Travel Expenses Arising from Employee's Fitness for Duty Examination, April 5, 1983:

The issue in this decision is whether travel expenses are payable to a Government employee who chooses to have a "fitness for duty" medical examination performed by a private physician located some distance from his official duty station, despite the availability of a United States medical officer at his station. We hold that a Federal employee who travels to a place within a reasonable distance from his duty station in order to have a fitness for duty examination performed by a private physician is entitled to reimbursement for his resulting travel expenses.

This decision is in response to a request from Mr. Frank X. Hamel, a civilian personnel officer with the Defense Logistics Agency (DLA) in Tracy, California. According to the submission, Federal agency officials may require an employee to submit to an appropriate "fitness for duty" examination when questions arise concerning his physical or mental ability to continue work in his assigned position. Where the agency prescribes that an employee submit to such an examination, it must give that employee the option of being examined either at a Government facility, if one is reasonably available, or by a private physician of the employee's own choosing.

A question has now arisen concerning the use of appropriated funds to pay the travel expenses, including mileage and per diem, of a Government employee who chooses to travel some distance from his duty station to have his examination performed by a private physician, rather than allowing a Government medical officer to examine him at a facility near his place of employment. If such travel expenses may be reimbursed, the officer asks whether the agency would then be required to impose a reasonable limitation on the distance traveled for which reimbursement may be provided.

A Federal agency has authority to direct an employee to submit to a "fitness for duty" examination when questions arise concerning his mental or physical capacity to continue working in his assigned position. *Yates* v. *United States,* 220 Ct. Cl. 669, 670 (1979). See also Federal Personnel Manual (FPM) Supplement 752-1, Subchapter S1-3a(5). Chapter 339 of the FPM, Subchapter 1-3(c), further provides as follows:

* * * Normally, a Federal medical officer should conduct the fitness-for-duty examination. If, however, the employee refuses to be examined by a Federal medical officer or other agency-designed physician, the examination may be conducted by a physician of the employee's choice, subject to the following conditions: (1) the agency determines that the medical examination is necessary primarily for the benefit of

the Government; (2) the physician is board-certified in the appropriate medical specialty, and acceptable to the agency; and (3) the physician submits a complete report of the examination directly to the agency. When an agency obtains a fitness-for-duty medical examination, *whether by a Federal medical officer or an employee-designated physician, there must be no cost to the employee* or the Civil Service Commission. The Comptroller General has ruled that agencies have authority to pay for such medical examinations which are made by employee-designated physicians under the above conditions. [Italic supplied.]

We have consistently held that an agency may use appropriated funds to pay for physical examinations of its employees when those examinations are primarily for the benefit of the Government rather than for the benefit of the employees concerned. 49 Comp. Gen. 794 (1970); 41 *id.* 531 (1962). We have also held that employees may be granted administrative leave for reasonable amounts of time required to undergo such examinations. 44 Comp. Gen. 333 (1964). Finally, as we stated in *Gus C. Ford,* B-188012, May 10, 1977:

> [o]ur Office has also allowed travel expenses and per diem when travel is required in connection with an employee's physical examination but only where the examination is necessary in connection with the employee's position (fitness for duty) and where it is primarily for the benefit of the Government. * * *

See also 49 Comp. Gen. 794, above. Thus, we have based our allowance of travel expenses in these cases on the same criteria as those governing payment for the physical examinations themselves: necessity and Government benefit.

In these cases, we have not attempted to draw any distinction between travel to the office of a United States medical officer and travel to the office of a private physician. Nor do we believe that such a distinction should now be made. Where a physical examination is necessary and for the Government's benefit, we believe that an employee is entitled to reimbursement for reasonable incidental travel expenses.

Under FPM Chapter 339, Subchapter 1-3(c), an employee who is required to undergo a fitness for duty examination as a condition of continued employment may choose to be examined either by a Federal medical officer or by a private physician of his own choice, who has been found to be acceptable to the agency concerned. In addition, the regulation states that when the agency requires such a fitness for duty examination, there must be no cost to the employee, regardless of whether the examination is performed by a Federal medical officer or by an employee-designated physician. We believe that this provision requires that an agency pay not only for the cost of the fitness for duty examination itself, but for all costs directly relating to the examination, including any incidental travel expenses incurred by the employee. Furthermore, these costs must be paid by the agency whether or not the employee consents to be examined by a Federal medical official. If the employee is to be given a meaningful choice to be examined by a private physician, as Subchapter 1-3(c) of FPM Chapter 339 provides, we believe that he must not be penalized for exercising that option by being

required to pay his own travel expenses in such a case. Therefore, we hold that travel expenses may be paid both to employees traveling to Federal medical facilities, and to those traveling to the offices of selected private physicians for their fitness for duty examinations.

We recognize that paying travel expenses to the location of employee-designated physicians should be subject to some limitations. In this regard, an agency may use its administrative discretion to impose reasonable limitations on the distance traveled for which employees may be reimbursed. In doing so, the agency should give consideration to the availability and proximity of appropriate medical facilities and personnel, and the methods of transportation to be used by its employees en route to such facilities. See, for example, the 25-mile limitation on travel for treatment of work-related injuries provided in 20 C.F.R. § 10.402(b) (1982).

Accordingly, with the qualifications stated above, travel expenses may be paid to an employee who chooses to have a fitness for duty examination performed by a private physician located away from his official duty station.

[B-209196, B-208925.2]

Contracts—Architect, Engineering, etc. Services—Procurement Practices—Brooks Bill Applicability—Procurement Not Restricted to A-E Firms—Administrative Determination

General Accounting Office will not question a contracting agency's determination to secure services through competitive bidding procedures rather than through the procedures prescribed in the Brooks Act for the selection of architectural or engineering firms unless the protester demonstrates that the agency clearly intended to circumvent the Act.

Matter of: Association of Soil and Foundation Engineers, April 5, 1983:

The Association of Soil and Foundation Engineers (ASFE) protests use of standard competitive procedures under invitation for bids (IFB) No. FWS 6-82-046 issued by the Department of the Interior. ASFE additionally requests that we reconsider our decision *Association of Soil and Foundation Engineers,* B-208925, January 4, 1983, 83-1 CPD 8, in which we denied its protest under IFB No. K5120136, also issued by the Department of the Interior. ASFE contends that the services under both solicitations should have been secured through the special procedures prescribed in the Brooks Act, 40 U.S.C. § 541 *et seq.* (1976), for the procurement of architectural and engineering (A-E) services. The Brooks Act declares it to be Federal policy to issue public announcements of all requirements for A-E services and to negotiate contracts for the services on the basis of demonstrated competence and qualifications; the procedures do not include price competition. We deny the

protest against solicitation FWS 6-82-046 and affirm our prior decision concerning solicitation KS120136.

Solicitation No. FWS 6-82-046 calls for the drilling of soil samples, the classification and laboratory analysis of the soil samples, and the submission of a report which details the results of the testing and recommends construction methods and foundation design for various structures and facilities at the Leadville Fish Hatchery, Leadville, Colorado. The preponderance of the contract work described in the solicitation involves the drilling, collection and laboratory analysis of soil samples which ASFE agrees do not constitute professional A-E services under the Brooks Act. Although professional A-E firms often perform these services, they are not unique to A-E firms. Rather, ASFE contends that the Brooks Act applies to the procurement essentially because the solicitation requires to be included in the report, in addition to test results and findings,

> * * * recommendations for the type of foundations (piling, spread footings, etc.), site drainage recommendations, method of construction including soil bearing capacities and settlement predictions for the structure proposed.

In ASFE's view this aspect of the procurement is A-E in nature and, therefore, Brooks Act procedures should have been used to procure all the services contemplated by the solicitation.

Solicitation K5120136 uses standard competitive procedures to secure soil boring sampling and testing needed to provide the State of Ohio with recommendations about stabilizing a site known as the Weidemeyer earthslip. The majority of the contract work involves drilling, installation of piezometers and collecting soil and rock samples. Again, ASFE concedes that these efforts do not constitute professional A-E services under the Brooks Act, but asserts that those services may logically and justifiably be performed by an A-E firm. ASFE argues that the Brooks Act applies to the procurement because the solicitation also requires the contractor to submit,

> * * * an engineering report which includes recommendations for priority repairs, recommendations for design load cases, and recommendations for soil design parameters for the various soil stratas encountered.

Again ASFE asserts these are A-E services and that the noncompetitive procedures should have been used.

Even if we accept ASFE's assertion that recommending types of foundations and methods of construction constitute engineering services, we do not agree with ASFE that it follows as a matter of logical necessity that Brooks Act procedures had to be used in the procurements. The reason is that the Brooks Act does not require that contracts be awarded to A-E firms merely because architects or engineers might do part of the contract work. See *Association of Soil and Foundation Engineers—Reconsideration,* 61 Comp. Gen. 377 (1982), 82-1 CPD 429. Rather, the Act's procedures, and the re-

striction to A-E firms attached to them, apply to the procurement of services which uniquely or to a substantial or dominant extent require performance by a professionally licensed and qualified A-E firm. *Ninneman Engineering—Reconsideration,* B-184770, March 9, 1977, 77-1 CPD 171.

The application of this standard is in certain cases not a matter of great difficulty and the applicability or nonapplicability of Brooks Act procedures is clear. For example, design and consultation services secured in connection with a Federal construction project clearly are required to be performed by an A-E firm [1] and Brooks Act procedures must be used.[2] See *Ninneman Engineering—Reconsideration, supra.* Similarly, preliminary road location surveying is not uniquely or to a dominant extent required to be performed by an A-E firm and the service must be procured competitively. *Timberland-McCullough, Inc.,* B-208086, September 24, 1982, 82-2 CPD 273.

Between these clear cases the statutory requirement to utilize non-competitive precedures to procure A-E services [3] becomes difficult to apply, resulting in our continuing attempt, through the bid protest process, to draw fine distinctions and to provide guidelines to the agencies as to the application of the Brooks Act to particular contracts. Of necessity, these determinations are based on the nature and circumstances of the work to be done and the needs of the contracting agency. Such determinations are the responsibility of the contracting agency, not our Office and, therefore, we have recognized broad discretion on the part of the agency in making such determinations. *See Association of Soil and Foundation Engineers,* B-204634, February 2, 1982, 82-1 CPD 77. We think that under the circumstances the proper role of this Office in these cases is to defer to the judgment of the agency unless the agency's conclusions are so egregious as to demonstrate a clear intent either to circumvent the Act or to employ the noncompetitive procedures enuciated by the Act to secure services that should properly be solicited by competitive means.

Although ASFE vehemently disagrees with Interior on both contracts, the record does not establish that Interior's conclusions are so erroneous as to warrant a conclusion that it intended to circumvent the Brooks Act. We affirm our initial decision concerning solicitation No. KS120136 and deny the protest on solicitation No. FWS 6-82-046.

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[1] This is consistent with the stated purpose of the Brooks Act, that is, "to establish a Federal policy for the selection of qualified architects and engineers to design and provide consultant services in carrying out Federal construction and related programs." S. Rep. No. 1219, 92d Congress, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4767. The rationale for the policy is that the quality of these services is basic and essential to the quality of construction, yet their cost generally represents a very small part of the total cost of construction. The act itself is not limited to construction.

[2] The Brooks Act requires negotiation on the basis of demonstrated competence and qualification for the type of professional services required, that is, without price competition, but at fair and reasonable prices. 40 U.S.C. 542. Costs will be kept under control by the 6 percent fee limitation prescribed by 41 U.S.C. 254(b). S. Rep. No. 1219, *supra* note 1, at 4772. The 6 percent fee limitation concerns A-E contracts relating to any public works or utility project, that is, projects concerning construction. 17 Comp. Gen. 545 (1938).

[3] The Act defines A-E services only as those professional services of an architectural and engineering nature as well as those incidental services that members of these professions and those in their employ may logically or justifiably perform. 40 U.S.C. 541(3).

[B-209433]

Contracts—Small Business Concerns—Award—Self-Certification—Indication of Error—Contracting Officer's Duty To Investigate, etc.

While contracting officer and Small Business Administration considered timely size protest contained insufficient detail, contracting officer should have pursued matter on his own initiative under Defense Acquisition Regulation 1-703(b)(2) where data submitted by proposed awardee in bid indicated $5 million size standard may be exceeded.

Matter of: Foam-Flex Inc., April 12, 1983:

Foam-Flex Inc. (FFI) protests a contracting officer's refusal to consider FFI's protest against F.J. Dahill Company's (Dahill) size status for the purposes of the present procurement. The contract is for roofing work to be performed at the Bradley Air National Guard Base, East Granby, Connecticut, and was awarded to Dahill under invitation for bids (IFB) No. DAHA06-82-B-0010, a small business set-aside issued by the United States Property and Fiscal Office for Connecticut (USPFO-CT). The contracting officer was of the opinion that a letter submitted by FFI did not constitute a protest of Dahill's size status since it did not contain sufficient evidence in support of FFI's claim.

We sustain the protest.

Three bids were opened on September 24, 1982. Dahill was the low bidder. Shortly thereafter, FFI questioned the contracting officer concerning the eligibility of Dahill as a small business under the $5 million average 3-year annual receipts size standard set forth in the IFB. In response to FFI's inquiry, the contracting officer reviewed Dahill's bid to determine whether Dahill had certified itself as a small business and also allegedly contacted the Small Business Administration's (SBA) regional office to verify the applicable small business size standard. The SBA regional office reportedly informed the contracting officer that the applicable size standard was $9.5 million average annual receipts. (We note that the SBA regional office later denied that it had given this information.) FFI was advised of this fact and was also informed by the contracting officer that if the award was delayed, funds for the project would be lost. Based upon this conversation FFI declined to institute a formal protest at that time.

On September 29, 1982, however, FFI discussed the matter with the SBA and was told that the size standard was actually $5 million. FFI then decided to file a protest and a letter was delivered to the contracting office on September 29, 1982. The letter indicated that in FFI's opinion Dahill did not qualify as a small business since it exceeded the guidelines set forth in the IFB. Under Defense Acquisition Regulation (DAR) § 1-703(b)(1) (Defense Acquisition Circular (DAC) No. 76-19, July 27, 1979), the protest was timely since it was filed within the 5-day time period provided.

The contracting officer reviewed the letter sent by FFI and determined that it did not comply with the requirements of DAR § 1-703(b)(1) since it did not contain sufficient evidence to support FFI's allegation. Due to this deficiency, it was determined that the letter was not a "protest" and as a result, the contracting officer did not then forward the matter to the SBA. The contract award proceeded as originally planned and Dahill was awarded the contract on September 30, 1982. Subsequently, the protest was sent to SBA as an after award protest for a prospective size determination. SBA declined to consider the matter because SBA considered the protest to be nonspecific.

Generally, in the absence of information prior to award that would reasonably impeach a bidder's self-certification or a timely size protest, a contracting officer may accept a small business size certification at face value. *Keco Industries, Inc.,* 56 Comp. Gen. 878 (1977), 77-2 CPD 98; *Eller & Company, Inc.,* B-191986, June 16, 1978, 78-1 CPD 441. The self-certification mechanism was adopted as a practical solution with the knowledge that case-by-case investigation of size status would be extremely expensive and time consuming and with the understanding that small business concerns in a particular industry are in the best position to know the size status of their competitors. B-168933, April 3, 1970.

In this instance, FFI relied on its knowledge of the contractors in the area and of the roofing business in general in contesting Dahill's eligibility as a small business concern. Even though we recognize that FFI could possibly have furnished additional information about Dahill, we find the specifics of the protest not to be the major concern here. Rather, we find the contracting officer's response to the evidence submitted by FFI was inadequate. A cursory examination by the contracting officer of the Construction Contractor Experience Data, accompanying Dahill's bid, would have indicated that Dahill listed receipts during the previous 3 years in excess of the $5 million size standard set out in the IFB. Although there appears to have been some confusion as to the exact standard to be applied, there is no evidence in the record that the contracting officer ever reviewed the sales data submitted by Dahill in order to determine whether Dahill would have qualified under either the $5 million or $9.5 million size standard. If this action had been taken, the contracting officer, who had the relevant information rather than FFI, could have filed his own size protest. *See* DAR § 1-703(b)(2) (DAC No. 76-19, July 27, 1979).

Accordingly, we sustain the protest. However, since the contract has been substantially completed, no remedial relief is available in this case.

[B-207626]

Pay—Retired—Survivor Benefit Plan—Children—Dependency Status—Mental Incapacity During School Year

Under the Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, eligible beneficiaries include a deceased service member's "dependent child," a term defined by statute as including one who is incapable of supporting himself because of mental or physical incapacity incurred before his twenty-second birthday while pursuing a full-time course of study. Given this definition, a military officer's daughter who suffered a mental breakdown at the age of 19 during the summer vacation following the successful completion of her first year of college, and who was thus rendered incapable of self-support, may properly be considered a "dependent child" eligible for an annuity under the Plan. 44 Comp. Gen. 551 is modified in part.

Pay—Retired—Survivor Benefit Plan—Beneficiary Payments—Suspension and Reinstatement—Mentally Incapacitated Beneficiaries' Employment

A deceased military officer's daughter, considered eligible for a Survivor Benefit Plan annuity on the basis of mental illness making her incapable of self-support, then recovered from her illness to the extent that she was able to support herself for 6 months through gainful employment. She subsequently suffered a relapse requiring rehospitalization. The annuity may properly be suspended during the 6-month period of employment. It may be reinstated during the following period when she was again incapable of self-support because of the original disabling condition, since the applicable laws governing military survivor annuity plans do not preclude reinstatement in appropriate circumstances.

Releases—Proper Release or Acquittance—Survivor Benefit Plan Annuitant—Mentally Incapacitated Adult

It is necessary that a good acquittance be obtained when payments are made to persons under Federal law. When amounts due a minor are involved, a good acquittance results through payment to the minor's natural guardian without formal court appointment, provided that the laws of the State of domicile authorize that procedure as a means of obtaining acquittance. However, payments may not be made to one claiming to act as natural guardian and custodian of a payee, when the payee is in fact an adult suffering from mental illness.

Agents—Of Private Parties—Authority—Vitiated—Mental Incapacity of Principal

Under the rules of agency, a known mental incapacity of the principal may operate to vitiate the agent's authority even in the absence of a formal adjudication of incompetency. Hence, Survivor Benefit Plan annuity payments may not be made to an agent designated in a power of attorney which was signed by an annuitant known to be suffering from mental illness but not adjudged incompetent, since in the circumstances the validity of the power of attorney is too doubtful to serve as a proper basis for a payment from appropriated funds.

Pay—Retired—Survivor Benefit Plan—Beneficiary Payments—Mentally Incapacitated Beneficiaries—Effect of Incapacity on Payments

Survivor Benefit Plan annuity payments in the case of an adult beneficiary known to be suffering from mental illness, but not adjudged incompetent, may be made directly to the beneficiary if by psychiatric opinion the beneficiary is considered sufficiently competent to manage the amounts due and to use the annuity properly for personal maintenance. Otherwise, the amounts due should remain unpaid and credited on account until a guardian authorized to receive payment is appointed by a court.

Matter of: Survivor Benefit Plan—Incapacitated Annuitants, April 13, 1983:

Background

This action is in response to a request for an advance decision from an accounting and finance officer of the United States Air Force concerning the propriety of approving a voucher in the amount of $13,676.56 in favor of Laura J. (last name omitted). The voucher covers Survivor Benefit Plan annuity payments due her for the period from January 1, 1978, through December 31, 1981, if it may properly be concluded that during that time she was a "dependent child" incapable of self-support because of mental illness. The request was assigned submission number DO-AF-1397 by the Department of Defense Military Pay and Allowance Committee.

We conclude that the annuity payments in question may properly be approved, subject to certain conditions and limitations.

Laura J. was born in August 1956, and she entered college as a full-time student in the fall of 1974 when she was 18 years old. In August 1975, during the summer vacation following the completion of her freshman year at college, she suffered a mental breakdown and was hospitalized for 3 months. She returned to college as a part-time student in January 1976 while continuing to receive out-patient psychiatric care. However, recurring debilitating episodes of mental illness requiring rehospitalization repeatedly interrupted her attendance at school, and eventually in January 1980 she discontinued her studies completely without having finished the sophomore year of college. In July 1980 she secured full-time employment in a retail store but was discharged after 3 weeks because of erratic behavior. Shortly thereafter her condition worsened to the extent that hospitalization was again required. In July 1981, following her recovery, she obtained full-time employment as an office clerk on a 6-month probationary basis. Her employment was terminated at the end of that 6-month period because the behavioral symptoms of her illness had begun to recur. Her condition continued to deteriorate until hospitalization was again required in February 1982. The attending psychiatrists have diagnosed her condition as "severe affective illness" manifested by anxiety and depression, and by periods of complete inability to function except to satisfy "her basic needs for rest and eating." At times the psychiatrists have been "guardedly positive" about her prognosis and have expressed the opinion that she had recovered to the point of being capable of self-support. At other times they have been less optimistic, and have expressed the opinion that she was not only incapable of self-support but also unable "to function even at marginal levels during periods as an out-patient."

Laura's father was a retired military officer. In December 1972 he elected to participate in the Survivor Benefit Plan with spouse

and dependent child coverage. He died shortly thereafter, and the Air Force commenced payment of an annuity under the Plan to his widow, i.e., to Laura's mother. The mother's entitlement to the annuity ended in January 1978 when she remarried. Uncertainty then arose concerning Laura's eligibility to succeed to the annuity under 10 U.S.C. 1450 as the officer's "dependent child" on the basis of her mental illness. Three specific questions about the matter are presented in the submission.

Eligibility To Receive Annuity

The first question is:

a. Is Laura eligible to receive a Survivor Benefit Plan annuity, based on the illness that occurred during the summer break of 1975 after she completed the spring 1975 semester, even though she was not attending school at the time the illness occurred?

The Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, is an income maintenance program for the dependents of deceased service members. Eligible beneficiaries include a member's "dependent child." That term is defined by 10 U.S.C. 1447(5)(B), insofar as is here pertinent, as a person who is:

* * * incapable of supporting himself because of a mental or physical incapacity existing before his eighteenth birthday or incurred on or after that birthday, but before his twenty-second birthday, while pursuing * * * a full-time course of study or training; * * *

* * * * * * *

* * * A child who is a student is considered not to have ceased to be a student during an interim between school years if the interim is not more than 150 days and if he shows to the satisfaction of the Secretary of Defense that he has a bona fide intention of continuing to pursue a course of study or training in the same or a different school during the school semester (or other period into which the school year is divided) immediately after the interim. * * *

Implementing regulations issued by the Secretary of Defense are contained in paragraph 102.i. of Department of Defense Directive 1332.27 (Encl 1), which states:

* * * Students will continue to be considered as such during the interims between school years but not for periods longer than 150 days. Students must provide bona fide evidence of intent to continue study or training in the same or a different school during the school semester or other period into which the school year is divided. * * *

In the present case, evidence has been furnished in the form of school records and medical statements verifying that Laura was a successful full-time college student during the 1974-75 school year, and that she was thereafter prevented from returning to college within 150 days as a full-time student for the fall 1975 semester by the onset of mental illness during the interim summer vacation. Further, evidence has been furnished verifying that she subsequently attempted to continue her studies while she was a psychiatric outpatient. In our view this evidence tends to preclude any conjecture that she might have intended to discontinue college attendance at the end of her freshman year. Hence, under the applicable

laws and regulations, we would have no objection to a determination that Laura is eligible to receive a Survivor Benefit Plan annuity as a "dependent child" incapable of supporting herself because of mental incapacity incurred before her twenty-second birthday while she was pursuing a full-time course of study. Question "a" is therefore answered affirmatively.

Termination of Annuity During Periods of Self-Support

The second question is:

b. It appears Laura's illness improves and then relapes. If question a is answered affirmatively, is the Survivor Benefit Plan annuity payable for periods in which she is self-supporting? Does the eligibility terminate when she becomes self-supporting regardless of future relapses?

In *Matter of Elrod,* 62 Comp. Gen. 193 (1983), we held that payments made under military survivor annuity plans on the basis of a beneficiary's mental or physical incapacity may properly be suspended if evidence exists demonstrating that the beneficiary has become independently capable of earning amounts sufficient for his own personal needs through substantial and sustainable gainful employment. We said that in any given case the determination of whether the beneficiary had become capable of self-support would have to depend upon a full consideration of the individual facts of that particular case.

In the *Elrod* decision, we also noted that while provisions of law governing the administration of military survivor annuity plans did not specifically authorize the reinstatement of a suspended annuity, neither did those provisions expressly preclude a disabled beneficiary from seeking reinstatement of this annuity following a period of suspension. We said that in light of the beneficial purposes for which the plans were established and the current national policy of encouraging employment of the handicapped, it may be that reinstatement should be allowed in an appropriate case. We therefore indicated that if an appropriate case were presented, we would consider the circumstances with a view towards modifying our earlier decision in 44 Comp. Gen. 551 (1965), in which it was held that if a survivor annuity paid to a handicapped beneficiary under the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431–1446) was suspended it could not be reinstated in the absence of specific statutory authority.

In the present case, our view is that because of mental illness Laura was incapable of self-support through substantial and sustainable gainful employment during the period from January 1978 to July 1981. In particular, we note that the records of the case reflect that while a psychiatrist in March 1980 expressed the opinion that she was then capable of self-support, when she was able to obtain gainful employment in July 1980 she was actually unable to sustain that employment beyond a brief 3-week period because of mental instability. Hence, we would have no objection to the issu-

ance of annuity payments for Laura's benefit covering the period from January 1978 to July 1981. See 44 Comp. Gen. 551, cited above, for answers to questions other than that regarding reinstatement of an annuity after suspension.

However, during the prolonged 6-month period beginning in July 1981, Laura had recovered to the extent that she was apparently able to lead a normal life and to earn amounts sufficient for her personal needs through sustained employment. Our view is that she was then no longer incapable of self-support because of mental illness, and that payment of an annuity covering the period of her 6 months of gainful employment could properly be suspended unless evidence is furnished showing that her earnings were insufficient to take care of her ordinary living expenses. Compare *Matter of Elrod,* cited above.

It is also our view that in this case the circumstances of Laura's subsequent loss of employment and self-sufficiency, due to the original disabling condition, warrant reinstatement of the annuity effective on the date she became unemployed. Our decision in 44 Comp. Gen. 551, cited above, involved the Retired Serviceman's Family Protection Plan and not the more recently enacted Survivor Benefit Plan. However, to the extent that the conclusion stated with regard to reinstatement of survivor benefits might be considered applicable to the Survivor Benefit Plan that decision will not be followed. Further, to the extent that Retired Serviceman's Family Protection Plan benefits may be involved in other cases that decision will no longer be followed.

Our view is that the reinstated annuity may properly be continued until a determination is made that Laura has again recovered to the point of being capable of self-support, under the procedures and policies described in *Matter of Elrod,* cited above. In this particular case we find that a psychiatric opinion concerning her recovery, by itself, would not be a proper basis to support such a determination of self-sufficiency. Suspension of the annuity would be warranted if on the basis of sufficient competent information it may be concluded that she has recovered and is able to obtain gainful employment that is sustainable at wages sufficient to cover ordinary living expenses.

Guardianship Requirements

The third question presented in the submission is:

> c. If the Survivor Benefit Plan annuity is payable, should a guardian be appointed or may we accept a Custodianship Certificate signed by [Laura's mother]? Or may the annuity be paid directly to Laura?

It is indicated that this question has arisen because the issue of Laura's legal competency has never been adjudicated by a court of the State of her domicile. Hence, a court has never had the occasion to consider whether a guardian should be appointed to manage

her affairs. The reason for this is that Laura herself has apparently on occasion voiced objection to being made the respondent in proposed competency proceedings. Also, Laura's mother consulted private legal counsel about competency proceedings and was apparently advised that it would be difficult if not impossible for her to obtain legal guardianship under the laws of the State of domicile unless the proceedings were initiated at a time when Laura was physically confined in a hospital for treatment of mental illness.

In lieu of a court guardianship order, Laura's mother has filed a Custodianship Certificate, AFAFC Form 0-428, with the Air Force Accounting and Finance Center indicating that Laura is of age but that she was in the process of applying for guardianship, but claiming payment as custodian of any moneys due Laura. It also appears that at an earlier time Laura signed a power of attorney form authorizing her mother to receive and negotiate checks payable to her order, but Finance Center officials declined to accept that power of attorney.

It is necessary that a good acquittance be obtained by the Government when payments are made to persons under Federal law. We have held that when amounts due to a minor are involved, a good acquittance results through payment to the minor's natural guardian without formal court appointment, provided that the applicable laws of the State of domicile regarding payments to minors authorize that procedure as a means of obtaining acquittance and the matter is otherwise free from doubt. See 47 Comp. Gen. 209 (1967). However, in this case Laura's mother cannot properly be considered as natural guardian and custodian of a minor, since Laura has attained the age of majority. Hence, our view is that annuity payments due to Laura may not properly be made to her mother on the basis of the Custodianship Certificate.

Concerning the power of attorney form that was signed by Laura and submitted to the Finance Center by her mother, generally a competent adult may appoint another to act on his behalf as his agent and attorney in fact through the execution of letters or powers of attorney, but third parties have an obligation to ascertain the extent of the agent's authority, and to be aware that a known mental incapacity of the principal may operate to vitiate the agent's authority even in the absence of a formal adjudication of incompetency. 2A C.J.S. *Agency* sec. 141.a., 150 *et seq.* In the circumstances presented here it is our view that Laura's known mental incapacity made her power of attorney of too doubtful validity to serve as a proper basis for payments from appropriated funds to an agent designated by her, and that the Finance Center officials therefore acted correctly in declining to accept her power of attorney.

Consequently, it is our view that the concerned accounting and finance officials should now make inquiry to ascertain the state of Laura's present mental capacity. It may be that she is sufficiently

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competent at the present time to manage responsibly amounts due her and to use the annuity properly for her own maintenance. In that case a good acquittance will be obtained by issuing payment directly to Laura as a competent adult. On the other hand, if Laura is now hospitalized because of mental illness, or if she is not considered by psychiatric opinion to be capable of managing her personal finances, then the amounts due should remain credited to her account, until either she recovers sufficient competency to personally receive payment, or a guardian authorized to receive payment under applicable State law is appointed by a court.

The three questions presented are answered accordingly. The voucher enclosed with the submission may not be approved for payment as is, but is being returned for further processing consistent with the views expressed in this decision.

[B-209191]

Subsistence—Per Diem—Military Personnel—Temporary Duty—Appropriation Limitations—Exceptions

The holding in 60 Comp. Gen. 181 regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals. 60 Comp. Gen. 181 is extended.

Matter of: Lieutenant Commander William J. Harrigan, *et al.*, April 13, 1983:

By letter of September 7, 1982, Lieutenant Commander William J. Harrigan asks whether there is any basis to excuse his liability and that of other members of the Helicopter Operations Group, National Oceanic and Atmospheric Administration, arising out of overpayments of subsistence expenses made in disregard of the principle set forth in *Matter of Bureau of Indian Affairs,* 60 Comp. Gen. 181 (1981). Agency bills of collection issued to these members of the uniformed services were the subject of our Claims Group's letter of July 19, 1982, advising Commander Harrigan that overpayments of per diem or subsistence expenses may not be considered for waiver under 5 U.S.C. 5584. While the overpayments may not be waived, for the reasons set forth herein, we find that the bills of collection should be canceled.

The record indicates that at varing times between January 21 and May 20, 1981, members of the Helcopter Operations Group performed temporary duty in the State of Alaska. Lodgings were procured by purchase order and were furnished to the members who were reimbursed for the remainder of their subsistence expenses on the basis of individual travel vouchers. On July 27, 1981, the

members were issued bills of collection for repayment of subsistence expenses they had received in excess of the maximum fixed by regulation. The bills of collection were issued on the basis of our holding in *Matter of Bureau of Indian Affairs,* 60 Comp. Gen. 181 (1981).

Matter of Bureau of Indian Affairs held that while a Government contracting officer may procure rooms or meals from a commercial concern for employees on temporary duty, appropriated funds are not available to pay per diem or actual expenses of employees in excess of that allowed by statute or regulation, whether by direct reimbursement or indirectly by furnishing meals and/or rooms by contract. While that decision was based on the general proposition that officers of the Government may not do indirectly that which statute or regulation forbids doing directly, it was specifically addressed to the per diem and subsistence expense provisions of 5 U.S.C. 5702 applicable to civilian employees of the Federal Government. In issuing the bills of collection in this case, the agency's finance office concluded that the principles of law underlying our holding in 60 Comp. Gen. 181 are equally applicable to members of the uniformed services who receive per diem or subsistence expenses under 37 U.S.C. 404 and 405. We agree that agencies may not circumvent the per diem or actual subsistence expense limitations prescribed by statute or regulation by contracting with commercial concerns for lodgings or meals to be furnished members of the uniformed services or civilian employees.

Our holding in *Bureau of Indian Affairs* was made prospective in application from January 19, 1981, the date the decision was issued, for the reason that there had been a lack of precedent in this particular area. Since that decision was not, by its specific terms, applicable to members of the uniformed services, we will not object to per diem payments such as those already made to Commander Harrigan that exceed statutory or regulatory maximums as a result of the agency's having contracted for lodgings or meals with commercial concerns. Effective from the date of this decision that rule will be applicable to per diem payments made to members of the uniformed services.

The bills of collection issued Commander Harrigan and other members of the Helicopter Operations group should be canceled.

[B-210291]

Agriculture Department—Rural Electrification Administration—Guaranteed Loans of Federal Financing Bank—Cost of Servicing—Reimbursable Basis Requirement

Rural Electrification Administration (REA) may not use funds either from its annual appropriation or REA's Revolving Fund to pay, on a nonreimbursable basis, for the cost of servicing REA guarnateed loans made by the Federal Financing Bank (FFB). Definition of a guaranteed loan under 7 U.S.C. 936 as one which is initially made, held, and serviced by a legally organized lender agency, together with other

provisions in REA's and FFB's legislation, indicate that since FFB acts as the lender, REA can only perform servicing function as FFB's agent on a reimbursable basis.

Matter of: Rural Electrification Administration Guaranteed Loans—Payment of Servicing Costs, April 13, 1983:

This decision is in response to a request from the Administrator of the Rural Electrification Administration (REA) for our opinion concerning the payment of costs incurred in connection with the servicing of REA guaranteed loans made by the Federal Financing Bank (FFB). The Administrator's specific question is whether he has authority "to use funds appropriated under the RE Act or in the Rural Electrification and Telephone Revolving Fund for the purpose of servicing FFB obligations, repayment of which is guaranteed pursuant to § 306 of the RE Act, on an unreimbursable basis where there have been no defaults on the obligations?" [1] For the reasons set forth hereafter, we do not believe the Administrator of REA has such authority.

Under section 306 of the Rural Electrification Act of 1936, as amended, 7 U.S.C. § 936, REA is authorized to provide financial assistance to borrowers for the purpose of rural electrification by guaranteeing 100 percent of loans made by "legally organized lending" agencies. In 1981, this provision was amended by section 165(b) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 379, to provide that at the request of any borrower of a loan to be guaranteed by REA "the loan shall be made by the Federal Financing Bank * * *."

Although the 1981 amendment requires FFB to make REA-guaranteed loans at the request of the borrower, FFB had already been making REA guaranteed loans under the terms of the Loan Commitment Agreement between FFB and REA, dated August 14, 1974. Under the terms of the Agreement, FFB agreed to purchase "obligations guaranteed by the Administrator of REA" under the Rural Electrification Act. Paragraph 5(b) of the Agreement provides that any loan servicing required with respect to these loans "shall be performed by REA on behalf of FFB." That paragraph further provides that "REA shall be reimbursed by FFB for such loan servicing pursuant to section 10 of the Federal Financing Bank Act of 1973 at the rate of two one-thousandths of one percentum (0.0002) per annum of the amounts owed on guaranteed loans at the end of each calender year."

It appears that FFB is interested in modifying the Loan Commitment Agreement to provide for REA to service the FFB loans on a nonreimbursable basis. Hence, REA has presented this question as to its authority to use its appropriated funds or moneys in the Re-

[1] The Administrator's letter contained a second question as to whether FFB was "required to provide for the servicing of REA-guaranteed loans assuming REA does not undertake such servicing?" Subsequently, we were informed by an REA official that it was withdrawing its second question. Therefore, our decision does not formally respond to that question. However, since the two questions were not unrelated, our answer to the remaining question may have some bearing on the question that was withdrawn as well.

volving Fund to pay the servicing costs without reimbursement from FFB.

As recognized in the Administrator's letter, this is not the first time a question has arisen concerning the FFB-REA Agreement. In B-162373-O.M., July 31, 1979, we answered a question raised by one of our audit divisions as to the legality of FFB acting as "a lender in the first instance" by purchasing the REA/guaranteed note from the borrower.[2] In our opinion we concluded "that the REA/FFB arrangement does not violate the respective statutory authorization of either agency."

With respect to the "servicing" issue, we observed that the REA-FFB arrangement might appear to conflict with the statutory definition of a guaranteed loan because REA and not FFB "services the loan and retains physical possession of the loan instrument." However, we concluded that no such conflict existed because REA serviced the loan on a reimbursable basis as the agent for FFB which was legally entitled as the holder of the note to receive the borrower's payments after collection by REA. We said that this was consistent with section 10 of the FFB Act which authorizes FFB to utilize the services of another Federal agency on a reimbursable basis. Our conclusion also relied heavily on REA's explanation that the servicing arrangement between FFB and REA did not violate the statutory scheme since FFB assumed the lender's servicing responsibility "by paying REA therefor," in accordance with a provision in the FFB Act "which confers authority on it and on other Federal agencies to arrange for performing, on its behalf, actions like loan servicing."

Thus, it is clear that our opinion upholding the legality of the REA-FFB arrangement, as well as REA's explanation of its legality, relied to a considerable degree on the fact that, while REA was actually performing the loan servicing function, it was doing so as agent for FFB on a reimbursable basis.

As stated above, 7 U.S.C. § 936 was amended in 1981 to require FFB to act as the lender in making these guaranteed loans if requested to do so by the borrower. However, this amendment did nothing to alter the nature of the relationship between FFB and REA or shift the responsibility of paying servicing fees from FFB to REA. Nor did the amendment change the definition of a guaranteed loan in 7 U.S.C. § 936 as "one which is initially made, held, and serviced by a legally organized lending agency and which is guaranteed by the Administrator hereunder." Therefore, at least when the loan is first made, the original lender must bear the responsibility of servicing these loans either by performing the servicing directly or by paying for the cost of the servicing if conducted by its agent.

[2] 7 U.S.C. § 936 had not yet been amended to require FFB to make these loans if requested to do so by the Borrower.

Moreover, we note that the word "initially" was added to the definition of a guaranteed loan by section 1 of Pub. L. No. 94-124, approved November 4, 1975, as part of an amendment making it clear that REA-guaranteed loans could be assigned. See S. Rep. No. 94-424, 94th Cong., 1st Sess. 2, 3 (1975). The addition of the word "initially" was not intended to permit shifting the burden of servicing the loan from the originating lender to REA. In our opinion, the only way the original lender might free itself of the responsibility for paying for the servicing of the loan would be by shifting it to an assignee in connection with an assignment of the loan. Servicing the loan could not become the obligation of REA unless and until the loan went into default.

Since, under the statute, the servicing of the loan is the responsibility of the lender rather than REA, it is our view that REA cannot use its own funds to pay for the costs of the servicing. It can perform the servicing so long as it is reimbursed for the costs by the lender.

Examination of the REA and FFB legislation provides additional support for our position. As we stated in our 1979 opinion, section 10 of the FFB legislation, 12 U.S.C. § 2289(10), provides that the FFB has the power "to act through any corporate or other agency or instrumentality of the United States, and to utilize the services thereof *on a reimbursable basis* * * * ." [Italic supplied.] Although this provision is not written in mandatory terms, it certainly suggests that it was the intent of the Congress that when FFB uses the services of another agency, as it is clearly doing in this case, it should reimburse the agency for those services.[3] Contrast this provision with the language contained in section 403 of the Rural Electrification Act of 1936, as amended, 7 U.S.C. § 943(b), which provides that in performing its statutory responsibilities the Rural Telephone Bank may use "the facilities and the services of employees of the Rural Electrification Administration or any other agency of the Department of Agriculture, without cost to the telephone bank * * *."

Our position finds further support if we analyze the language contained in 7 U.S.C. § 932(b) which governs the liabilities and uses of the revolving fund—one of the two possible sources that REA could use to pay the servicing costs, if allowed. Under that section the assets of the revolving fund are available only for certain stated purposes, one of which is described as follows:

> (7) payment of taxes, insurance, prior liens, * * * expenses for necessary services, including construction inspections, commercial appraisals, loan servicing, * * * and other program services, and other expenses and advances authorized in section 907 of this title in connection with insured loans. *Such items may be paid in connection with guaranteed loans after or in connection with the acquisition of such loans or security thereof after default,* to the extent determined to be

[3] Also, note 31 U.S.C. § 1535 which provides for services to be performed by one agency for another on a reimbursable basis.

necessary to protect the interest of the Government, or in connection with any other activity authorized in this Act; * * * [Italic supplied.]

In its letter to us setting forth its position concerning this matter, the Department of the Treasury, on behalf of FFB, maintains that the last phrase—"or in connection with any other activity authorized in this Act"—is very broad and encompasses expenses for the servicing of guaranteed loans prior to default. We disagree. The express statutory language provides that with respect to guaranteed loans, as opposed to insured loans, servicing and other expenses can be paid "after default" if necessary to protect the Government's interest. Treasury's interpretation would require us to conclude that the final phrase of the last sentence essentially nullified the first part of the sentence which we underlined above. That would violate a basic canon of statutory construction and would require us to adopt a strained interpretation of the express statutory language.

As we read 7 U.S.C.§ 932(b)(7), the revolving fund can be used to pay all of the different kinds of expenses, including loan servicing, for insured loans—which are defined in 7 U.S.C. § 935(c) as loans "which are made, held, and serviced by the Administrator * * *." However, with respect to guaranteed loans, these kinds of expenses can only be paid after or in connection with a default. Finally, with respect to other REA activities, not involving insured or guaranteed loans, the revolving fund can be used to pay such expenses, if necessary.

Moreover, we do not believe that the use of any of REA's current appropriations to pay for these servicing costs without reimbursement from FFB would be consistent with the recently expressed intent of Congress in connection with its enactment of the Agriculture, Rural Development, and Related Agencies Appropriation Act, 1983, Pub. L. No. 97-370, 96 Stat. 1887, approved December 18, 1982. The conference report on the appropriations bill reads as follows in this respect:

> Under a long-standing agreement between the Rural Electrification Administration and the Federal Financing Bank, FFB has reimbursed REA for its billing and collection costs on FFB loans guaranteed by REA. The conferees have been advised that the REA-FFB agreement expired on November 30, 1982, and has not been renewed because of FFB's reported refusal to continue this reimbursement process. In view of the fact that the 1981 amendments to the Rural Electrification Act now direct the FFB to make loans under an REA guarantee at the request of the borrower, FFB's legal obligation to make loans under REA's guarantee is not contingent upon the existence of an agreement between the two agencies. *REA is expected to continue providing billing and accounting and related services on existing and new loans made by FFB under an REA guarantee, and FFB is expected to continue reimbursing REA for this service.* [Italic supplied.] See H. Rep. No. 97-957, 97th Sess. 17 (1982).

In its letter to us, Treasury also makes several other arguments to support its position. Treasury argues that in adopting the 1973 amendment to the REA legislation, Pub. L. No. 93-32, 87 Stat. 65, which added the loan guarantee section to the statute, both the Congress and the Administration intended to retain "REA's tradi-

tional and time-proven role as a loan maker and servicer of loans." *See* H. Rep. No. 93-91, 93rd Cong., 1st Sess. 27 (1973). While we would not necessarily dispute Treasury's contention that one of the objectives of the legislation was to retain REA's role as maker and servicer of loans, Public Law 93-32 did much more than just establish a loan guarantee program. For example, as stated above, the Act established an insured loan program in which REA does act as the "maker and servicer of loans." Obviously, when REA guarantees a loan made by another lender it is not functioning as a loan maker. Similarly, we do not believe that the Congress intended for REA to fill the role of loan servicer in connection with guranteed loans made by lenders other than REA. If Treasury's contention were correct, REA would be responsible for servicing, or paying for the servicing, of all of its guaranteed loans, including those made by private, non-Governmental lenders. This would not be reasonable in our view and would not be consistent with the way in which loan guarantee programs of other agencies operate.

In addition, Treasury argues that as an alternative to the theory that REA has the authority to pay for the servicing of guaranteed loans, REA could redefine "servicing" in such a manner "as to coincide with the service currently provided by FFB." Under this view, functions currently performed by FFB, such as "processing and making disbursements, interest rate and prepayment cancellation, determination of principal and interest payment schedules and payment monitoring," would be considered loan servicing and would remain the responsibility of FFB. On the other hand, what REA now does and characterizes as servicing would be redefined as "program administration," and would be paid for by REA as administrative expenses.

We cannot endorse this approach. The statute specifically refers to loan servicing. While the term is not defined in the legislation we must presume, in the absence of any contrary indication, that in using the term "servicing"—a not uncommon term in the banking industry—Congress intended it to be given its generally accepted meaning. Accordingly, REA would not be justified in redefining that term so as to arbitrarily exclude those functions and tasks that are generally performed by lenders in connection with managing and overseeing the loans they make. In this respect, we note that in paragraph 5(b) of the 1974 Loan Commitment Agreement between FFB and REA, FFB apparently agreed that REA was performing "loan servicing" for FFB under 7 U.S.C. § 936 and not "program administration."

Having resolved the basic question we must address one final point raised by REA informally. That is, we would have no objection if REA determines that the current annual charge of .0002 per centum on the outstanding balance of guaranteed loans that is paid by FFB under the 1974 Agreement is either too high or too low and should be adjusted accordingly. However, the rate to be assessed

against FFB should represent, as closely as can be determined, the actual cost to REA of performing the servicing functions that would otherwise have to be performed by FFB as the lender.

In accordance with the foregoing, the Administrator of REA may not use funds either from its annual appropriation or in the Rural Electrification and Telephone Revolving Fund to pay, on a non-reimbursable basis, for the cost of servicing REA guaranteed loans made by FFB.

[B-208598]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Husband and Wife Both Members of Armed Services

A member of the uniformed services who is separated from his or her spouse, who is also a member, and who has legal custody of one or more of their children on whose behalf the spouse contributes no support, is entitled to a basic allowance for quarters at the with-dependents rate, regardless of the spouse's entitlement, provided that the dependents on account of whom the increased allowance is paid do not reside in Government quarters.

Quarters Allowance—Basic Allowance for Quarters (BAQ)—With Dependent Rate—Eligibility—Separation of Husband and Wife—Legal Sufficiency of Separation Agreement

A properly executed separation agreement generally is legally sufficient as a statement of the parties' marital separation and resulting legal obligations, for the purpose of determining entitlement to a basic allowance for quarters, even though the agreement was not issued or sanctioned by a court. However, a member's entitlement to basic allowance for quarters based on child support obligations created by a separation agreement should be reassessed following court action since the court is not bound by the agreement in awarding custody.

Matter of: Senior Airman Donna L. McCoy, USAF, and Staff Sergeant Marty L. Cooper, USAF, April 15, 1983:

This action responds to questions submitted by Air Force accounting and finance officers concerning the claims of Senior Airman Donna L. McCoy, assigned to Keesler Air Force Base, Mississippi, and Staff Sergeant Marty L. Cooper, assigned to Ramstein Air Base, Germany, for increased basic allowance for quarters on account of their dependents. Since they involve similar questions, the two separate requests for advance decisions on these claims were approved and consolidated by the Department of Defense Military Pay and Allowance Committee and assigned control number DO-AF-1404. We conclude that both members are entitled to payment.

Facts—McCoy's Case

Donna McCoy is legally separated from her spouse, Johnny E. McCoy, who is also a military member. Two children were born of their marriage. By the terms of the separation agreement, Donna

has care and custody of one of their children, and Johnny has care and custody of their other child. Their separation agreement further provides that no child support shall be paid by or to either parent until further order of the court. The agreement, which become effective and binding on June 3, 1982, provides that the terms and conditions thereof are intended to become a part of the final judgment of divorce terminating the McCoys' marriage.

On May 21, 1982, Donna McCoy terminated her residence with Johnny McCoy in Government family quarters. At that time she claimed basic allowance for quarters at the with-dependents rate, since she and the child in her custody then began residing in private quarters. Johnny McCoy and the child in his custody continued residence in Government family quarters.

The accounting and finance officer asks (1) whether under these circumstances Donna McCoy is entitled to an increased quarters allowance as claimed, and (2) whether basic allowance for quarters at the with-dependents rate will be payable to both members if Johnny McCoy should also move to private quarters with the child in his custody.

Facts—Cooper's Case

The same questions are raised concerning the claim of Sergeant Marty L. Cooper. Both Marty Cooper and his wife, Evelyn Cooper, are military members stationed in Germany. On May 27, 1982, they executed a notarized separation agreement, which gave Marty custody of one of their three children. Evelyn received custody of their other two children. Marty terminated his residence with Evelyn in Government quarters and returned the child in his custody to the continental United States. Evelyn and the children in her custody continued their residence in Government quarters.

Marty Cooper claims basic allowance for quarters at the with-dependents rate on account of the child in his custody, who resides in private quarters. In connection with claims for basic allowance for quarters under such circumstances, the submission indicates some uncertainty as to the legal sufficiency of a separation agreement that has not been issued or sanctioned by an appropriate court. We are also asked whether the answers to the questions presented would be the same if the separation agreement is subsequently incorporated into the court order and final decree of divorce.

Discussion

A member of a uniformed service who is entitled to basic pay is also entitled to an increased basic allowance for quarters on account of his dependents if adequate Government quarters are not provided for them. 37 U.S.C. § 403 (1976). The purpose of the increased allowance is to reimburse the member for a part of the ex-

pense of providing private quarters for his or her dependents. 60 Comp. Gen. 399 (1981).

We have held that when two members are married to each other and have one or more children of their marriage, only one member is entitled to an increased basic allowance for quarters on account of their common dependent(s), even though one of the members may already receive an increased allowance on behalf of dependents acquired prior to the present marriage. 54 Comp. Gen. 665 (1975); and *Matter of Cruise*, B-180328, October 21, 1974.

If two members who are married to each other have dependents of their marriage and subsequently separate or divorce, generally only one of the members may receive an increased basic allowance for quarters for their common dependents. For example, if the non-custodial member is supporting the common dependents in an amount required by the regulations (Department of Defense Military Pay and Allowances Entitlements Manual, paragraphs 30236a(1) (c and d)), pursuant to a legal obligation created by an agreement or court order, that member is entitled to the increased allowance. *Matter of Doerfer*, B-189973, February 8, 1979. However, if the member who is legally required to provide child support is entitled to an increased allowance on account of other dependents (i.e., dependents not common to the relevant marriage to another member), then the custodial member is entitled to an increased allowance on behalf of their common dependent(s), if the custodial parent provides the substantial portion of the dependent's support. Pay and Allowances Manual, paragraph 30236a(3); 60 Comp. Gen. 399 (1981); 52 *id.* 602 (1973); *Matter of Doerfer*, cited above.

These rules are based on the assumption that the non-custodial member is providing support pursuant to a legal obligation to one or more of the common dependents not residing in his household. However, in a situation where a custodial member has established a separate household and the other member is not paying that parent for any of the common dependents in his or her care at the minimum amount required by the Pay and Allowances Manual, then that custodial member is entitled to an increased basic allowance for quarters on account of the dependents in his or her care. This is so because a divided custody and support arrangement separates the two members' dependents so that they are members of two different households and are no longer the "common dependents" of the two members.

In the present cases, one member has legal custody of one or more dependent and the other member has legal custody of the other dependent or dependents, neither member is legally obligated to support the dependent or dependents in the custody of the other, and the dependents of one member do not reside in the same household with the dependents of the other. Thus, the two members no longer have "common dependents" for purposes of entitlement to increased basic allowance for quarters. Therefore, under

the provisions of 37 U.S.C. § 403, either or both of the members may be paid the increased allowance, each in his or her own individual right, provided that the dependent on account of whom the increased allowance is paid resides in private, non-Government quarters. See 58 Comp. Gen. 100 (1978) and *Matter of Ranazzi*, B-195383, November 6, 1979. Entitlement to the increased allowance commences on the date the member and the child in his or her custody establish a residence in non-Government quarters or the effective date of the separation agreement, whichever is later.

Concerning the legal sufficiency of the separation agreement in the Coopers' case, for the purpose of determining a member's eligibility for increased basic allowance for quarters, if under the law of the controlling jurisdiction a husband and wife are authorized to enter an agreement that contemplates an existing or immediate marital separation, which does in fact occur, such agreement is generally recognized by the courts. *Hill* v. *Hill,* 142 P.2d 417 (Cal. Sup. Ct. 1943). This is so even though the agreement may not have been submitted to the court for approval. *Singer* v. *Singer,* S.W.2d 605 Mo. Ct. App. (1965).

In concert with these general principles, we have recognized a written, properly executed separation agreement as a legitimate statement of the parties' marital separation and legal obligations pertaining to their marriage, for the purpose of determining a member's entitlement to certain allowances. See 58 Comp. Gen. 100, 103 (1978), and *Matter of Doerfer,* cited above; see also Pay and Allowances Manual, paragraphs 30236d and e.

It should be noted, however, that although the separation agreement may include provisions for custody and maintenance of the couple's children, such agreement is not binding upon the court in awarding custody. *Hudson* v. *Hudson,* 257 S.E. 2d 448 (N.C. Ct. App. 1979). Thus, while the legal support obligations the two members assumed under the separation agreement may be recognized for entitlement to increased basic allowance for quarters, both members' entitlement should be reassessed following actions by the court regarding custody and support. If the members' custody and support obligations remain unchanged, so also do their entitlements. If these arrangements are modified by the order of the court, changes in the members' allowance may be required.

Conclusion

Accordingly, payment of the increased allowance is authorized for Airman Donna McCoy, beginning on June 3, 1982, and for Sergeant Marty Cooper, beginning on the date he and the child in his custody assumed residence in non-Government quarters, if that date is subsequent to the effective date of his separation agreement. If either of their spouses moves from Government quarters to private quarters, Airman McCoy's or Sergeant Cooper's entitle-

ment to the increased allowance will not be affected. But, presumably, the other spouse then also will become entitled to the quarters allowance at the with-dependents rate, unless the present custody and support arrangements are modified. Incorporation of support agreements into the orders of the court and final decrees will not affect these holdings.

[B-208708]

Officers and Employees—Transfers—Leases—Unexpired Lease Expense—Reimbursement—Governed by Terms of Lease

To settle lease which did not contain termination clause, transferred employee paid rent for unexpired 4½ month term of lease. Employee is entitled to full amount of lease settlement expenses paid in avoidance of potentially greater liability. Reimbursement is not diminished by agency's finding that it is customary for landlord to refund rent when he has relet premises during unexpired term of lease since reimbursement is governed by terms of lease and not what is customary in locality.

Matter of: Norman Mikalac, April 15, 1983:

By letter of July 21, 1982, an authorized certifying officer with the Defense Logistics Agency requested an advance decision on the reclaim of Mr. Norman Mikalac for a month's rent paid in connection with the settlement of an unexpired lease. The request was forwarded through the Per Diem, Travel and Transportation Allowance Committee and assigned PDTATAC Control No. 82-20. The employee's payment of rent for the 4½ month period of the unexpired lease was in settlement of a potentially greater liability under the terms of that document. For this reason and because neither state law nor the terms of the lease obligated the landlord to relet the premises and hold any rent received for the account of the former tenant, the employee is entitled to the full amount of the settlement, notwithstanding the fact that the former landlord relet the premises for the last month of the lease term.

By Travel Order No. TGB 81-C-0831, dated July 16, 1981, Mr. Mikalac was transferred from Philadelphia, Pennsylvania, to a position with the Defense Logistics Agency in Baltimore, Maryland. At the time he was notified of his transfer Mr. Mikalac was residing in a house he had rented under a 1-year lease which expired December 31, 1981. The lease contained no termination clause and did not permit subletting without approval by the landlord.

The record indicates that when Mr. Mikalac was notified of his transfer, he contacted his landlord and offered to settle his liability under the lease by paying rent through the end of October 1981. On July 22, 1981, he received a letter from the owner's attorney advising that he was obligated under the terms of the lease to pay the full monthly rental amount for the unexpired period of the lease through December 1981. That letter stated in part:

Your failure to completely satisfy my client with regard to your full obligation under the terms of above lease and the expenditures detailed below will ensure that the following actions are taken: (1) The pursuit by my client of all available legal

remedies to which he is entitled; (2) The confiscation by my client of the $500 security deposit held under the above lease; (3) An unsatisfactory reference by my client to your prospective landlord.

Attached to the letter was an itemized list of expenses the lessor would incur as a result of the termination totaling $2,251.50. Mr Mikalac ultimately agreed to pay the rent for the remainder of his lease (4½ months). His security deposit of $500 was returned and the lessor did not pursue his claim for additional damages.

When Mr. Mikalac filed his voucher on September 28, 1981, he claimed $1,798 for the cost of terminating his lease. The agency disallowed $395, an amount equal to the final month's rent, upon learning that the landlord had relet the house in December 1981. Based on its determination that a tenant would ordinarily be entitled to a return of forfeited rent where the landlord relet the premises during the unexpired term of the lease, the agency found that the $395 amount in question was not a customary or reasonable expense of settlement. Although Mr. Mikalac was advised to recover the $395 from his former landlord, the landlord's attorney has informed the agency that the parties' agreement constituted a complete settlement of their obligations under the lease and the employee is not entitled to return of the 1-month's rent in issue.

The criteria to be applied to determine whether Mr. Mikalac is entitled to reimbursement for the full amount of the expenses incurred in settling his unexpired lease are set forth in paragraph C14003 of Volume II, Joint Travel Regulations (JTR), which provides:

> Expenses incurred for settling an unexpired lease (including month-to-month rental) on residence quarters occupied by the employee at the old duty station may include broker's fees for obtaining a sublease or charges for advertising an unexpired lease. Such expenses are reimbursable when:
>
> 1. applicable laws or the terms of the lease provide for payment of settlement expenses,
>
> 2. such expenses cannot be avoided by subleasing or other arrangement,
>
> 3. the employee has not contributed to the expense by failing to give appropriate lease termination notice promptly after he has definite knowledge of the proposed transfer,
>
> 4. the broker's fees or advertising charges are not in excess of those customarily charged for comparable services in that locality.
>
> Itemization of these expenses is required, the total amount of which will be entered in the travel voucher. The voucher may be submitted separately or with a claim that is to be made for expenses incident to the purchase of a dwelling. Each item must be supported by documentation showing that the expense was, in fact, incurred and paid by the employee.

Mr. Mikalac's lease did not contain a specific provision for payment of liquidated damages in the event of early termination. We have held, however, that the first condition for reimbursement (contained in item 1) is not to be interpreted as requiring such a provision and in the absence of such provision, have allowed reimbusement where the employee entered into a reasonable settlement of his obligations under the terms of that lease. *Matter of Jason*, B-186035, November 2, 1976. Similarly, since the lease did not contain a notice provision, item 3 is not in issue and Mr. Mikalac has

not claimed brokerage or advertising expenses which are the subject of item 4. With regard to item 2, the terms of the lease specifically prohibited subletting. Under Pennsylvania law a landlord has no clear duty to mitigate damages when there has been a premature termination of a lease. *Ralph* v. *Deiley,* 141 A. 640 (1928); 21 A.L.R.3d 534 (1968); *Cusamano* v. *Anthony M. DiLucia, Inc.*, 421 A.2d 1120, 1125 n.9 (1980).

Under the terms of Mr. Mikalac's lease, the landlord had the option of insisting upon rent for the unexpired balance of the term of the lease, together with other costs and expenses, upon the tenant's failure to pay rent or upon his abandonment of the premises. Like Pennsylvania law, the lease imposed no clear duty upon the landlord to relet the premises in an effort to reduce the former tenant's liability. In this case, the record indicates that Mr. Mikalac offered to settle his outstanding liability by payment of rent through October 1981. His offer was summarily rejected, and he was advised that his landlord would settle for no less than payment of rent for the unexpired term of the lease and that he faced even greater liability should he be unwilling to meet those terms.

Since Mr. Mikalac attempted to reduce his liability and since the payment is no more than is required by the terms of the lease in the event of the tenant's premature termination, Mr. Mikalac is entitled to reimbursement for the $1,798 amount he had claimed as a lease settlement expense. Under the regulations, his entitlement is not diminished by the fact that it may not be customary for the landlord to insist upon or retain rent for the unexpired term of the lease where he has successfully relet the premises before the end of that term. Reimbursement for lease settlement expenses is governed by the actual terms of the lease and the requirement that the employee make a reasonable effort to settle his obligation thereunder. Under the regulations only broker's fees and advertising charges for the purpose of settling a lease are limited to those customarily charged in the locality.

[B-209581]

Mileage—Travel by Privately Owned Automobile—In Lieu of Government Vehicle—Reimbursement

Employee, who was a member of an agency review team and authorized to perform temporary duty travel in a group by Government-owned van, received permission to travel by privately owned vehicle as an exercise of personal preference. Since the agency did approve his privately owned vehicle use, and since the regulations do not authorize proration of reimbursement where Government vehicle is used anyway, employee may be reimbursed mileage at 7.5 cent rate authorized by Federal Travel Regulations para. 1-4.4c.

Matter of: Don L. Sapp—Reimbursement of Travel Expenses—Government Vehicle Available, April 15, 1983:

This decision is in response to a request from an Authorized Certifying Officer, General Services Administration, concerning the entitlement of Mr. Don L. Sapp, an agency employee, to be reimbursed mileage for use of his privately owned vehicle while performing temporary duty travel.

The issue presented is whether an employee may be reimbursed 7.5 cents per mile, or a prorata amount, when he uses a privately owned vehicle in lieu of a Government-furnished one.

Mr. Sapp is entitled to be reimbursed the full 7.5 cents per mile since the regulations do not provide for proration.

Mr. Sapp was a member of a review team which was to travel from Atlanta, Georgia, to Birmingham, Alabama, to perform temporary duty and return. A Government-owned van was available, which use was determined to be advantageous to the Government. Mr. Sapp requested and was authorized to use his privately owned vehicle for this travel as a matter of personal preference, while the rest of the review team traveled by Government van.

The submission points out that under the provision of the Federal Travel Regulations when an employee is permitted to use his privately owned vehicle as a matter of preference in lieu of Government-owned transportation, the rate of reimbursement for official travel is limited to 7.5 cents per mile, which approximates the cost of operating a Government-owned vehicle. Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), paragraph 1-4.4c. It is suggested that such a rule implies that only one traveler is involved, and the use of the privately owned vehicle is in lieu of the use of the Government vehicle. Thus, the cost to the Government by permitting the employee to use his own vehicle would not be increased. However, it is also pointed out that when multiple ridership in a Government vehicle is contemplated, each authorized deviation from the use of such vehicle would automatically increase the Government's cost. It is suggested that where a Government vehicle will still be used and where a passenger is authorized privately owned vehicle use as a matter of personal preference, in order to minimize the Government cost for the additional vehicle, the employee's reimbursement should be porated.

Section 5704 of Title 5, United States Code, provides in part:

(a) [I]n any case in which an employee who is engaged on official business for the Government chooses to use a privately owned vehicle in lieu of a Government vehicle, payment on a mileage basis is limited to the cost of travel by a Government vehicle.

Paragraph 1-2.2 of the FTR, promulgated thereunder, provides in part:

b. *Selecting method of transportation to be used.* Travel on official business shall be by the method of transportation which will result in the greatest advantage to the Government, cost and other factors considered.

c. *Presumptions as to most advantageous method of transportation.*

* * * * * * *

(2) *Goverment—furnished automobile.* When it is determined that * * * an automobile is required for official travel, a Government furnished automobile shall be used whenever it is reasonably available.

(3) *Privately owned conveyance.* Except as provided in 1-2.2d, the use of a privately owned conveyance shall be authorized only when such use is advantageous to the Government.

* * * * * * *

d. *Permissive use of a privately owned conveyance.* When an employee uses a privately owned conveyance as a matter of personal preference and such use is compatible with the performance of official business * * * such use may be authorized or approved provided that reimbursement is limited in accordance with * * * [the provisions of 1-4].

The basic focus of these various provisions of the FTR is that Government vehicles should be used whenever available and appropriate. However, use of a Government vehicle is not required to the exclusion of all other comparable modes of transportation. The restraints imposed by the regulations are that when other transportation modes are permitted to be used, e.g., privately owned vehicles, and if authorized as compatible with the performance of official business, the reimbursement authorized is limited by paragraph 1-4.4c to the cost of operating the Government vehicle.

We agree that this concept seems to imply a single user of a Government vehicle. However, we believe that since sufficient multiple traveler situations have arisen in the past, and since the regulations have not specifically provided for this type of situation, it is not unreasonable to conclude that the provisions of paragraph 1-2.2d include any Government-employee passenger in a Government vehicle should use of his privately owned vehicle for personal preference be approved. In view of the fact that nothing is contained in the regulations permitting proration, coupled with the specific authority contained in FTR paragraph 1-4.4c, each employee who is permitted to use his privately owned vehicle as a matter of personal preference in lieu of transportation by Government-owned vehicle would be authorized to be reimbursed for official mileage at the 7.5 cent rate.

Accordingly, Mr. Sapp may be reimbursed for his official mileage at the 7.5 cent rate, if otherwise correct.

[B-202278]

Legislation—Recommended by GAO—Presidential Inaugural Ceremonies—Participation by Federal Agencies—Extent and Types of Participation

The Presidential Inaugural Ceremonies Act, now largely codified at 36 U.S.C. 721-730, is the primiary legislation dealing with Presidential inaugurations. It authorizes Department of Defense (DOD) to provide limited assistance, primarily safety and medical in nature, to the Presidential Inaugural Committee (PIC), but even in these instances, the statute requires the PIC to indemnify the Government against losses. DOD itself recognizes that much of its extensive participation in Presidential

inaugural activities is fundamentally a matter of custom rather than being rooted in legal authority. Nevertheless, Presidential inaugurations are highly symbolic national events and DOD support was provided with the knowledge and approval of many members of the Congress over a period of years. General Accounting Office recommends that the Congress provide specific legislative guidance on the extent and types of support and participation in inaugural activities which Federal agencies are authorized to provide.

Appropriations—Defense Department—Inaugural Ceremonies—Extent of Appropriation Availability

Section 601 of the Economy Act, as amended, 31 U.S.C. 686 (now 31 U.S.C. 1535), permits one agency or bureau of the Government to furnish materials, supplies or services for another such agency or bureau on a reimbursable basis. However, since the Presidential Inaugural Committee (PIC) is not a Government agency and DOD used its own appropriations without reimbursement from either the PIC or Joint Congressional Committee on Inaugural Ceremonies in participating in the 1981 Presidential inaugural activities, the authority of the Economy Act was not available.

Appropriations—Defense Department—Inaugural Ceremonies—Extent of Appropriation Availability—Participation of Members and Employees Only

Participation in the inaugural ceremony and in the inaugural parade can be justified on the basis of its obvious significance for DOD, as well for other Federal agencies. However, each agency may only incur and pay expenses directly attributable to the participation of its own employees. It is therefore improper for DOD, in the absence of specific statutory authority, to pay such costs as housing of high school band participants in the parade, lending military jeeps to pull floats provided by non-military organizations, providing administrative and logistical support to PIC offices, etc.

Appropriations—Defense Department—Inaugural Ceremonies—Extent of Appropriation Availability—Participation of Members and Employees Only—Use as Chauffeurs, etc.

Use of military personnel for VIPs and other non-military persons in the capacity of chauffeurs, personal escorts, social aides and ushers is improper under the general appropriations law principles and under DOD's community relations regulations. See 32 C.F.R. Parts 237 and 238.

President—Inaugural Ceremonies—Inaugural Balls—Status—Private Gatherings

Presidential inaugural balls are basically private gatherings or parties not generally available to the community, whose proceeds go to the private, non-Government PIC. They are neither official civil ceremonies nor official Federal Government functions under the DOD's community relations regulations (32 C.F.R. Parts 237 and 238). Therefore, DOD's appropriated funds are not available to cover the costs of participation by any of its employees or members.

To the Honorable William Proxmire, United States Senate, April 18, 1983:

This is in response to your request of February 19, 1981, for our opinion on the legality of certain support which the Department of Defense (DOD) provided for activities associated with the inauguration of President Ronald Reagan. More particularly, you asked

whether there was any specific statutory authority for the military to provide 1,120 service personnel as chauffeurs, personal escorts and social aides, as well as other non-safety and non-medical support, for inaugural activities. You noted that some members of the Presidential Inaugural Committee were provided with military drivers from mid-November 1980 until the end of January 1981. In addition, you requested any proposals we might have for a statutory remedy, in the event we concluded that there is no specific statutory authority for DOD to provide these kinds of support for Presidential inaugural activities.

There is no specific statutory authority for DOD to provide chauffeurs, personal escorts and social aides, as well as other non-safety and non-medical support, for inaugural activities, nor are many of DOD's inaugural activities covered by more general authorities such as the Economy Act or those which support expenditures for local community relations activities. The Presidential Inaugural Ceremonies Act does authorize DOD to provide limited assistance, primarily safety and medical in nature, to the Presidential Inaugural Committee (PIC), but DOD itself recognizes that its extensive participation in Presidential inauguration activities is fundamentally a matter of custom rather than being rooted in legal authority.

Accordingly, we must conclude that much of the support provided by DOD for 1981 inaugural activities was without proper legal authority. At the same time, it must be recognized that Presidential inaugurations are highly symbolic national functions for which DOD support has been provided with the knowledge and approval of members of Congress over the years. Lack of a statutory base for this support has resulted in practices questionable on policy as well as legal grounds.

In these circumstances, we recommend that Congress undertake a review of the Presidential Inaugural Ceremonies Act to establish a clear basis in policy and law for continuing participation by Federal agencies in Presidential inaugural activities. We will be glad to work with you in this endeavor. A detailed analysis follows.

DEPARTMENT OF DEFENSE ASSISTANCE FOR THE 1981 PRESIDENTIAL INAUGURATION

The Comptroller General has been requested to provide his opinion on the legality of certain support the Department of Defense (DOD) provided for activities associated with the inauguration of President Ronald Reagan. More particularly, we have been asked whether there was any specific statutory authority for the military to provide 1,120 service personnel as chauffeurs, personal escorts and social aides, as well as other non-safety and non-medical support, for inaugural activities. It was also noted that some members of the Presidential Inaugural Committee were provided with mili-

tary drivers from mid-November 1980 until the end of January 1981. In addition, we were asked to provide any proposals we might have for a statutory remedy, in the event we concluded that there is no specific statutory authority for DOD to provide these kinds of support for Presidential inaugural activities.

FACTS

We requested DOD to provide to us a complete report on its 1981 Presidential inaugural activities, including a full description of the types of inaugural assistance it furnished, as well as the legal basis for that assistance. In its report, DOD states that a total of 11,430 armed forces personnel provided support for activities associated with the 1981 Presidential Inauguration. The report indicates that 1,533 of its personnel were used as military aides (both personal aides and social aides), drivers, and ushers—the types of assistance about which you express the greatest concern. The other DOD personnel involved in the inaugural activities performed a variety of functions, including participating in the inaugural parade, acting as honor and parade route cordons, removing snow, and providing security. In addition, a variety of equipment, supplies and other services were provided by DOD, including logistical and administrative support. DOD inaugural support was coordinated through the Armed Forces Inaugural Committee (AFIC).

PRESIDENTIAL INAUGURAL CEREMONIES ACT

The only statutory provision that specifically authorizes DOD to provide support for inaugural activities is 10 U.S.C. § 2543, the codification of section 6 of the Presidential Inaugural Ceremonies Act, act of August 6, 1956, ch. 974, 84th Congress, 2d Sess., 70 Stat. 1049, 1050. That section provides:

> (a) The Secretary of Defense, under such conditions as he may prescribe, may lend, to an Inaugural Committee established under section 721 of title 36, hospital tents, smaller tents, camp appliances, hospital furniture, flags other than battle flags, flagpoles, litters, and ambulances and the services of their drivers, that can be spared without detriment to the public service.
>
> (b) The Inaugural Committee must give a good and sufficient bond for the return in good order and condition of property lent under subsection (a).
>
> (c) Property lent under subsection (a) shall be returned within nine days after the date of the ceremony inaugurating the President. The Inaugural Committee shall—
>
> (1) indemnify the United States for any loss of, or damage to, property lent under subsection (a); and
>
> (2) defray any expense incurred for the delivery, return, rehabilitation, replacement, or operation of that property.

The type of inaugural assistance covered by this provision is rather limited and primarily of a medical or safety nature. This provision does not authorized DOD to provide the number of personnel and the wide-ranging inaugural support referred to in DOD's report to us.

DOD itself recognized the limited coverage of the provision. In the Executive Summary of the 1977 Armed Forces Inaugural Committee, DOD stated:

> 10 U.S.C. 2543 is the only statutory authority within the United States Code specifically authorizing DOD support of a Presidential Inauguration. It identifies only medical and safety equipment support. Additional inaugural support has traditionally been provided by DOD, though not specifically defined in the statute. Using the limiting language of this statute as a basis, * * * the Special Assistant, Secretary of Defense, understandably had reason to question the legality of all support traditionally provided by DOD. This caused lengthy reviews, frequent discussion and many false starts and stops. Major disruptions resulted. In the end, * * * the discussion was elevated to the U.S. Senate level * * *. To preclude recurrence of this situation, it is strongly recommended that DOD immediately initiate action to propose appropriate legislation to clarify the language and intent of 10 U.S.C. 2543.* * *

In response to DOD's concerns, the Chairman of the Joint Congressional Committee on Inaugural Ceremonies for the 1977 Presidential Inauguration had introduced S. 2839, 96th Congress, to amend the Presidential Inaugural Ceremonies Act, *supra,* to clarify DOD's participation. "Because of the legal questions always accompanying Inaugural support * * *, the Department of Defense supported Senate Bill 2839 * * *." Nevertheless, that bill was not enacted, and DOD now states that "the bill is still needed to avoid the quadrennial questions that prompted this inquiry." Thus there seems to be a consensus of uncertainty about DOD's authority.

DOD has not been alone in struggling with the lack of legal clarity with respect to participation in inaugural activities. The General Services Administration (GSA) in the past experienced inaugural problems similar to those of DOD. Without any explicit authority GSA provided the following assistance in connection with inaugurals:

> 1. Provide office space, office furniture, and telephones for the inaugural committee.
> 2. Provide additional guards for the protection and security of Government property and buildings.
> 3. Make available public toilet facilities in Government buildings along the parade route.
> 4. Make cafeterias and snack bars in Government buildings available to military organizations participating in the parade.
> 5. Establish first-aid stations in Government buildings along or near the parade route.
> 6. Maintain standby work force to deal with building maintenance emergencies (elevator trouble, electrical failures, plumbing leaks, snow removal, etc.).
> 7. Arrange for special window and grounds cleaning at Government buildings along the parade route.
> 8. Construct stands and platforms at Government buildings along the parade route.
> 9. Provide parking space and dispatch services for official parade vehicles.
> 10. Cleanup Government buildings and grounds along parade route following inaugural.

H.R. Rep. No. 1796, 90th Cong., 2d Sess. 2 (1968).

Congress has since explicitly legitimized GSA's participation in inaugural activities by amending the Federal Property and Administrative Services Act. In 1968 Congress added subsection 210(a)(15)

to the Federal Property and Administrative Services Act, as amended, 40 U.S.C. § 490(a)(15), which authorized GSA:

> to render direct assistance to and perform special services for the Inaugural Committee (as defined in section 721 of Title 36) during an inaugural period in connection with Presidential inaugural operations and functions, including employment of personal services without regard to the civil service and classification laws; provide Government-owned and leased space for personnel and parking; pay overtime to guard and custodial forces; erect and remove stands and platforms; provide and operate first-aid stations; provide furniture and equipment; and provide other incidental services in the discretion of the Administrator.

It is with this background that we analyze whether DOD's participation in the 1981 Presidential inaugural events was legally supportable on some basis other than 10 U.S.C. § 2543. Our starting point is the Presidential Inaugural Ceremonies Act, *supra,* now largely codified at 36 U.S.C. §§ 721–730, because it is the primary legislation dealing with Presidential inaugurations. Legally it could well be construed as the exclusive authority for establishing responsibilities related to Presidential inaugurals, since it is the permanent legislation in which Congress attempted to address the whole inaugural process. The statute itself, however, does not explicitly preempt other authorities, and the example of the special legislation for GSA indicates that Congress has not legislated on inaugural matters exclusively through amendments to the Presidential Inaugural Ceremonies Act. Accordingly, we shall not treat the Presidential Inaugural Ceremonies Act, *supra,* as preempting other possible authorities for DOD assistance for Presidential inaugurals, as long as the other more general authorities do not contradict the provisions and policies of the Presidential Inaugural Ceremonies Act. The more general authorities relied on by DOD are the Economy Act and DOD's community relations regulations, each of which is discussed below.

Before addressing the other authorities relied on by DOD, however, at least the major features of the Presidential Inaugural Ceremonies Act should be noted, so that DOD's assistance may be properly evaluated in the context of the provisions of that primary statute.

First, subsection 1(b)(2) of the act, 36 U.S.C. § 721(b)(2), acknowledges that there will be a Presidential Inaugural Committee (PIC) for each Presidential inauguration, and defines it as "the committee in charge of the Presidential inaugural ceremony and functions and activities connected therewith, to be appointed by the President-elect." The statute assumes that the PIC will be a private, non-governmental entity, and gives it substantive and substantial rights. However, it contains no provisions authorizing Governmental financial assistance to the PIC. At the same time, in at least three sections, the Presidential Inaugural Ceremonies Act requires that the PIC indemnify the Government for any loss or damage.[1] As

[1] Section 4 of the act, 36 U.S.C. § 724, provides, in part:
" " " The Inaugural Committee shall *indemnify and save harmless* the District of Columbia and the appropriate agency or agencies of the Federal Government against any loss or damage to " " " ["any sidewalk, street,

such, the Presidential Inaugural Ceremonies Act implies that the PIC was not expected to receive Federal funds or any assistance from Federal agencies other than as specified.

Section 9 of the act, 36 U.S.C. § 729, reserves to the Joint Congressional Committee on Inaugural Ceremonies (JCCIC) responsibility for inaugural activities at the United States Capitol Buildings or Grounds or other property under the jurisdiction of the Congress. In addition, this section permits the JCCIC to receive, upon its request, any of the services or facilities otherwise authorized by the Presidential Inaugural Ceremonies Act.

Section 6 of the Presidential Inaugural Ceremonies Act, *supra*, which authorizes the limited DOD support to the PIC, is but one isolated provision of this statute, and DOD is but one of the agencies assigned responsibilities. Among other things, the Presidential Inaugural Ceremonies Act does, in addition, explicitly:

> Authorize an appropriation for District [of Columbia] expenses in connection with a Presidential inauguration;
> [A]uthorize the Commissioners [now Council of the District of Columbia] to make regulations for the protection of life, health, and property during the "Inaugural period," * * *;
> [A]uthorize the granting of special licenses, [with the approval of the Inaugural Committee,] to persons selling goods, wares, and merchandise on the streets of the District [of Columbia] during such period;
> [C]entralize in the Secretary of the Interior (or his designated agent, who might be the Superintendent of National Capital Parks) the authority to grant permits to the Inaugural Committee for the temporary use of public space under the control of the Federal Government outside of the Capitol Grounds;
> [A]uthorize the Commissioners [now Mayor of the District of Columbia] to grant permits to the Inaugural Committee for the temporary use of public space under their control; [and]
> [A]uthorize the temporary installation [by the Inaugural Committee] of lighting or communication facilities on and over public space; * * *. (Organization modified from original into paragraph structure.)

S. Rep. No. 2645, 84th Congress, 2d Sess. 1 and 2 (1956). See also, H.R. Rep. No. 2611, 84th Congress, 2d Sess. 2 and 3 (1956). Moreover, section 3 of the act, as amended, 36 U.S.C. § 723, specifically authorized funds to be appropriated to the District of Columbia to enable it to:

> * * * provide additional municipal services * * * during the inaugural period, including employment of personal services without regard to the civil-service and classification laws; travel expenses of enforcement personnel, including sanitarians, from other jurisdictions; hire of means of transportation; meals for policemen, fire-

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park, reservation, or other public grounds in the District of Columbia" occupied with the approval of the Inaugural Committee by any stand or structure "for the sale of goods, wares, merchandise, food or drink"] and against any liability arising from the use of such property, either by the Inaugural Committee or a licensee of the Inaugural Committee. [Italic supplied.]

Section 5 of the act, 36 U.S.C. § 725, provides, in part:

> * * * No expense or damage from the installation, operation, or removal [by the Inaugural Committee] of * * * temporary overhead conductors or * * * illumination or other electrical facilities shall be incurred by the United States or the District of Columbia, and the Inaugural Committee shall *indemnify and save harmless* the District of Columbia and the appropriate agency or agencies of the Federal Government against any loss or damage and against any liability whatsoever arising from any act of the Inaugural Committee or any agent, licensee, servant, or employee of the Inaugural Committee. [Italic supplied.]

Section 6 of the act, 10 U.S.C. § 2543, provides, in part:

> * * * [T]he Inaugural Committee shall *indemnify* the Government for any loss or damage to any * * * ["hospital tents, smaller tents, camp appliances, hospital furniture, ensigns, flags, ambulances, drivers, stretchers, and Red Cross flags and poles" lent to them by the DOD], and no expense shall be incurred by the United States Government for the delivery, return, rehabilitation, replacement, or operation of such equipment. The Inaugural Committee shall give a good and sufficient bond for the safe return of such property in good order and condition, and the whole without expense to the United States. [Italic supplied.]

men, and other municipal employees, cost of removing and relocating streetcar loading platforms, construction, rent, maintenance, and expenses incident to the operation of temporary public confort stations, first-aid stations, and information booths; and other incidental expenses in the discretion of the Commissioners [now Mayor of the District of Columbia] * * *.

Finally, subsection 1(b)(1) of the Presidential Inaugural Ceremonies Act defines the term "inaugural period" as:

* * * the period which includes the day on which the ceremony of inaugurating the President is held, the five calendar days immediately preceding such day, and the four calendar days immediately subsequent to such day. 36 U.S.C. § 721(b)(1).

ECONOMY ACT

Aside from the Presidential Inaugural Ceremonies Act, DOD relies in part on the so-called Economy Act as authority to provide additional support for inaugural events in response to requests of the Presidential Inaugural Committee and the Joint Congressional Committee on Inaugural Ceremonies.[2] Section 601 of the Economy Act, as amended,[3] 31 U.S.C. § 1535,[4] permits one agency or bureau of the Government to furnish materials, supplies or services for another on a reimbursable basis. The PIC is not a Government agency and even if it were, DOD used its own appropriations without reimbursement from either the PIC or JCCIC. Therefore, the authority of the Economy Act is not applicable.

COMMUNITY RELATIONS REGULATIONS

Aside from statutes, DOD relies upon its internal regulations and its traditional ceremonial role of participation in national celebrations and somber state occasions.

DOD's community relations regulations are codified at 32 C.F.R. Parts 237 and 238. The statutory authority listed for them is 5 U.S.C. § 301 (previously codified at 5 U.S.C. § 22) which provides that:

The head of an executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of

[2] DOD stated its justification for reliance on the Economy Act as follows:
Another legal theory which authorized Department of Defense support to the Inaugural is that much of it was pursuant to the Economy Act (31 U.S.C. 686). Throughout the pre-Inaugural period, the AFIC received requests from the PIC, which is recognized by 36 U.S.C. 721. As an operational principle, the AFIC responded to the PIC as if the PIC were an agency entitled to receive Economy Act assistance. Although this was inconsistent with a 1977 interpretation by the Staff Judge Advocate, Military District of Washington, it was reasonable for the AFIC to provide assistance to the PIC in view of the interrelationship among the JCCIC, PIC, and AFIC. Of course, in 1977 the Special Assistant to the Secretary of Defense expressly approved Economy Act support for the JCCIC, which is recognized by 36 U.S.C. 729.

[3] Section 601 of the Economy Act, as amended, states in part:
(a) Any executive department or independent establishment of the *Government*, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau, or office to be in the interest of the Government so to do, may place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and *shall pay promptly by check* to such Federal agency as may be requisitioned, upon its written request, *either in advance or upon* the furnishing or *performance* thereof, all or part of *the* estimated or *actual cost* thereof as determined by such department, establishment, bureau, or office as may be requisitioned; but proper adjustments on the basis of the actual cost of the materials, supplies, or equipment furnished, or work or services performed, paid for in advance, shall be made as may be agreed upon by the departments, establishments, bureaus, or offices concerned * * * [Italic supplied.]

[4] Pub. L. No. 97-258, approved September 13, 1982, 96 Stat. 877, enacted Title 31 of the United States Code into positive law and renumbered various of its provisions. The Economy Act, cited by DOD as 31 U.S.C. § 686, is now found at 31 U.S.C. § 1535.

its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

DOD defines "community relations" as "the relationship between the military and civilian communities." 32 C.F.R. § 237.3(a). DOD's policy justifications for the community relations program include recognition that:

> The morale of all personnel of the Department of Defense is affected by the favorable or unfavorable attitudes of the civilian community toward their mission and their presence in the area * * *. (32 C.F.R. § 237.4(a)(2).),

and that:

> Active participation of military units and military personnel and their dependents as individuals in civilian activities, organizations, and programs is an important factor in establishing and maintaining a state of mutual acceptance, respect, cooperation, and appreciation between the Armed Forces and civilian communities affected by their operations. (32 C.F.R. § 237.4(a)(3).)

These regulations encompass a broad range of activities, with emphasis on DOD participation in *local* community events. They were not designed to cover events which are national in scope such as a Presidential inauguaration and which have little if anything to do with the means by which favorable local community relations are fostered. Nevertheless, an examination of certain aspects of the regulations may be useful for the purpose of developing Presidential inauguration participation policy.

As a general principle, DOD's regulations distinguish between the kind of participation in public events and programs which primarily fosters DOD's own interests and purposes, and participation as one of several interested parties in which the benefits may be said to be mutual. (By necessary implication, if there is only negligible benefit to DOD to be derived from its participation, it should decline the invitation to be part of the event.) DOD may pick up most or all of the costs of its participation in the first category as necessary. For events in the second category, DOD should pay only the proportionate share of the costs directly attributable to the participation of its own personnel.

We will now examine DOD assistance with the 1981 Presidential inaugural activities in the light of these principles.

INAUGURAL CEREMONY

The installation of the President as Commander-in-Chief of the Armed Services is obviously of major interest to the DOD. It is also of major interest to every other Federal entity, as well as to the public at large. In recognition of this shared interest, the Congress established the Joint Congressional Committee on Inaugural Ceremonies (JCCIC) and charged it with the responsibility of making arrangements for the inaugurations of the President-elect and the Vice President-elect. In addition, section 9 of the Presidential Inaugural Ceremonies Act, 36 U.S.C. § 729, reserves to the JCCIC responsibility for inaugural activities at the United States Capitol

Buildings or Grounds or other property under the jurisdiction of the Congress. Consequently, primary responsibility for the arrangements for the Presidential inaugural ceremony, including funding, rests with the JCCIC rather than DOD.

Since DOD also has a clear interest in the event, it may pay for the expenses necessarily incurred by its personnel in participating in the ceremony. This might well include the costs of transporting DOD participants to the ceremony, per diem and other travel expenses of participating, the costs of ceremonial uniforms, flags, etc. It would also include the costs of any services provided to the Presidential Inaugural Committee (PIC) under section 6 of the Presidential Inaugural Ceremonies Act, discussed before. As explained earlier, that type of assistance is rather limited and is primarily of a medical or safety nature.

On the other hand, there appears to be no authority for the provision of what DOD described as "logistical and administrative" support to the JCCIC, nor for the provision of equipment and supplies (unrelated to DOD's own participation needs), all on a non-reimbursable basis. We aso question the use of DOD personnel as ushers for those holding reserved seats for the inaugural ceremony. (Ushers are explicitly listed as inappropriate capacities for service by military personnel in DOD's community relations regulations, 32 C.F.R. § 238.6(b)(4)(iv).) However, it is not our intention now to single out all specific costs which may definitely be allowed and to identify all others which are clearly improper. We are merely discussing the applicable principles under DOD's own community relations regulations, in order to point up the need for more definitive guidance from the Congress.

INAUGURAL PARADE

Participation in this significant national celebration is clearly of great importance and significance to DOD. As was true of the inaugural ceremony, other Federal entities could also regard such participation as being of direct benefit or interest to them. For example, it is conceivable that at some future inaugural, the Departments of Agriculture or Interior might be invited by the PIC to provide a "float" symbolizing their contributions to the nation. Thus, once again we have a "mutual benefit" event, and each agency may incur and pay costs directly attributable to its own participation. As for other costs not so allocable, we note that subsection 1(b)(2) of the Presidential Inaugural Ceremonies Act, 36 U.S.C. § 721(b)(2), charges the PIC with responsibility for Presidential inaugural functions and activities that do not take place at the United States Capitol Buildings or Grounds or on other property under the jurisdiction of the Congress. In addition, that statute does not provide for assistance to the PIC through Federal expenditures, although use of appropriated funds was anticipated by the

District of Columbia government for related functions. Therefore, we conclude that primary responsibility for the Presidential inaugural parade rested with the PIC and not DOD.

Applying this principle, we agree with a January 6, 1977, memorandum (referred to in the materials included in the Congressional submission) from the Assistant Secretary of Defense (Installation and Logistics) to the Assistant Secretaries of the military departments. This memorandum questioned the practice of using military jeeps to pull non-military floats, or to supply military drivers for (non-DOD) VIPS taking part in the parade. Aside from the risks of tort liability, these expenses are not properly attributable to DOD's own needs but are, instead, expenses incurred for the benefit of some other participant.

INAUGURAL BALLS

In defining "official civil ceremonies," DOD's community relations regulations provide:

> * * * Community or civic celebrations such as banquets, dinners, receptions, carnivals, festivals, opening of sports seasons, and anniversaries are *not* considered official civil ceremonies even though sponsored or attended by civic or governmental dignitaries. [Italic supplied.] 32 C.F.R. § 237.7(h).

In addition, these DOD regulations define "Official Federal Government functions" as:

> * * * Those activities in which officials of the Federal Government are involved in the performance of their official duties. 32 C.F.R. § 238.3(a)(3).

An inaugural ball, being akin to a banquet, dinner or reception, would not be regarded as an official civil ceremony. In addition, even though an inaugural ball may be attended by officials of the Federal Government, they are not in attendance in the performance of their official duties, but rather as guests who happen to be officials. Moreover, unlike the inaugural parade, an inaugural ball is not generally available to the community. *See* 32 C.F.R. § 238.6(a)(1)(iii). The inaugural balls have been limited to invitees, in significant part selected by the PIC; admission is by ticket only (usually for a substantial fee); and are basically private gatherings or parties whose proceeds go to the PIC. Therefore, we doubt that any of DOD's costs of participating at inaugural balls, whether incurred for DOD officials or other, constitute official expenses which may be paid from DOD appropriations.

PREINAUGURAL ACTIVITIES

The submission states that certain kinds of DOD assistance were provided to some members of the PIC from mid-November 1980 until the end of January 1981. We recognize the complexities associated with effective coordination and implementation of the various inaugural activities. Therefore, a reasonable amount of planning and preparation by participants is essential. As was true for

all the other inaugural activities discussed before, DOD should only have assumed the costs of planning and preparation for its own participants.

SPECIFIC ASSISTANCE

Much of the assistance reported to us by DOD appears directly related to its own preinaugural needs. There are, however, a number of questionable activities. For example, DOD reports the billeting of high school and university parade participants from outside the National Capital Region in local military installations. In addition, DOD reports:

> e. The Military Aides Subcommittee of the AFIC organized, assigned, briefed, supervised, and assisted aides provides to VIPs during the inaugural period. Two categories of aides were provided. Personal aides were assigned to assist specific VIPs. Social aides were assigned to assist at official inaugural events. A total of 175 personal aides and 329 social aides were utilized.
>
> * * * * * * *
>
> i. The Transportation Subcommittee of the AFIC coordinated the travel and transportation of all Armed Forces elements in connection with the inaugural and operated the inaugural motor pool. This motor pool provided drivers to operate vehicles donated to the PIC for the purpose of providing transportation for AFIC and PIC staff personnel on official business prior to the inaugural and other VIPs during Inaugural week. During the peak period immediately preceding Inaugural day, 671 drivers were utilized.

The use of military personnel as chauffeurs, personal escorts and social aides for nonmilitary personnel cannot be regarded as a cost related to the participation of DOD's own personnel in the inaugural events. Moreover, this type of support does not comply with 32 C.F.R. § 238.6(b)(4)(iii) of DOD's community relations regulations, which provide:

> (b) The Department of Defense does *not* authorize support of community relations programs when * * *
> (4) * * * DOD support:
>
> * * * * * * *
>
> (iii) Consists wholly or in part of resources, facilities, or services which are otherwise reasonably available from commercial sources. [Italic in original.]

We have seen no evidence that adequate, nonmilitary-chauffeured transportation was not reasonably available from commercial sources, such as taxis, buses, subways, and other forms of public transportation, for the use of PIC personnel during the preinaugural period. Similarly, with respect to drivers for the private motor vehicles loaned to the PIC, there appear to be many sources of help in the private sector, if PIC personnel were unable to drive themselves in the preinaugural period, or even in the inaugural period itself.

Similarly, we believe that the services of personal escorts or aides, social aides, and ushers were "reasonably available from commercial sources," and thus were not authorized to be provided by DOD under DOD's community relations regulations.

We find nothing in the materials before us that indicates that military personnel or military skills were peculiarly essential in the performance of the duties assigned to personal aides, social aides, or ushers for the inaugural activities. Thus, we think that personnel for these tasks should have been obtained from commercial sources. See also 32 C.F.R. § 238.6(b)(4)(iv) and 32 C.F.R. § 238.11(f)(ii) of DOD's community relations regulations which list these functions as being inappropriate for DOD personnel.

Even if DOD's community relations regulations did not contain the limitations discussed, we would have reservations about these expenditures. It is fundamental that Federal agencies cannot make use of appropriated funds to supply services (or manufacture products or materials) for private parties in the absence of specific authority therefor, usually specific statutory authority. 34 Comp. Gen. 599 (1955); 31 *id.* 624 (1952); 28 *id.* 38 (1948); B-69238, July 13, 1948. *See also* 31 U.S.C. § 628; *National Forest Preservation Group* v. *Volpe,* 352 F. Supp. 123 (D.C. Mont. 1972), *aff'd. on reconsideration* 359 F. Supp. 136 (D.C. Mont. 1973). In fact, it has been held that the performance of services by Government personnel for non-Federal or private agencies involves an improper use of appropriated funds even where the Government is compensated therefor or reimbursed in kind. 34 Comp. Gen. 599 (1955); 31 *id.* 624 (1952); B-69238, July 13, 1948. *See also* 33 Comp. Gen. 115 (1953). Moreover, "the general rule [is] that it is the sole right of the Government to supervise and control the work and time of performance of its officers and employees engaged in governmental activities," and an agency does not have authority to delegate this responsibility to a non-Federal or private entity. 31 Comp. Gen. 624 (1952).

In any other context besides the Presidential inaugural events, there would be little doubt about the impropriety of using taxpayer funds to provide personal aides, social aides, and drivers for private individuals. While we agree that the application of usual laws and regulations may not seem appropriate for inaugural activities, the current law does not make any special exceptions for agency assistance to the inaugural events, other than as provided in the Presidential Inaugural Ceremonies Act. If assistance would be unlawful and improper generally, it likewise would be unlawful and improper for the inaugural events. Consequently, we conclude that a significant amount of the support provided by DOD for 1981 inaugural activities was without proper legal authority.

CONGRESS

The Executive Summary of the 1977 Armed Forces Inaugural Committee discloses certain DOD inaugural activities in 1977 of questionable legality under the standards discussed above, and akin to those of concern in the 1981 inaugural. However, many of these DOD actions were apparently undertaken with the knowl-

edge, active involvement and approval of key members of Congress. DOD stated in its response to our letter of inquiry that Congress had "full knowledge of past practices because Congressional members themselves have participated in the events." However, the mere fact that an activity has been disclosed to the Congress and has not been objected to does not necessarily require the conclusion that it was thereby legally authorized. B-69238, July 13, 1948.

We note that the House Committee on Government Operations, when acting upon GSA's request for inaugural legislation which was discussed above, stated:

> The inauguration of a President of the United States is a principal event in our democratic society. It symbolizes the major attribute of a governmental system based on laws rather than on men: the orderly transfer of the powers of the highest office in the land.
>
> Millions of Americans are present on this ceremonious occasion, either in person or through the medium of television, and their presence gives further affirmation and legitimacy to the democratic process.
>
> The spectacle of an inauguration requires a great deal of planning as well as financing to accommodate the public and to insure that the event is as memorable in execution as it is in significance. * * *

H. Rep. No. 1796, 90th Cong., 2d Sess. 2 (1968).

We agree with these statements. However, we are not confident that existing law, agency practices and Congressional oversight are adequate to provide necessary guidance to agencies on permissible and impermissible inaugural activities and their funding.

RECOMMENDATION

We recommend that Congress undertake a review of the provisions of the Presidential Inaugural Ceremonies Act for the purpose of conforming its provisions to recent practices with respect to Government support of inaugural activities or, in the alternative, prohibiting the practices that do not conform with the law. In this review, we suggest that special attention be given the issues of:

(1) which inaugural functions should properly be funded by the American taxpayers and which by the President-elect and Vice President-elect's supporters from private funds;

(2) whether formal governmental representation on the Presidential Inaugural Committee might be appropriate, if the Government is to bear any substantial costs for inaugural activities;

(3) whether Government funding should vary depending on the inaugural activity, i.e., pre-inaugural planning and preparation, formal inaugural ceremony, inaugural parade, and inaugural balls; and

(4) DOD's appropriate role in inaugural activities in light of the current trend of increasing DOD's responsibilities for such activities as contrasted with the Presidential Inaugural Committee, the Joint Congressional Committee on Inaugural Ceremonies, the Government of the District of Columbia, and the Department of the Interior.

Until these basic policy issues are resolved, we are reluctant to propose any specific statutory language. However, we shall be glad to work with Congress in a review of the provisions of the Presidential Inaugural Ceremonies Act and in offering any other assistance that may be requested in devising a legislative solution to the problems identified above.

[B-211213]

Payments—Quantum Meruit/Valebant Basis—Absence, etc. of Contract—Government Acceptance of Goods/Services

When goods are furnished or services rendered to the Government, but the contract provision under which performance occurred is void, the Government is obliged to pay the reasonable value of the goods or services under an implied contract.

Set-Off—Contract Payments—Recovery of Overpayments

Procuring agency should attempt to recover payments that are in excess of the fair and reasonable value of services rendered under illegal contract provision. This can be done by setting off overpayments against any other amounts due the contractor, and may be done any time up to 10 years in appropriate circumstances.

Matter of: The Department of Labor—Request for Advance Decision, April 21, 1983:

The Department of Labor requests our opinion concerning three task order contracts for architect-engineering management services provided to the Job Corps. The contracts, all of which extend to September 30, 1983, contain provisions that the agency believes constitute a cost-plus-a-percentage-of-cost system of contracting.

We agree that the provisions violate the prohibition contained in 41 U.S.C. § 254(b) (1976) against this system of contracting, and we recommend that the Department of Labor attempt to recover any improper payments made under these contracts.

The contracts, with ceiling amounts, are as follows:

The Leo Daly Company	$9,568,858
FACE Associates, Inc	2,350,000
Environmental Management Consultants	9,155,000

In each, the Government has agreed to pay the contractor certain per-day rates for certain classes of employees who will provide field and office support. These rates, the contracts state, include salaries and wages, overhead, G&A, and profit.

In addition, the Daly and FACE contracts contain a provision permitting the contractor to add a percentage of costs to certain expenses. They state:

> A maximum of * * * 7.5 percent of basic costs shall be added by the contractor on all materials, subcontracts, travel, and other expense items to cover overhead and profit. A maximum markup of 5 percent will be added for all expenses that are not supervised and/or subcontracted for by the contractor.

The Environmental Management contract is identical except that it provides for a maximum markup of 10 percent of basic costs.

The Department of Labor states that it now is taking action to delete the provision from the three contracts, and is attempting to negotiate a settlement of costs incurred thus far on a *quantum meruit* basis, with recovery of unearned profits. The agency asks whether additional legal or administrative actions are necessary.

The usual guidelines applied by our Office in determining whether a contract constitutes a cost-plus-a-percentage-of-cost system of contracting are (1) whether payment is at a predetermined rate; (2) whether this rate is applied to actual performance costs; (3) whether the contractor's entitlement is uncertain at the time of contracting; and (4) whether it increases commensurately with increased performance costs. *Department of State—Method of Payment Provisions,* B-196556, August 5, 1980, 80-2 CPD 87. The provision quoted above appears to fall within these guidelines, and the presence of a ceiling on costs does not save it from violating the statute. See *Federal Aviation Administration—Request for Advance Decision,* 58 Comp. Gen. 654 (1979), 79-2 CPD 34.

In our opinion, that portion of the contract containing the markup provisions is therefore void. We believe, however, that the portion providing for payment of wages at specific daily rates, including overhead and profit, is still valid. In other words, the contract is divisible into a legal portion, supported by valid consideration, and an illegal portion invalid because the method of payment specified is contrary to statute. *See* Calmari and Perillo, Contracts, § 384, Divisibility of Illegal Bargains (1970); 6A Corbin on Contracts § 1528 (1962).

If the Job Corps needs architect and engineering management services between now and September 30, 1983, as it informally advises us it does, it must modify the contracts by deleting the illegal payment provisions and in each case negotiating a fixed fee that the contractor will be paid in addition to his direct costs for the expenses covered by the provision. The Department of Labor advises us that it is preparing a new procurement, and that the cost-plus-a-percentage-of-cost payment provisions will not be included in contracts for similar services in fiscal 1984.

As for payments already made, the courts and our Office have recognized that when goods are furnished or services rendered, but the contract under which performance occurred is void, the Government is obliged to pay the reasonable value of the goods or serv-

ices on an implied contract for *quantum meruit* or *quantum valebat. Federal Aviation Administration, supra; Marketing Consultants International Limited,* 55 Comp. Gen. 554, 564 (1975), 75-2 CPD 384.

Therefore, if the contracting officer determines that the amounts already paid were fair and reasonable, and the Government has received a benefit, payments to date may be considered proper. Overpayments, if any, may be considered during negotiation of the fixed fee, as outlined above. If they cannot be recaptured in this manner, the Department of Labor should attempt to recover any payments that it considers in excess of the fair and reasonable value of services rendered by setting them off against any other amount owed to the contractors by the Government.

The statute of limitations, 28 U.S.C. § 2415 (1976), would prevent court action to recover overpayments after 6 years. However, legislation enacted late in the 97th Congress makes it clear that in appropriate circumstances outstanding claims may be recovered by means of administrative setoff for up to 10 years. *See* 31 U.S.C. § 3716, as adopted by Pub. L. 97-452, 96 Stat. 2471, (1983). Nonetheless, the Department Labor should seek recovery as expeditiously as possible.

[B-207731]

Debt Collections—By Government Employees Requirement

Collection of fees owed the United States is an inherent governmental function which may be performed only by Federal employees.

Debt Collections—By Government Employees Requirement—Collection by Non-Employees—System for Protection of Government—Feasibility Questionable

General Accounting Office questions the feasibility of developing a system of alternative controls to protect the Government against loss in the event that volunteers collect Government monies.

Matter of: Collection of Recreation User Fees by National Forest Volunteers, April 22, 1983;

The Secretary of Agriculture has requested our opinion on whether individuals who are designated for public volunteer service pursuant to the Volunteers in the National Forests Act of 1972 may collect camping fees and similar types of recreation user fees owed the United States. The submission notes that before using volunteers for this purpose, the Department of Agriculture plans to develop proper guidelines and procedures to assure the security of public funds. We cannot approve the proposal since the collection of fees owed the United States is, in our view, an inherent governmental function which may be performed only by Federal employees. Furthermore, as will be explained below, we question the

feasibility of developing alternate controls to assure the security of funds collected.

The submission notes that about half of the 2,000 National Forest campgrounds are currently staffed by a campground host serving as a volunteer under the authority of the Volunteers Act. Most of the campground hosts, we are told, are middle-aged, mature persons who have led responsible lives and can be trusted to perform their job in accordance with the agreement signed by them and the unit manager. Fee collection is largely dependent upon the good faith of campers using the campgrounds, who are expected to deposit their payments in a locked box, which is emptied periodically by a Forest Service employee. The Forest Service anticipates that the presence of a campground host who collects fees will increase payment compliance among campers, as well as decrease the opportunity for vandalism of the collection boxes.

The Volunteers in the National Forests Act of 1972, Public Law 92-300, codified at 16 U.S.C. §§ 558a-d, authorizes the use of volunteers "for or in aid of interpretive functions, visitor services, conservation measures and development, or other activities in and related to areas administered by the Secretary [of Agriculture] through the Forest Service." Neither the Act itself nor the committee reports (Senate Report No. 92-696 and House Report No. 92-982) authorize the use of volunteers to collect fees. The House report describes the functions to be performed by the volunteers as follows:

> The duties of the volunteers would include providing special information services to visitors, assisting at historical and special events, increasing the availability of interpretive programs, providing special skills, training volunteers in specialized cases, assisting in special research projects such as historical research of a ghost town, writing brochures on trees, plants, birds, and mammals or other features of interest, working on special projects, and teaching special subjects. H. Rpt. No. 92-982, 1972 U.S. CODE CONG. & AD. NEWS 2298-9.

Although the use of volunteers for collection purposes is not explicitly prohibited in either this enumeration of volunteer activities or in the language of the Act itself, it is clear that fee collection was not a function that Congress had in mind when it enacted the Volunteers Act.

When asked by the Forest Service whether non-employees could be designated as agents of the Government to perform limited collection duties, the Department of Agriculture's Office of General Counsel noted that OMB Circular A-76, March 29, 1979, "Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government," defined governmental functions which were required to be performed in-house "due to a special relationship in executing governmental responsibilities" as including "monetary transactions and entitlements." Agriculture's legal staff expressed the opinion that the contracting out of the collection function was thus precluded, and that, by analogy, "the delegation of such function outside the Department to a non-employee would

appear to be inappropriate." We agree. The handling of public funds, exemplified in this case by the collection of fees owed to the United States, is an inherent governmental function which must be performed by Government employees.

Further support for this conclusion may be found in the legislative history of a "companion statute," the Volunteers in the Parks Act of 1969, 16 U.S.C. § 18g. In reporting on this legislation, the Senate Committee on Interior and Insular Affairs noted that the intent of the legislation was to authorize the use of volunteers, for example, to "help to provide special information, services to visitors, assist in archeological digs, conduct special research, or help in the interpretation of historical events." The Committee emphasized that the legislation was not intended to authorize the use of volunteers "to do the jobs normally assigned to regular career employees." S. Rep. No. 91-1013 (to accompany H.R. 12758), reprinted in 1969 U.S. CODE CONG. & AD. NEWS 3579, 3580. In our view, handling public funds is a function that should always be assigned to employees.

Agriculture's legal staff also pointed out that employees charged with the safekeeping of public monies are personally accountable for funds entrusted to them, and that if a deficiency occurs, there are statutorily imposed penalities and remedies by which the Government may recover the funds. Non-employees, in contrast, would not be subject to strict accountability under any existing law, and in the event of a non-employee's withholding of funds, the Government's only remedy would be to seek a judgment in the courts.

The Forest Service responded to these concerns by specifying that the following conditions would need to be satisfied before the responsibility of collecting fees would be assigned to non-employees:

(1) The volunteer must secure a surety bond from a Federally approved bonding institution.

(2) The vounteer must agree to be strictly accountable for any deficiency in funds of the United States entrusted to him or her.

(3) The volunteer must understand and agree to the directions, policies, and procedures pertaining to the collection of campground fees (currently set forth in the Forest Service's Collection Officer Handbook).

Although the imposition of strict accountablility on the volunteer, coupled with the requirement that he or she obtain a surety bond payable in the event of either a negligent or a non-negligent loss, would provide adequate assurance that U.S. funds are secure, we have doubts as to be feasibility of obtaining such bonds. We also have reservations about subjecting a volunteer to the sort of potential liability to which he or she would be subject under such strict liability guidelines.

As we pointed out in discussions with Forest Service officials, making a volunteer strictly accountable for funds entrusted to him

or her does not necessarily place the volunteer on equal footing with Government employees to whom funds have been entrusted. Although accountable officers of the Government are strictly liable for funds in their possession, the GAO has statutory authority to relieve the officers of such liability under certain circumstances. For example, 31 U.S.C. § 3527(a) (formerly 31 U.S.C. § 82a-1) authorizes this Office to relieve an accountable officer of liability for physical loss or deficiency of Government funds if we agree with the determination of the agency (1) that the loss or deficiency occurred while the officer or agent was acting in the discharge of his official duties, or by reason of the act or omission of a subordinate of the officer or agent; and (2) that the loss or deficiency occurred without fault or negligence on the part of the officer or agent. It is not clear, however, that we would have statutory authority to relieve volunteers for losses which are not attributable to their own fault or negligence.

This in turn means that 31 U.S.C. § 3527(d), which permits the adjustment of the account of an official or agent who is granted relief, would not apply. In order to protect the Government against the possibility of loss, volunteers would accordingly need to obtain bonds which would indemnify against non-negligent losses as well as those caused by the volunteer's negligence. It is unclear to us that such coverage may be obtained at a cost which a volunteer would be willing to bear.

Moreover, it must be recognized that the sort of bonds which Federal employees obtained prior to the enactment of Public Law 92-310, June 6, 1972, 31 U.S.C. § 9302 (formerly § 1201), did not protect the bonded employee personally. A bonding company which made good a loss to the Government was entitled to proceed against the bonded employee to recover from him or her the amount paid. *See, e.g.,* B-186922, April 8, 1977. Thus, under any proposal to use volunteers in this manner, the volunteers could find themselves held personally liable for losses occurring during the course of their service, even where they had obtained surety bonds. This is another consideration which causes us to question the feasibility of the Forest Service's proposal, even if it were otherwise acceptable.

In conclusion, we cannot approve the Forest Service's proposal that volunteers be used to collect recreation user fees owed the United States since:

(1) there is no indication that Congress intended that volunteers would perform such a function;

(2) fee collection is an inherent governmental function which may be performed only by Government employees; and

(3) in order to protect the Government fully against loss, volunteers would need to obtain surety bonds payable in the event of both negligent and non-negligent losses, and it is not clear that

such bonds are available at a cost that either the agency[1] or the individual volunteer would be willing to bear.

[B-208220]

Compensation—Backpay—Retroactive Promotions—Computation

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back pay under 42 U.S.C. 2000e-16(b). Under regulations implementing sec. 2000e-16(b), set forth in 29 C.F.R. 1613.271(b)(1), back pay must be computed in the same manner as if awarded pursuant to the Back Pay Act, as amended, 5 U.S.C. 5596, and its implementing regulations set forth in 5 CFR 550.805. The standards for computing back pay must be applied in light of the make-whole purposes of 42 U.S.C. 2000e-16(b).

Compensation—Backpay—Retroactive Promotions—Computation

A grade GS-12 employee who was discriminatorily denied a promotion to grade GS-13 was awarded a retroactive promotion with back pay under 42 U.S.C.. 2000e-16(b). A cash award was granted to the employee under the Employee Incentive Awards Act during the period of the discriminatory personnel action. We hold that the award should not be offset against back pay since such an offset would contravene the make-whole purposes of 42 U.S.C. 2000e-16(b). Moreover, once the cash award was duly granted in accordance with the awards statute and regulations, the employee acquired a vested right to the amount awarded.

Matter of: Ladorn Creighton—Backpay, April 22, 1983:

Edward J. Obloy, General Counsel of the Defense Mapping Agency (DMA), requests a decision as to whether a cash award granted to Mr. Ladorn Creighton under the Employee Incentive Awards Act, 5 U.S.C. §§ 4501-4507 (1976 & Supp. IV 1980), during the period he was discriminatorily denied a promotion, must be offset against the backpay which he was awarded under 42 U.S.C. § 2000e-16(b) (1976 & Supp. III 1979). We hold that a cash award granted to an employee during the period of a discriminatory personnel action should not be offset against backpay since such an offset would contravene the make-whole purposes of 42 U.S.C. § 2000e-16(b). Moreover, once an incentive award is granted in accordance with 5 U.S.C. §§ 4501-4507, and implementing regulations in 5 C.F.R. Part 451 (1982), the recipient acquires a vested right to the amount awarded.

On April 20, 1982, DMA determined that Mr. Creighton, a grade GS-12 Supervisory Cartographer, had been denied a promotion to the position of Supervisory Cartographer, grade GS-13, in violation of the Equal Employment Opportunity Act of 1972, as amended, 42 U.S.C. § 2000e-16, and consequently awarded him a retroactive promotion effective August 10, 1979. In computing the employee's backpay under 5 U.S.C. § 5596, a question arose as to whether a $500 incentive award granted to Mr. Creighton on October 23, 1980,

[1] A Forest Service representative had informally asked that we include a discussion of the availability of agency funds to purchase the surety bonds. In view of the conclusions in the text, it is not necessary to address this issue.

in recognition of his sustained superior performance of assigned duties during the period October 10, 1979, to October 10, 1980, should be deducted from backpay in view of the provision of the Back Pay Act which requires deduction of "any amounts earned by the employee through other employment" during the period of the discriminatory action. Pending resolution of this issue by our Office, DMA is withholding $500 from the backpay awarded Mr. Creighton.

Section 2000e-16(b) of Title 42, United States Code, provides make-whole remedies, including backpay, for an employee of the Federal Government who is found to have undergone a discriminatory personnel action based on race, color, religion, sex, or national origin. Under regulations implementing section 2000e-16(b), set forth in 29 C.F.R. § 1613.271(b)(1), backpay is to be computed in the same manner as if awarded pursuant to the Back Pay Act and its implementing regulations. See generally, B-180021, March 20, 1975. Section 550.805(e) of Title 5, Code of Federal Regulations, implementing the Back Pay Act, provides that, in computing the amount of backpay under 5 U.S.C. § 5596, an agency shall deduct "[a]ny amounts earned by an employee from other employment during the period covered by the corrective action."

The standards for computing backpay awarded under 42 U.S.C. § 2000e-16(b), as defined by 5 C.F.R. § 550.805(e), must be applied in light of the remedial purposes of section 2000e-16(b). Specifically, we note that the Equal Employment Opportunity Act was intended to eradicate discrimination in the Federal Government and to make the victim of discrimination whole by restoring him to the position he would have occupied had the discrimination not occurred. See *Association Against Discrimination* v. *City of Bridgeport,* 647 F.2d 256, 278 (1981), and cases cited therein; and *Hackley* v. *Roudebush,* 520 F.2d 108, 136 (1975).

In keeping with the foregoing principles, we hold that the amount of the award received by Mr. Creighton for superior performance in grade GS-12 need not be deducted from backpay. Deduction of the award would allow the discriminating agency both to benefit from the employee's superior performance in the grade from which he had been denied promotion and to subtract from backpay the award recognizing such performance. Clearly, such a result would contravene the remedial policies underlying the Equal Employment Opportunity Act.

Moreover, we note that, while the granting of an incentive award is discretionary with the employing agency, the recipient of an award duly granted under 5 U.S.C. §§ 4501-4507, as implemented by the provisions of 5 C.F.R. Part 451, acquires a vested right to the amount awarded. See *John J. Kelly,* B-204724, September 13, 1982, and *Lawrence J. Ponce,* B-192684, November 19, 1979. Since there is no evidence that the $500 cash award was granted to Mr.

Creighton in violation of the awards statute or its implementing regulations, the employee is entitled to retain the award.

In view of the foregoing, we hold that the $500 award received by Mr. Creighton during the period of the discriminatory personnel action may be retained by him without offset against the backpay to which he has been determined to be entitled under 42 U.S.C. § 2000e-16(b).

[B-209070]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Date Basis of Protest Made Known to Protester

Two grounds of protest against application of Buy American Act evaluation factor are timely when filed within 10 working days of when the protester learns of basis of protest. Final ground of protest is untimely filed but will be considered under significant issue exception to Bid Protest Procedures.

Buy American Act—Bids—Evaluation—Foreign Country Classification—Not Prejudicial to Protester

Protester was not prejudiced by classification of foreign countries involved in Buy American evaluation of bids submitted for requirement of hexachlorethane.

Buy American Act—Bids—Evaluation—Domestic Product Proposed—Responsibility Determination—Not Required

Protest that Buy American Act evaluation should not have been conducted because sole domestic bid, which was not low, was, allegedly, bogus is rejected. Bogus charge relates to allegation concerning domestic bidder's alleged nonresponsibility. But Buy American regulatory scheme does not require responsibility determination of domestic bidder in this situation. Moreover, General Accounting Office does not consider that a responsibility determination need be made absent collusion or other extraordinary circumstances not present in this procurement. Finally, domestic bid contained no indication that it was other than domestic.

Buy American Act—Bids—Evaluation—Inapplicability of Buy American Act Evaluation Factor—Quantities on Which Only Foreign Bids Submitted

Sole domestic bidder submitted bid for quantity which was less than maximum specified in Invitation For Bids (IFB). Partial bid was authorized by IFB. Contracting officer applied Buy American Act evaluation factor against nondomestic bidder as to maximum quantity which nondomestic bidder bid on. Application of evaluation factor as to quantities on which domestic bidder submitted partial bid was proper. Application of evaluation factor as to quantities on which only foreign bids were submitted was improper. Partial termination of contract is recommended.

Matter of: Cal Capital Exports, April 22, 1983:

Cal Capital Exports (Cal Capital) protests an award by the Department of the Army, Materiel Development and Readiness Command (Army), to ICI Americas Incorporated (ICI) under invitation for bids (IFB) DAAA03-82-B-0039 for 1,413,025 pounds of hexachloroethane. The IFB also provided that bidders could bid on lesser quantities and that the Army reserved the right (unless the bidder specified otherwise) to award for a quantity less than that bid at the same unit price bid for the higher quantity.

Cal Capital protests the application of a Buy American Act evaluation factor to its low bid. Specifically, Cal Capital contends that: (1) there was confusion in classifying Brazil and the United Kingdom for Buy American purposes; (2) the sole domestic bid was not for consideration because the domestic bidder cannot satisfactorily manufacture the product; and (3) a proper Buy American evaluation would have resulted in multiple awards because the sole domestic bidder submitted a partial bid.

The protest is sustained in part and denied in part.

The following bids were submitted at bid opening:

Quantities	Bid Price (pounds)	Source
Cal Capital—1,413,025 pounds	$0.457/lb	Brazil.
ICI—1,413,025 pounds	.60/lb	United Kingdom.
Rhone-Poulenc—720,000 pounds	.60/lb	France.
Diamond Shamrock—min. 480,000, max. 960,000.	.67/lb	United States.

Defense Acquisition Regulation (DAR) § 6-104(b)(1) (Defense Acquisition Circular (DAC) No. 76-25, October 31, 1980) requires that an evaluation factor be added to a "nonqualifying country offer." The contracting officer determined that Cal Capital's bid was a nonqualifying offer and Diamond Shamrock's bid was a domestic offer. A 50-percent evaluation factor was added to Cal Capital's bid, raising the bid to $0.0086 per pound higher than Diamond Shamrock's bid. No evaluation factor was added to ICI's bid because it was a "qualifying country offer." ICI therefore became the low, evaluated bidder and was awarded a contract for all 1,413,025 pounds.

The Army contends that the first two grounds of the protest are untimely because they were filed with our Office on September 15, 1982, or more than 10 working days after Cal Capital was advised on August 30 that award would be made to ICI. We disagree. A protest must be filed within 10 working days after the protester knows of the basis of protest. 4 C.F.R. § 21.2(b)(2) (1983). Cal Capital insists that the Army did not "clarify" its position on the reasons for the award until September 10. The Army has not questioned this position. The company's September 15 protest, therefore, was timely. As to the final ground of protest, which was filed on December 2, 1982, we find it to raise a significant issue, as discussed below.

Cal Capital states that it undertook to determine if the Army properly evaluated bids. In response to its request for a list of *qualifying* countries, the Army sent a list of "*designated* countries under the Trade Agreement Act" [italic supplied]. Cal Capital argues that the fact that it was provided the wrong list indicates that the contracting officer may have improperly determined that the United Kingdom is a qualifying country and Brazil is a nonqualifying country.

The Army has provided a detailed response to Cal Capital's charge that it was prejudiced by the classification of the countries involved. We cannot question that response, which is:

> * * * For evaluation purposes under DAR 6-104.4, a "qualifying" country is defined by DAR 6-001.5(d) to be any country defined in 6-001.5(a), (b) or (c), to be a Defense Cooperation Country listed in DAR 6-1504, FMS/Offset Arrangement Country, listed in DAR 6-1310.1, or a Participating NATO Country listed in DAR 6-1401, respectively. The inference mandatorily is that all other countries are "nonqualifying" countries. The United Kingdom is listed in DAR 6-1401 as a Participating NATO Country and thus is a "qualifying" country per DAR 6-001.5(c) and (d). Brazil is not listed in either DAR 6-1504 as a Defense Cooperation Country, in DAR 6-1310.1 as a FMS/Offset Arrangement Country, or in DAR 6-1401 as a Participating NATO country, thus Brazil is a "nonqualifying" country. The conclusion is that the bid of ICI, which * * * offered a product from England, was correctly evaluated as a "qualifying" country. On the other hand, the Protester's bid, which * * * offered a product from Brazil, was correctly evaluated as a "nonqualifying" country.
>
> * * * [T]he Contracting Officer provid[ed] the Protester a list of designated countries under the Trade Agreements Act of 1979 as implemented by DAR 6-1601 and DAR 6-1602. DAR 6-1601 establishes designated countries from which bids on eligible products over $196,000 are to be evaluated without regard to the restrictions of the Buy American Act. * * *
>
> It is merely noted that even under the Trade Agreements Act of 1979, Brazil was not a designated country for which waiver of the Buy American Act is authorized. On the other hand, the United Kingdom is [also] entitled to the benefits of being a designated country and bidders offering eligible English products in an amount over $196,000 would be entitled to waive the provisions of the Buy American Act.

Thus, we deny this ground of protest.

DAR § 6-104.4, *supra,* requires that in the absence of a domestic bid, foreign bids shall be evaluated on an equal basis. Cal Capital contends that Diamond Shamrock is not currently producing hexachloroethane and cannot satisfactorily manufacture it. Thus, Cal Capital contends that this alleged circumstance should mean that there was no bona fide domestic bid.

In effect, Cal Capital is arguing that Diamond Shamrock is not a bona fide domestic bidder because the company is, allegedly, incapable of furnishing the item sought. The contracting officer responds, in effect, that he was not required to make a formal determination of Diamond Shamrock's responsibility since the company's bid was not low and, in any event, he had no reason to question the company's responsibility. Specifically, the contracting officer states that Diamond Shamrock "does produce [the chemical sought] as a byproduct of other manufacturing" and that the company provided acceptable samples of the chemical to Pine Bluff Arsenal 2 years ago.

In our view, the evaluation scheme contemplated by DAR § 6-104.4, *supra,* does not require that the responsibility of the sole domestic bidder, who is not low, be assessed for Buy American purposes. Moreover, we do not consider that an assessment need be made absent evidence of collusion or other extraordinary circumstances, which are not present here. Diamond Shamrock submitted a responsive domestic bid because it excluded no end product from its Buy American certificate and did not otherwise indicate that it was bidding a foreign end product. See *Fordice Construction Company,* B-206633, April 30, 1982, 82-1 CPD 401. Therefore, we cannot question the Army's view that Diamond Shamrock was a bona fide domestic bidder.

Cal Capital's final ground of protest is that the evaluation was improper because Diamond Shamrock submitted a partial bid on less than the entire quantity sought. The Army notes that partial bids were acceptable because they were not prohibited and clause 10 of standard form 33A, as noted above, provided that, "unless otherwise provided in the schedule, offers may be submitted for any quantities less than specified." However, Cal Capital's comments filed on December 2, 1982, on the Army's report reveal that Cal Capital is not disputing that partial bids were acceptable. Rather, Cal Capital is protesting that the evaluation factor should not be applied against Cal Capital on those quantities that Diamond Shamrock did not bid. Diamond Shamrock bid on a minimum of 480,000 pounds and a maximum of 960,000 pounds. Cal Capital concedes that if its first two grounds of protest are without merit, ICI is the low, evaluated bidder on the first 480,000 pounds. However, Cal Capital contends it is unclear whether Diamond Shamrock submitted a "firm offer" on quantities between 480,000 and 960,000 pounds because Diamond Shamrock referred to a "minimum" and "maximum." Cal Capital argues that the Buy American differential, therefore, may be inapplicable on these quantities. Finally, Cal Capital argues that the differential is clearly inapplicable as to quantities in excess of 960,000 pounds on which Diamond Shamrock did not bid.

The Army contends this argument is untimely because it was not clearly raised in Cal Capital's initial protest letter but, rather, filed more than 2 months after the initial protest. Cal Capital's initial protest contained the following:

> Diamond Shamrock neither currently produces Hexachloroethane nor submitted a bid for the total amount. Instead, Diamond-Shamrock could "implement production if required," and submitted a partial bid based on their facilities. Therefore, we conclude that there was indeed no domestic commercial producer at the time of bidding, and that our bid should not have been disqualified based on these facts.

While this statement arguably refers to the argument contained in Cal Capital's December 2 comments, we agree with the Army that the argument should have been more clearly raised in the initial protest. However, the evaluation, under DAR § 6-104.4, of nonqualifying offers competing against partial domestic bids, is a novel issue which has not previously been considered by our Office. We consider the Army's interpretation of DAR § 6-104.4 to be erroneous. Our resolution of this issue would be of widespread interest to the procurement community because it would clarify the proper application of DAR § 6-104.4. This issue, therefore, can be considered under the significant issue exception (*see* 4 C.F.R. § 21.2(c) (1983) of our Bid Protest Procedures).

We find no basis for Cal Capital's contention that Diamond Shamrock did not submit a "firm offer" on quantities between 480,000 and 960,000 pounds. Diamond Shamrock's bid was clear; it bid on a minimum of 480,000 and maximum of 960,000 pounds. Partial bids were acceptable. There was, therefore, nothing improper with Diamond Shamrock setting minimum and maximum limitations.

As to the first 960,000 pounds, the contracting officer properly applied the evaluation factor to Cal Capital's bid. The Buy American Act evaluation factor is applied for the benefit of domestic bidders. Diamond Shamrock bid on the first 960,000 pounds and is entitled to the benefit of the evaluation factor. However, it did not bid on quantities in excess of 960,000 pounds. While DAR § 6-104.4, *supra,* does not refer to partial bids, it clearly provides in example "G" of that regulation that the evaluation factor is inapplicable when there is no domestic bid. We conclude that the evaluation factor should not have been added to Cal Capital's bid on quantities on which Diamond Shamrock did not bid. If ICI had not bid, the Army would have awarded 960,000 pounds to Diamond Shamrock and 453,025 pounds to Cal Capital. ICI is certainly not entitled to a larger contract than Diamond Shamrock would have received under those circumstances. In this case, the Army should have made a multiple award—the first 960,000 pounds to ICI at $0.60 per pound and the remaining 453,025 pounds to Cal Capital at $0.457 per pound. This ground of protest is sustained.

The delivery schedule indicates that a delivery of 240,000 pounds is to be made on June 1, 1983, and a final delivery of 240,000 pounds is to be made on July 1. It is our understanding that ICI will not place orders for these deliveries until about 1 month before the delivery dates. It therefore appears that the expense and impact upon the agency resulting from a partial termination of ICI's contract as to 453,025 of the final 480,000 pounds would be minimal. Accordingly, we recommend a partial termination of the contract for the convenience of the Government. We further recommend that a contract for 453,025 pounds be awarded to Cal Capital

if it is still willing to deliver at $0.457 per pound and if the company is otherwise considered still to be eligible for award. If not, the contract with ICI need not be disturbed.

Since our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to those committees concerning action taken with respect to our recommendation.

[B-209073]

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

Where two married Air Force members with common dependents subsequently divorce, only one member may receive basic allowance for quarters based on the children as dependents, unless the class of common dependents is divided by separation agreement or court order. The member paying child support, which is stated to be on behalf of one child but is sufficient to qualify for entitlement under the applicable regulation, is entitled to the basic allowance for quarters at the with dependents rate while the member having custody of the children receives the allowance at the without dependents rate.

Matter of: Joanne M. Haag, USAF, April 22, 1983:

This action is in response to a request for an advance decision from the Accounting and Finance Officer, 47th Flying Training Wing, Laughlin Air Force Base, Texas. The request has been assigned Control Number DO-AF-1408 by the Department of Defense Military Pay and Allowance Committee.

The question for our determination is whether two divorced Air Force members are both entitled to an increased basic allowance for quarters when one member has custody of the couple's two children and the other member pays child support only on behalf of one child. Currently only the member paying child support receives the quarters allowance at the increased "with dependents" rate. The member with custody of both children is now seeking the quarters allowance at the with dependents rate on account of the child not claimed as a dependent by the former spouse. It is our view that only one member may receive an increased quarters allowance on behalf of common dependents who are all in the custody of one parent. In accordance with existing regulations the member paying child support is entitled to the increased allowance while the member with custody receives basic allowance for quarters at the without dependents rates.

The submission also asks whether our answer would differ if the couple were legally separated rather than divorced. It would not. *Matter of Doerfer,* B-189973, February 8, 1979.

Air Force member, Joanne M. Haag, requested an increased quarters allowance upon the finalization of her divorce from Air Force member Gerald L. Haag. Under the divorce decree, Ms. Haag was granted custody of the couple's two children. Mr. Haag was ordered to pay $200 in child support on behalf of one of the two children. Ms. Haag is not disputing Mr. Haag's entitlement to the quarters allowance at the with dependents rate but is instead claiming that she is also entitled to the increased allowance on behalf of the child for whom she receives no support and whom Mr. Haag does not claim as a dependent for quarters allowance purposes.

Under the provision of 37 U.S.C. 403 a member entitled to basic pay is also eligible for quarters allowance unless provided with adequate Government quarters. Two rates of the allowance are the with dependents and without dependents rates. This allowance is intended to partially reimburse a member for the expenses of providing quarters for himself and his dependents when Government quarters are not furnished. 60 Comp. Gen. 399 (1981).

Paragraph 30236a of the Department of Defense Military Pay and Allowances Entitlements Manual deals with cases involving members who were married but are subsequently divorced and have dependents of the marriage. These provisions generally provide that a member paying child support to the member with custody of the child is entitled to the increased quarters allowance if the support payments are equal to or greater than the difference in that member's with and without dependents rates of the allowance. The member with custody of the child can only claim the increased allowance if the other member declines to claim the child as a dependent for quarters allowance purposes. The eligibility of the member having custody to claim the child for such purposes is not diminished because the member paying support is receiving an increased allowance on account of other dependents.

In effect, the two members have attempted to divide their class of common dependents and each member now claims one child to qualify for the increased allotment. However, the term "other dependents" as used in paragraph 30236a refers to dependents not common to the two members. See 60 Comp. Gen. 399 and B-189973, February 8, 1979. Moreover, in the usual situation a claim for quarters allowance at the with dependents rate on the basis of one child constitutes a claim for an entire class of common dependents. B-189973, February 8, 1979.

The term dependent as used in 37 U.S.C. 403 (1976) includes a member's spouse and child. See 37 U.S.C. 401. A child of members married to each other is considered the dependent of both members. *Matter of McDonald,* 60 Comp. Gen. 154 (1981); 54 *id.* 665, 667 (1975); *Matter of Cruise,* B-180328, October 21, 1974. However, only one of the members may claim the child as a dependent for the purpose of the increased quarters allowance since the law permits

only one payment of the allowance on account of the same dependents. 51 Comp. Gen. 413 (1972). Moreover, ordinarily married members (not divorced or separated) with more than one child are not allowed to divide the children in order that each member can claim a dependent. All common dependents are automatically included in one class. Thus, if a member is entitled to the quarters allowance at the with dependents rate, such entitlement exists whether that member has one or more dependents. *Matter of Cruise,* B-180328, October 21, 1974.

We find that that rule should also apply to divorced or separated members with common dependents when the dependents are all in the legal custody of one parent. The situation would differ only where the class of common dependents is divided by court order or separation agreement (each member receiving custody of one child and no child support being awarded) or where joint custody required two separate households. The Haag's class of common dependents has not been so separated. Both children reside in the same house. Mr. Haag's parental rights pertain to both dependents. In addition, Ms. Haag is under court order to place the support payment received while the children are with their father in a trust fund created in the names of both children. The fact that Mr. Haag's support payments are on behalf of only one of the children is not, by itself, enough to divide the class of common dependents. Therefore, we find that either Mr. Haag or Ms. Haag (but not both) is entitled to the increased allowance on account of their children while they are not residing in Government quarters.

Paragraph 30236a of the Pay and Allowances Manual authorizes the increased allowance to the member paying child support if the amount of child support is sufficient to qualify under the criteria set forth therein. The member with custody receives basic allowance for quarters at the without dependents rate. Accordingly, Ms. Haag's claim for the difference between basic allowance for quarters at the without dependents rate and that allowance at the with dependents rate may not be allowed.

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