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Erroneous payments of basic pay should not be included in the computation of a service member's retired pay base for purposes of computing his retired pay entitlement under 10 U.S.C. 1407. Although that statute provides that retired pay base will be computed on basic pay "received" over a period of months of active duty, that is construed to mean only basic pay the member was legally entitled to receive.

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Pay—Retired—Computation—Pub. L. 96-342—"Saved Pay Rate" Under 10 U.S.C. 1401a(e)—Applicability

The provisions of 10 U.S.C. 1401a(e), applicable to computation of retired pay, allow the use of basic pay rates in effect on the day before the effective date of the rates of basic pay on which the member's retired pay would otherwise be based plus appropriate cost-of-living increases. This provision was enacted at a time when retired pay was computed only under the old system where it is based on a single specific rate of basic pay. However, there is no indication of legislative intent that it should not also apply to the new system of basing retired pay on average of pay received over a period of months. Therefore, as long as it may reasonably be applied under the new system, it should be applied when advantageous to the retired member.

Matter of: Airman First Class Edward H. Gallaher, USAF, Retired, February 1, 1983:

This action is in response to a request for decision from the Accounting and Finance Officer, Headquarters Air Force Accounting and Finance Center, Denver, Colorado, on several questions regarding the proper method of computing retired pay using the retired pay base required by the new provisions of 10 U.S.C. 1407. Particular reference is made to the proper retired pay entitlement of Airman First Class Edward H. Gallaher, USAF, retired. This matter has been assigned submission number DO-AF-1382 by the Department of Defense Military Pay and Allowance Committee.

Background

Airman Gallaher entered active duty in the Air Force as a staff sergeant (E-5) on November 21, 1980. On January 20, 1981, he was demoted to Airman First Class (E-3). On April 20, 1981, he was relieved from active duty in grade E-3 and placed on the Temporary Disability Retired List under the provisions of 10 U.S.C. 1202, with a disability rating of 50 percent. At the time of his placement on that list, he was credited with a total of 5 months of active service. His retired pay is to be computed under 10 U.S.C. 1401, Formula number 2.

Under 10 U.S.C. 1401, if Airman Gallaher had entered active duty on or before September 7, 1980, his retired pay would have been computed based on 50 percent of the rate of the monthly basic pay of an E-3, the pay to which he was entitled on the day before he was placed on the Temporary Disability Retired List. However, because he entered active duty after September 7, 1980, his retired pay is to be computed based on 50 percent of his retired pay base established under the new provisions of 10 U.S.C. 1407. Section 1407 was added, and various other retirement computation statutes were amended, in 1980 to authorize a new method of computing retired pay for members of the uniformed services by basing such pay on a percentage of a retired pay base. The retired pay base is the average basic pay the member received over 36 months, or in certain cases a lesser period of time. See Pub. Law 96-342, sec. 813, 94 Stat. 1100-1110.

Under 10 U.S.C. 1407(b)(1)(B), the retired pay base for a member such as Airman Gallaher who retired under 10 U.S.C. 1202 with less than 36 months' active duty is established by totaling the amount of basic pay he received while on active duty and dividing it by the number of months (including any fraction thereof), which the member served on active duty. In Airman Gallaher's case, such a computation method permitted him to include the pay he received as a Staff Sergeant (E-5) for part of the computation period. As a result, his retired pay rate was higher than it would have been had he retired prior to the change in method of computation

since under the old method his retired pay would have been computed based solely on the pay of the grade he held at the time of retirement (E-3).

Effect of Erroneous Basic Pay Payments

Because 10 U.S.C. 1407 provides for the use of the total amount of basic pay which the member "received," in computing the retired pay base, the finance officer questions whether an otherwise erroneous payment of basic pay the member "received" should be included. We hold that a member should not be credited with erroneous payments of basic pay for purpose of computing his retired pay base.

Section 1407 of title 10, United States Code, provides in part:

(a)(1) The retired pay or retainer pay of any person who first became a member of a uniformed service after September 7, 1980, is determined using the monthly retired pay base or monthly retainer pay base computed under this section. * * *

(b)(1) In the case of a member who is retired under section 1201 or 1202 of this title, the monthly retired pay base is—

(A) one thirty-sixth of the total amount of monthly basic pay which the member received for any 36 months (whether or not consecutive) of active duty as a member of a uniformed service; or

(B) in the case of a member who served on active duty for less than 36 months, the amount equal to the total amount of the basic pay which the member received during the period he served on active duty * * * divided by the number of months (including any fraction thereof) which he served on active duty.

As indicated, for computing the retired pay of service members who began their military careers on or prior to September 7, 1980, the monthly rate of basic pay to which they were entitled on the date of retirement generally is used. For those who began their military careers after September 7, 1980, the method was changed to use an average of the monthly basic pay "received" for the high 36 months the member served or in the case of a member whose period of service is less than 36 months, the average is based on the basic pay he "received" for the period actually served. This is somewhat similar to the high-three average used in computing annuities under the Civil Service retirement system. *Cf.* 5 U.S.C. 8331, definition (4).

No specific explanation is given in the House and Senate reports regarding the use of the word "received" as it relates to retired pay base computations. However, we do not think that Congress intended that erroneous amounts of basic pay received would be included in the computation. It is our view that the intention in enacting 10 U.S.C. 1407 is to change from the use of the basic pay rate in effect at retirement to an average of the basic pay the member was legally entitled to receive during the 36 months or lesser period, as applicable. Accordingly, only amounts which the member was legally entitled to receive should be included in the computation of the retired pay base.

Effect of Unauthorized Absences, Forfeitures and Demotions

The question is asked whether a service member's retired pay base is affected by such things as unauthorized absences, forfeitures or demotions which result in the member receiving less basic pay. In cases of forfeitures and demotions the reductions must be taken into account, but in cases of absences the reduction in pay received would not affect the retired pay base unless the period of absence is includable for retired pay computation.

A member serving on active duty is entitled to the basic pay authorized under 37 U.S.C. 203 and 1009, at the rate applicable to his grade and years of service at any one time. 37 U.S.C. 204. A demotion, like a promotion, entitles the member to a new rate of basic pay which must be taken into account when a member's total amount of basic pay is computed for retired pay base purposes. Likewise, diminishments of pay a member receives as a result of forfeitures imposed under the Uniform Code of Military Justice, 10 U.S.C. 801-940, should also be taken into account in establishing a member's total amount of basic pay for retired pay base purposes. Such a forfeiture of pay is a lawfully imposed reduction in the member's pay for the period covered by the penalty. Thus, the reduced pay becomes the basic pay which he received during that period.

As to unauthorized absences, under 37 U.S.C. 503 a member forfeits all pay for periods he is absent without leave unless the absence is excused as unavoidable. Enlisted members are generally required to make up lost time due to unauthorized absences to complete the term for which they were enlisted. 10 U.S.C. 972. Although there may be exceptions, generally members do not receive pay for periods of lost time nor are such periods generally creditable for percentage multiplier purposes in computing retired pay. See, for example, 39 Comp. Gen 844 (1960). In cases where lost time may not be included in the members retired pay multiplier computation, it should not be included in the retired pay base computation.

We note that unauthorized absence and resulting lost time was apparently not a factor in Airman Gallaher's case. Should a case arise which does not clearly fall within the general explanation above, it should be submitted here for decision on its particular facts.

Cost-of-Living Adjustments

The question also is asked, how cost-of-living adjustment under 10 U.S.C. 1401a are to be applied to retired pay which is computed based on a retired pay base under 10 U.S.C. 1407. We find that the cost-of-living adjustments authorized by 10 U.S.C. 1401a(b), (c), and (d) apply.

The basic provisions of 10 U.S.C. 1401a were enacted several years prior to the enactment of Public Law 96-342, which added 10 U.S.C. 1407, establishing the retired pay base system. As a result they were worded to be compatible with the system of computing retired pay on a specific single basic pay rate, the only system then in existence. The question now is whether and how do the provisions of 10 U.S.C. 1401a apply to retired pay computed on the new retired pay base.

Subsection (b) of 10 U.S.C. 1401a provides:

(b) Each time that an increase is made under section 8340(b) of title 5 in annuities paid under subchapter III of chapter 83 of such title, the Secretary of Defense shall at the same time increase the retired and retainer pay of members and former members of the armed forces by the same percent as the percentage by which annuities are increased under such section.

Under these provisions each time Civil Service annuities are increased under 5 U.S.C. 8340(b) based on increases in the Consumer Prices Index, the Secretary of Defense is to increase retired and retainer pay by the same percentage as the Civil Service annuities are increased. The language of this provision can be applied without complication to retired pay computed on a retired pay base. Also, we find nothing in the language of 10 U.S.C. 1407 or its legislative history to indicate that the cost-of-living increases authorized by section 1401a(b) were not meant to apply to retired pay computed on a retired pay base. Therefore, we find that these provisions apply to retired pay computed on a retired pay basic under 10 U.S.C. 1407 just as they apply to retired pay computed based on the rate of basic pay to which the member was entitled on the day before retirement.

Subsections (c) and (d) of 10 U.S.C. 1401a provide:

(c) Notwithstanding Subsection (b), if a member or former member of an armed force becomes entitled to retired pay or retainer pay based on rates of monthly basic pay prescribed by section 203 of title 37 that became effective after the last day of the month of the base index, his retired pay or retainer pay shall be increased on the effective date of the next adjustment of retired pay and retainer pay under subsection (b) only by the percent (adjusted to the nearest one-tenth of 1 percent) that the new base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

(d) If a member or former member of an armed force becomes entitled to retired pay or retainer pay on or after the effective date of an adjustment of retired pay and retainer pay under subsection (b) but before the effective date of the next increase in the rates of monthly basic pay prescribed by section 203 of title 37, his retired pay or retainer pay shall be increased, effective on the date he becomes entitled to that pay, by the present (adjusted to the nearest one-tenth of 1 percent) that the base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

Under section 1401a(c) only a partial cost-of-living increase in retired pay is granted when a member first becomes entitled to retired pay "based on rates of monthly basic pay" that became effective after the last day of the month of the base index used in com-

puting the cost-of-living increase under 10 U.S.C. 1401a(b). The partial increase is to be based on the percent that the new base index exceeds the index for the calendar month immediately before that in which the "rates of monthly basic pay on which his retired pay" is based became effective.

Under section 1401a(d) a partial cost-of-living increase is granted when a member becomes entitled to retired pay on or after the effective date of a cost-of-living increase under 10 U.S.C. 1401a(b) but before the effective date of the next increase in monthly basic pay. The partial increase is the percent that the base index exceeds the index for the calendar month immediately before that in which "the rates of monthly basic pay on which his retired pay" is based became effective.

The purpose of sections 1401a(c) and (d) is to limit the cost-of-living increase in retired pay to that portion of the increase which occurred since the last statutory increase in basic pay on which the member's retired pay is based. B-166335, June 4, 1969. That is, under section 1401a(c), if he retires after a basic pay increase but before the next retired pay cost-of-living increase, he receives only a partial increase when the next cost-of-living increase occurs rather than the full increase. Under section 1401a(d), if he retires after the retired pay cost-of-living increase but before the next basic pay increase, he receives an immediate partial cost-of-living increase rather than no increase until the next cost-of-living increase.

The language of sections 1401a(c) and (d) was designed for the system of basing retired pay on a single specific basic pay rate rather than retired pay based on the new retired pay base which is an average of pay received and may include numerous different sets of basic pay rates. However, we find no intent in the enactment of the retired pay base system to repeal or eliminate the partial increases under sections 1401a(c) and (d). Further, those sections were designed to apply in conjunction with the provisions of section 1401a(b) which clearly applies to retired pay computed on a retired pay base. Therefore, it is our view that sections 1401a(c) and (d) should also be applied to retired pay computed on a retired pay base if reasonably possible.

It appears that these provisions can reasonably be applied by disregarding the prior basic pay rates which were used in determining the retired pay base. Instead, in applying sections 1401a(c) and (d) the most recent basic pay rates should be used and the partial increase percentage determined in the same manner as used with respect to members retiring under the old system. This partial increase should then be applied at the appropriate time (depending upon whether (c) or (d) applies) to the member's actual retired pay base.

"Saved Pay" Rates

The submission also asks whether the so-called "saved pay rate" provisions of 10 U.S.C. 1401a(e) apply to the computation of retired pay computed on a retired pay base provided for by 10 U.S.C. 1407. Section 1401a(e) provides:

> (e) Notwithstanding subsections (c) and (d), the adjusted retired pay or retainer pay of a member or former member of an armed force retired on or after October 1, 1967, may not be less than it would have been had he become entitled to retired pay or retainer pay based on the same pay grade, years of service for pay, years of service for retired or retainer pay purposes, and percent of disability, if any, on the day before the effective date of the rates of monthly basic pay on which his retired pay or retainer pay is based.

When it is to the member's advantage in the computation of retired pay, 10 U.S.C. 1401a(e) authorizes the use of basic pay rates in effect on the day before the effective date of the rates of monthly basic pay on which the member's retired pay would otherwise be based, plus appropriate cost-of-living increases. 53 Comp. Gen. 698 and 53 *id.* 701 (1974). This provision was directed to retired pay based on a specific basic pay rate and not an average of basic pay received over a period of time. However, like sections 1401a(c) and (d), we find no clear indication that in enacting the retired pay base system, Congress intended that section 1401a(e) would not be applied. Thus, we find that when it is possible to do so and it results in a benefit to the retiree, section 1401a(e) should be applied to the computation of retired pay based on a retired pay base under 10 U.S.C. 1407. In Airman Gallaher's case, section 1401a(e) may be applied to allow the use of the pay rates in effect immediately prior to the rates in effect at the time he retired.

Conclusion

As the foregoing relates to Airman Gallaher, his initial retired pay base is obtained by totaling the basic pay he was legally entitled to receive while on active duty. This should reflect the change in his basic pay due to his January 20, 1981 demotion. That total is to be divided by the number of months of his total active duty time to arrive at his retired pay base. The 50 percent disability rating should then be applied to the retired pay base to determine his initial retired pay. However, from the computation furnished us by the Air Force it appears that it would be to Airman Gallaher's advantage to use the October 1979 pay rates (as authorized by section 1401a(e)) rather than the October 1980 pay rates. Therefore, his retired pay base should be computed using the 1979 rates, and all applicable cost-of-living increases authorized under 10 U.S.C. 1401a. The voucher submitted is being returned for payment, if otherwise correct.

Should the application of any of the provisions of subsections (c) through (e) of 10 U.S.C. 1401a to retired pay computed on a retired pay base be too cumbersome to implement or should their imple-

mentation be otherwise undersirable, we suggest the services seek clarifying legislation.

[B-207605]

Contracts—Small Business Concerns—Awards—Responsibility Determination—Government Printing Office Contracts

The Government Printing Office is a legislative agency which is excluded from coverage of the Small Business Act. Therefore, its determination that a small business concern is nonresponsible need not be referred to the Small Business Administration for review under certificate of competency procedures.

Contractors—Responsibility—Administrative Determination—Security Clearance—Absence at Time of Contract Award

General Accounting Office will not disturb contracting agency's determination that a firm is nonresponsible where that determination is reasonably based on fact that firm did not have security clearances necessary to perform contract and could not obtain such security clearances in time to perform in an efficient and uninterrupted manner.

Matter of: Fry Communications, Inc., February 1, 1983:

Fry Communications, Inc. (Fry), protests the Government Printing Office's (GPO) determination that Fry was not responsible to perform the services required under invitation for bids No. A203-S, and the subsequent award of the contract to Braceland Brothers, Inc. Fry contends that GPO's finding of nonresponsibility was contrary to the terms of the invitation and applicable sections of the Federal Procurement Regulations (FPR). Fry further contends that, since it is a small business, GPO was required to refer the matter of its nonresponsibility to the Small Business Administration (SBA) for the possible issuance of a certificate of competency as required under the Small Business Act, 15 U.S.C. § 637(b)(7).

We find no merit to the protest.

The invitation was for printing and related services, including production of looseleaf pamphlets, reprints and changes. Under the resulting requirements contract, the contractor is to perform such operations as film processing, printing, binding, packing and distributing. The invitation stated that approximately 50 percent of the orders under the contract "will be classified up to 'Confidential' or 'NATO Confidential.' " The invitation further stated that:

> All provisions of the Security Agreement (DD Form 441) including the "Industrial Security Manual for Safeguarding Classified Information" (DoD 5220.22-M) are hereby made a part of these specifications and will be applicable to all phases of production and shipment of classified publications ordered under these specifications.

Bids were opened on April 27, 1982, and Fry submitted the lowest bid. The contracting officer subsequently contacted the Defense Investigative Service Cognizant Security Office (DISCO) to find out if Fry had been properly cleared under the Department of Defense Industrial Security Program to handle any classified material which would be released to the firm if awarded the contract. A

DISCO representative told the contracting officer that it would take at least 6 months for Fry to obtain the necessary clearance. (Subsequent to Fry's filing a protest in our Office, the contracting officer again contacted DISCO and was told Fry was not cleared and that, "Under the most ideally realistic conditions, it would normally take 60 to 90 days to clear a facility from the time of receipt of the request.") The DISCO representative further informed the contracting officer that because of the need for "NATO Confidential" clearance, an interim security clearance would not be issued. The contracting officer concluded that there was not sufficient time for Fry to obtain the proper clearance before performance had to start and, therefore, determined Fry to be nonresponsible and awarded to Braceland Brothers, Inc., on May 12.

Fry contends that, even though the contracting officer determined Fry to be nonresponsible, Fry's offer could not properly be rejected without referral of the responsibility issue to the SBA for review under its certificate of competency procedures. Fry cites FPR § 1-1.708-2 and the Small Business Act, 15 U.S.C. § 637(b)(7), as mandating such referral.

In accordance with section 501 of the Small Business Act Amendments of 1978, 15 U.S.C. § 637(b)(7) (Supp. IV, 1980), no small business concern may be precluded from award because of nonresponsibility without referral of the matter to SBA for final disposition under the certificate of competency procedures. Section 1-1.708-2 of the FPR (Amendment 192, June 1978) is the implementing regulation. Under 15 U.S.C. § 637, SBA has authority to make final determinations with regard to "all aspects of responsibility" of small business concerns. However, we conclude that the certificate of competency procedures are not applicable to GPO procurements. Before reaching this conclusion, we reviewed reports from both GPO and SBA, as well as submissions from the protester. In addition, the legal issue concerning whether GPO is subject to SBA's certificate of competency review was before the United States District Court for the District of Columbia (*Gray Graphics Corp.* v. *United States Government Printing Office, et al.,* Civil Action No. 82-2869, decided December 20, 1982) while we were considering this protest, and reviewed certain documents submitted to the court before deciding this case. The views of SBA, in particular, are entitled to significant weight because of its statutory responsibility to administer the certificate of competency program. See *System Development Corporation and International Business Machines,* B-204672, March 9, 1982, 82-1 CPD 218.

GPO contends that it is not a Government agency covered by the Small Business Act. GPO submits that agencies covered by the act are defined in section 3(b) of the act, 15 U.S.C. § 632(b), which incorporates the following definition of "agency" found in the Administrative Procedure Act at 5 U.S.C. § 551(1):

"agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, *but does not include*—
(A) *the Congress* * * *. [Italic supplied.]

Because GPO considers itself to be a congressional or legislative agency, GPO argues that it is excluded as an agency covered by the Small Business Act. GPO points to the legislative history of the Small Business Act amendments and, in particular, the language used by the Senate Committee on Governmental Affairs (quoted below) as a further indication that the act's definition of agency excludes agencies in the legislative branch of Government. S. Rep. No. 1140, 95th Cong., 2nd Sess. 12 (1978). Moreover, GPO refers to Senate Document No. 96-44 entitled "Handbook for Small Business, A Survey of Small Business Programs of the Federal Government" (1980, 4th ed.) as a clear indication of congressional intent to exclude GPO from Small Business Act coverage because the handbook does not include the GPO, or an other legislative branch agency in its guide to agencies that administer Small Business Act Programs.

Fry argues that GPO is covered by the Small Business Act because nowhere in the Administrative Procedure Act or in the Small Business Act is GPO expressly exempted from the SBA's certificate of competency jurisdiction. Fry contends that, if Congress had intended to exclude "legislative-type agencies," it would have done so with specific language in the statute. Furthermore, Fry argues that the United States District Court for the District of Columbia has held that GPO is an agency within the meaning of the Administrative Procedure Act. *Estes* v. *Spence,* 338 F. Supp. 319 (D.C. 1972).

We note, as Fry points out, that GPO has been held to be an agency whose actions are subject to judicial review under the Administrative Procedure Act. *Estes* v. *Spence, supra.* Nevertheless, we do not think that Congress ever intended to make GPO subject to the Small Business Act. The legislative history of the Small Business Act indicates that Congress did not intend to include any legislative or judicial branch agency within the coverage of the Small Business Act. GPO, of course, is an agency within the legislative branch. See *United States* v. *Allison,* 91 U.S. 303 (1875).

Section 3(b) of the Small Business Act was added to the act by the 1978 Amendments, Pub. L. 95-507, 92 Stat. 1757, 1772, approved October 24, 1978, 15 U.S.C. § 637c(2). In explaining the wording of section 3(b), the Senate Committee on Governmental Affairs stated in Senate Report 95-1140, issued August 16, 1978, at page 12, that:

The Committee definition of "agency" excludes the United States Postal Service, the General Accounting Office, and agencies in the *legislative* and judicial branches. [Italics supplied.]

We recognize that GAO, which is also considered to be within the legislative branch of Government (See, for example, *Smithkline Corporation* v. *Staats,* 668 F.2d 201, 204 (3rd Cir. 1981)), is specifical-

ly exempted from the Small Business Act while GPO is not specifically exempted. However, this does not mean that Congress therefore wanted to exempt GAO and not other legislative branch agencies from the act's coverage. Rather, the specific exemption for GAO is explained by the fact that GAO is defined as an Executive agency for purposes of title 5, *see* 5 U.S.C. §§ 104 and 105, and thus could be considered subject to the Small Business Act unless there was a specific exemption.

The SBA has concluded that the Small Business Act was not intended to be applied to legislative agencies such as GPO, and the court in *Gray Graphics* gave deference to the SBA view of its own authority under that act. Based on the legislative history of the Small Business Act, we also conclude that GPO is not subject to the act.

We now consider Fry's contention that the contracting officer's determination that Fry was nonresponsible was improper because it was based upon the fact that Fry did not have the necessary security clearance at the time of contract award rather than at the time of performance. Fry cites FRP § 1-1.1203-1(b) (Amendment 192, June 1978) which requires only that the prospective contractor be able to comply with the proposed delivery schedule. Fry argues that it relied upon GPO's past practice of awarding similar contracts to contractors which did not have security clearances. Fry points out that there was no specific requirement for possessing a security clearance in the invitation. Fry also argues that since contract performance would extend over a 1-year period, there is sufficient time for obtaining any clearance if necessary.

The determination of a prospective contractor's responsibility—that is, its ability to perform the desired services or to deliver the required product in accord with the solicitation's delivery schedule and specifications—is primarily the function of the procuring activity and is necessarily a matter of judgment involving a considerable degree of discretion. Therefore, our Office will not disturb a determination of nonresponsibility absent a showing of either bad faith on the part of the procurement officials or the lack of a reasonable basis to support such a determination. *Lear Colorprint Corporation,* B-199523, October 6, 1980, 80-2 CPD 244.

Based on our discussion below, there is no showing of fraud of bad faith of the part of GPO officials. Moreover, we cannot conclude that there was no reasonable basis for the determination that Fry was nonresponsible. Therefore, this point of Fry's protest is without merit.

Concerning Fry's alleged reliance on past GPO awards to contractors without security clearances, GPO reports that it has always awarded contracts for the reproduction of classified material only to properly cleared contractors. Where, as here, the conflicting statements of the protester and the agency constitute the only available evidence of what really transpired in the past, the pro-

tester has not carried its burden of affirmatively proving the case. *Kassel Kitchen Equipment Co., Inc.*, B-190089, March 2, 1978, 78-1 CPD 162. Furthermore, even if GPO had been making awards in the past without regard to security clearances, those prior actions would not necessarily justify award without regard to security clearance in the present case since prior improper contract actions do not prevent an agency from applying correct procedures in later procurements. *SKS Group, Ltd.*, B-205871, June 14, 1982, 82-1 CPD 574.

In our opinion, the contracting officer's determination that Fry was nonresponsible had a reasonable basis. The solicitation clearly informed all offerors that half of the orders placed under the contract would involve classified material, that the Department of Defense "Industrial Security Manual for Safeguarding Classified Information" was incorporated and would be applicable to all phases of production and shipment of classified publications ordered under the contract, and that deliveries/pickups would have to be made by employees with proper security clearances. Thus, all offerors should have been aware that proper security clearance would be required of the contractor before performance could begin. Section 1-1.1203-1(b) of the FPR (Amendment 192, June 1978) specifically requires that, in order to be determined to be responsible, a prospective contractor must be able to comply with the required delivery or performance schedule. Here, after discussing the matter with DISCO officials, the contracting officer ascertained that Fry would not be able to obtain the necessary security clearance before orders pertaining to classified documents were placed under the contract. In fact, an order related to a "NATO Confidential" publication was placed only 9 days after contract award. We think that the failure of Fry to obtain the necessary clearance in these circumstances was relevant to Fry's ability to perform the contract in an efficient and uninterrupted manner. Since the burden is on the prospective contractor to demonstrate its ability to perform properly before being awarded a contract, we find nothing improper in the contracting officer's determination here. *See* B-167536, October 17, 1969; *What-Mac Contractors, Inc.*, 58 Comp. Gen. 767 (1979), 79-2 CPD 179; *see, also,* FPR § 1.1-1203 (Amendment 192, June 1978).

Accordingly, the protest is denied.

[B-208082]

Subsistence—Actual Expenses—Meals—Dinner—At Airport Prior To Return From TDY—Reimbursement Guidelines

An employee on temporary duty obtained a meal at the airport prior to his return flight. Although a traveler is ordinarily expected to eat dinner at his residence on evening of return from temporary duty, the determination of whether an employee should be reimbursed is for the agency. In determining whether it would be unreasonable to expect an employee to eat at home rather than en route, factors such as

elapsed time between meals and absence of in-flight meal service may be considered. B-189622, Mar. 24, 1978, is distinguished.

Certifying Officers—Submissions to Comptroller General—Items of $25 or Less

Claims amounting to $25 or less should normally be handled by certifying and disbursing officers under procedures authorized in letter of July 14, 1976, and need not be submitted to the Comptroller General for decision.

Matter of: Shawn H. Steinke, February 1, 1983:

By letter of June 24, 1982, an authorized certifying officer with the Department of Energy requested an advance decision regarding Mr. Shawn H. Steinke's claim for $13.40 for the cost of a meal obtained while returning from a temporary duty assignment. In addition, the certifying officer requests guidance concerning the types of situations in which it is appropriate to reimburse an employee for the cost of a meal obtained shortly after beginning or before completing temporary duty travel. The determination of whether an employee should be reimbursed for the cost of a meal obtained under these circumstances is to be made by the agency concerned. The General Accounting Office will not disturb an agency's determination unless it is clearly erroneous or arbitrary or capricious.

The record shows that Mr. Steinke returned to his duty station in Las Vegas, Nevada, from Los Alamos, New Mexico, on April 14, 1982. He left Los Alamos at 1:30 p.m. (Mountain Time) and traveled by car to Albuquerque, New Mexico. He ate dinner in Albuquerque before boarding a 6:15 flight to Las Vegas. There was no meal served on the flight. He arrived at his residence at 7:30 (8:30 Mountain Time).

Mr. Steinke's claim for dinner was previously disallowed by the certifying officer on the basis of our holding in *Matter of Simmons,* B-189622, March 24, 1978. That decision involved an employee who purchased dinner at the airport between 7 and 7:45 p.m. after his return flight and immediately before departing for his residence. He claimed reimbursement for the cost of that meal notwithstanding the general rule that subsistence expenses incurred by the traveler at his permanent duty station, his residence, en route to or from a nearby airport, or at the airport may not be reimbursed. In holding that he could not be reimbursed, we noted that the employee's "election to have dinner at the airport rather than at home was a purely personal choice, dictated at least in part by his preference as to time of eating. Therefore * * * the cost of this dinner was a personal expense. * * *." In that case, the employee had been served an in-flight lunch within 5 hours of the time he would have arrived home had he not delayed his return to dine at the airport.

Unlike *Simmons,* the case before us now involves the purchase of a meal prior to the return flight. This case is similar to *Matter of Stamnes,* B-202985, March 4, 1982, where the employee also pur-

chased a meal at the airport prior to his return flight. In these cases the primary consideration is the amount the employee's eating routine would have been interrupted had he taken his meal at home. As we noted in *Stamnes,* "the determination whether it would be unreasonable to expect the employee to eat dinner at home is a matter primarily for the agency concerned." In this particular case it is not clear that the official who approved Mr. Steinke's travel voucher considered the reasonableness of his decision to eat dinner before boarding the flight in Albuquerque. While the matter is returned to the Department of Energy for determination by the appropriate official, it would not appear improper to reimburse an employee for a meal en route to his duty station where the elapsed time between meals would otherwise have been more than 7½ hours. Although we would not ordinarily consider it unreasonable to expect an employee to eat dinner following his return home from temporary duty at 7:30 p.m., we believe it is appropriate to consider time zone changes and elapsed time between meals in determining whether the employee acted prudently in purchasing an evening meal en route home from a temporary duty assignment.

With regard to the certifying officer's request for general guidance in determining whether an employee should be reimbursed for a meal obtained in similar circumstances we again point out that this determination is a matter primarily for the agency concerned. As suggested in *Matter of Burrell,* B-195940, December 26, 1979, an employee is ordinarily expected to eat breakfast or dinner at his residence on the morning of departure for temporary duty, or on the evening of his return. However, the reasonableness of the employee's actions in doing otherwise depends on the particular facts of a given case. The considerations that would justify purchase of a dinner en route home are similar to those that might be found to warrrant the purchase of a substitute meal when an employee is provided an in-flight meal incident to his return transportation. See e.g., *Matter of Morrill,* B-192246, January 8, 1979; c.f. *Matter of Sestile,* B-194641, February 19, 1980.

Where the employing agency has made the initial reasonableness determination, this Office will overturn the agency's determination only where our review of the evidence results in a finding that the agency's determination was clearly erroneous, or arbitrary or capricious. *Matter of Virgne,* B-203857, December 15, 1981.

We have found that treatment of claims for minor amounts at the request of disbursing and certifying officers is an expensive and time consuming function which can appropriately be handled by the individual agency. Accordingly, on July 14, 1976, we issued a letter to the heads of departments and agencies, disbursing and certifying officers. That letter states as follows:

Under existing law disbursing officers and certifying officers may apply for and obtain a decision by the Comptroller General of the United States upon any ques-

tion involving a payment to be made by them or a payment on any voucher presented for certification. 31 U.S.C. 74, *id.* 82d.

In order to obtain the protection afforded by the cited statutory provisions numerous questions involving minor amounts are presented for decision by the Comptroller General. The General Accounting Office and the agencies involved incur inordinate administrative costs in processing these requests for decision and the necessity for dealing with them serves to delay attention to questions involving more significant amounts and subjects.

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

We recognize that this claim was originally denied by the certifying officer and that upon appeal from that action the claim was submitted for advance decision because of the uncertainty as to whether the facts presented a justifiable reason for allowance. However, we reemphasize our position that in cases involving an item of $25 or less and, in order to avoid unnecessary requests for decisions in the future in such cases, the accounting officer should obtain a determination from the appropriate agency official in accordance with our letter of July 14, 1976. Such action normally should enable the accounting officer to settle the claim without a request for advance decision.

[B-208341]

Compensation—Severance Pay—Eligibility—Involuntary Separation Requirement—Resignation Incident to RIF—Cancellation of RIF Prior to Effective Date of Resignation

Federal Trade Commission (FTC) announced that it was closing several regional offices, and employees of these offices were given specific notice that their jobs would be abolished pursuant to a reduction-in-force (RIF). After several employees submitted written resignations, the FTC reversed its decision, did not close the regional offices, and canceled the RIF. The employees separated from service after the RIF was canceled. Hence, they are not entitled to severance pay since their resignations were voluntary and could have been withdrawn. Civil Service Regulations state that employees are not eligible for severance pay if at the date of separation they decline an offer of an equivalent position in their commuting area, and the option to remain in the same position is equally preclusive. 5 C.F.R. 550.701(b)(2).

Matter of: Ivan Orton, *et al.*—Severance Pay, February 1, 1983:

John H. Carley, General Counsel, of the Federal Trade Commission (FTC), requests our opinion concerning the entitlement to severance pay of several former employees of the FTC. The issue presented is whether employees who give notice of their intent to resign while under specific notice of a reduction-in-force (RIF), but whose resignations are not effective until after these RIF notices have been canceled, are entitled to severance pay. Our holding is that under these circumstances, the employees are not entitled to severance pay.

On April 16, 1982, the FTC decided to close four of its ten regional offices. On April 19 and 21, 1982, employees in the regional offices to be closed were given specific notice that their jobs would be abolished effective July 15, 1982. These employees were offered equivalent positions in Washington, D.C., and asked to accept or decline these offers within 30 days.

On May 27, 1982, the Senate passed H.R. 5922 a supplemental appropriation bill for 1982 which included language prohibiting the FTC from reducing the number of its regional offices. 128 *Cong. Rec.* S6342 (Daily ed. May 17, 1982, Part II). As a result of this congressional action, the reductions-in-force were canceled on May 28, 1982, and affected employees were notified through supervisory channels. It should be noted that, after Senate passage, the language prohibiting closure of FTC regional offices was deleted in the Conference Committee, with the specific notation that the FTC had agreed that the regional office reorganization would be delayed until fiscal year 1983 to allow fuller consideration by the Congress. H.R. Rep. No. 605, p. 24, 97th Cong., 2d Sess., June 10, 1982. Ultimately this bill was vetoed by the President on June 24, 1982.

Six employees of the FTC had given notice prior to the cancellation of the RIF of their intent to resign on effective dates after the cancellation of the RIF. Another employee accepted non-Federal employment while the notices were in effect, but did not give notice of his intent to resign until after the cancellation. Each of these seven employees cited the RIF notices as the reason for seeking and accepting other employment. Two of the affected employees, Mr. Ivan Orton and Mr. Donald S. Cooper, submitted letters to us setting forth their reasons for leaving the Government after receipt of the RIF notice. Also submitted was a memorandum from James C. Miller III, Chairman of the FTC, to the Commission concerning the suspension of the plan to close the affected regional offices. Based on this memorandum, the two employees argue that the cancellation of the RIF was procedurally improper.

Payment of severance pay is authorized by 5 U.S.C. § 5595 (1976), which provides that an employee who has ben employed currently for a continuous period of at least 12 months, and is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency, is entitled to be paid severence pay. The issue then is whether the resignations of the seven employees from the FTC are to be considered involuntary separated.

The severance pay regulations, specifically 5 C.F.R. § 550.706 (1982), set forth situations in which an employee's separation by resignation is deemed to be an involuntary separation. A resignation after receiving a RIF notice would be an involuntary separation under this regulation. However, 5 C.F.R. § 550.701(b)(2), provides that:

This subpart [severance pay] does not apply to an employee who at the time of separation from the service, is offered and declines to accept an equivalent position in his agency in the same commuting area, including an agency to which the employee with his function is transferred in a transfer of functions between agencies. For purposes of this paragraph, an equivalent position is a position of like seniority tenure, and pay other than a retained rate.

It should be noted that the regulations do not specifically address the situation here in which a RIF was canceled, and employees were allowed to remain in the same positions they were holding when the RIF was first proposed. It also should be noted that the regulation specifically refers to "the time of separation" as the key time for the offer of an equivalent position.

In this case, Mr. Orton and the other individuals involved could have retained their positions, instead of separating from the agency, after the RIF was canceled. It is clear under the regulations that if the FTC had offered them equivalent positions in the same commuting area, and the RIF had taken place, they would not have been entitled to severance pay.

It is equally clear that since the employees, following the cancellation of the RIF, were allowed to remain in the same positions, in the same offices, at the same grades and pay, they were also ineligible to receive severance pay under the statute. That is, the option to remain in the same position rendered their subsequent separation a voluntary one and precludes payment of severance pay.

The argument that the entitlement to severance pay vests on the date a written resignation is submitted, instead of the date of separation, is not persuasive. Under the provisions of the Federal Personnel Manual, Chapter 715, Subchapter 2, a resignation is a voluntary action by an employee, and an agency may permit an employee to withdraw the resignation at any time before it has become effective, except when the agency has a valid reason to deny the withdrawal. FPM Chapter 715, S2–3. In this case each of the seven employees could have withdrawn his resignation following the cancellation of the RIF, but each chose not to do so.

The two employees who wrote letters to us raise several arguments in support of their claims for severance pay. First, they argue that they resigned from their positions in reliance on the proposed actions of the agency, that is, abolition of their jobs. Also, they allege that the FTC promised to pay them severance pay even if the RIF was canceled. Since they relied on these actions to their detriment, they argue that the Government should be estopped from denying them severance pay.

We must disagree with the two employees. The doctrine of estoppel is not applicable here because the relationship between the Government and its employees is not contractual, but appointive, and is governed strictly in accordance with statutes and regulations. *William J. Elder and Stephen M. Owen,* 56 Comp. Gen. 85 (1976).

Next, one of the employees argues that he had already given his personal commitment to start new employment before the RIF was canceled. He alleges that his professional reputation would be tarnished if he withdrew that commitment. He also states that he could have left the FTC immediately while the RIF was still in effect, but that he chose not to do so since he was in the midst of handling important cases for the FTC. He states that if he had resigned immediately, his files and cases could not have been transferred to other employees in an orderly manner. We believe that the employee's actions were in accord with the highest professional standards of Federal attorneys. However, we have no choice but to decide the severance pay issue in strict accordance with the applicable statute and regulations.

Finally, both employees allege that there may have been procedural irregularities in the cancellation of the RIF. Mr. Cooper has submitted the memorandum from Chairman Miller as evidence of the alleged procedural irregularities. However, our Office does not decide such questions and that issue is more properly addressed to the Merit Systems Protection Board. We do not rule in any way on the procedural propriety of the FTC's proposed RIF or its cancellation thereof, but hold only that the statute and regulations preclude payments of severance pay when employees are separated from the service by resignation after a proposed RIF has been canceled.

Accordingly, our decision is that the seven employees in question are not entitled to severance pay.

[B-209302]

Discharges and Dismissals—Military Personnel—Involuntary Separation—Pub. L. 96-513 Effect—Travel and Transportation Allowances—To Home of Selection

The Joint Travel Regulations, Vol. 1, may be amended to include travel and transportation allowances to a home of selection for a member discharged or released from active duty with separation pay under 10 U.S.C. 1174 (Supp. IV, 1980). A statute must be read in the context of other laws pertaining to the same subject and should be interpreted in light of the aims and designs of the total body of law of which it is a part.

Matter of: Home-of-Selection Travel and Transportation Allowances, February 1, 1983:

We have been asked whether Volume 1 of the Joint Travel Regulations may be amended to include travel and transportation allowances to a home of selection for a uniformed services member discharged or released from active duty with "separation pay." Release from active duty with separation pay was added by the Defense Officer Personnel Management Act. Public Law No. 96-513, section 109, 94 Stat. 2835, 2870, enacting 10 U.S.C. § 1174 (Supp. IV, 1980). Travel and transportation allowances provided under 37

U.S.C. §§ 406 (d) and (g) for a member's dependents and household effects were amended to reflect release from active duty with separation pay. Pub. L. No. 96-513, section 506. However, 37 U.S.C. § 404(c) which authorizes a qualified member to select his home for the purpose of travel and transportation allowances was not amended to refer to a member released with entitlement to separation pay. We find that, in accordance with the purpose and intent of Congress in providing for release of members with entitlement to separation pay, they are also entitled to travel and transportation allowances to their home of selection when they otherwise qualify.

The question was presented by the Assistant Secretary of the Army (Manpower and Reserve Affairs), and was assigned Control No. 82-22 by the Per Diem, Travel and Transportation Allowance Committee.

Background

The Defense Officer Personnel Management Act, cited above, amended titles 10 and 37 of the United States Code. A primary purpose of the Act was to revise and standardize the law relating to appointment, promotion, separation, and mandatory retirement of Regular commissioned officers of the Army, Navy, Air Force, and Marine Corps. See S. Rep. No. 96-375, 96th Cong., 1st Sess. (1979). Significantly revised were procedures providing for a lump-sum payment upon involuntary separation ("separation pay").

Separation pay is a contingency payment for members of the armed services involuntarily separated from active duty after completing 5 years of service but prior to becoming entitled to retirement pay. The purpose of the separation payment is to ease the member's re-entry into civilian life. S. Rep. No. 96-375 at p. 28. Prior to the Defense Officer Personnel Management Act there were various types of separation payments. Regular officers who were discharged received "severance pay" while Reserve members who were involuntarily released received "readjustment pay."

The readjustment and severance pay provisions were repealed and superseded by a new section. Pub. L. No. 96-513, section 109. The new provision, 10 U.S.C. § 1174 (Supp. IV, 1980), provided a standard name ("separation pay") and formula for computing the amount of pay due to members involuntarily separated from the service. Because a member with less than 10 years of service would receive more under the older provisions, a savings provision was included to permit a member on active duty when the new law was enacted to elect under either the old or new provisions. Pub. L. No. 96-513, section 607.

The standardization of the separation pay procedures required conforming amendments to the travel and transportation allowances provisions. Travel and transportation allowances to a home

of selection upon separation or retirement are provided under 37 U.S.C. §§ 404 and 406. Section 406 allows travel and transportation allowances for dependents, baggage and household effects. Specifically, section 406(d) authorizes nontemporary storage of baggage and household effects; section 406(g) provides for transportation of dependents and household goods. These travel and transportation allowances are available only to members entitled to make a home of selection under 37 U.S. § 404(c) (1976). Section 404(c) permits a qualified member to elect a home of selection within 1 year of separation. To qualify for these allowances a member involuntarily separated must have "at least eight years of continuous active duty with no single break therein of more than 90 days." 37 U.S.C. §§ 404(c)(1)(B); 406(d)(2); 406(g)(2) (1976).

In enacting Pub. L. No. 96-513, Congress technically amended 37 U.S.C. §§ 406(d)(2) and 406(g)(2) to specifically refer to release from active duty with separation pay. However, a similar amendment was not made to 37 U.S.C. § 404(c). Therefore, the qualifying language in section 404(c) providing for selecting a home upon release for members involuntarily separated remains:

> * * * immediately following at least eight years of continous active duty with no single break therein of more than 90 days, is discharged with severance pay or is involuntarily released from active duty with readjustment pay * * *. 37 U.S.C. § 404(c)(1).

As is indicated above, sections 406 (d) and (g) were specifically amended to reflect the change to separation pay for an involuntarily separated member who:

> * * * immediately following at least eight years of continous active duty with no single break therein of more than 90 days, is discharged *with separation pay* or severance pay or is involuntarily released from duty *with separation pay* or readjustment pay. * * * [Italic supplied.]

Since section 404(c) was not changed by the Defense Officer Personnel Management Act, the Assistant Secretary questions whether the Joint Travel Regulations can be amended to include home-of-selection travel and transportation allowances for members released from active duty with separation pay.

Discussion

The Joint Travel Regulations implement the basic laws relating to travel for uniformed services personnel. Thus, to determine if the Joint Travel Regulations can be amended to include transportation allowances to a home of selection for a member discharged or released from active duty with separation pay, we must find that there is appropriate statutory authority.

This requires that we interpret 37 U.S.C. § 404(c) in light of the later enacted 10 U.S.C. § 1174. Not only must a statute be given a rational and sensible interpretation, it must also be read in the context of other laws pertaining to the same subject and should be interpreted in light of the aims and designs of the total body of law

of which it is a part. *Cohen* v. *United States,* 384 F.2d 1001 (Ct. Cl. 1967).

Section 404(c) does not include the phrase "discharged or involuntarily released with separation pay." Thus, a literal interpretation of section 404(c) would deny travel allowances for travel to a home of selection to members released with separation pay. However, such a restricted reading of section 404(c) would lead to an absurd result. Only those members with 8 continuous years of service who elected severance pay or readjusment pay under the saving clause would be entitled to the travel allowances to a home of selection. Those members who elected the new category of separation pay (which replaces severance and readjustment pay) would not technically come under the section 404(c) entitlement provision. Clearly, this is not what Congress intended. The technical amendment of section 406 to include references to separation pay shows that Congress meant the travel benefit provisions to be read in conjunction with the new pay category.

The legislative history is silent as to why section 404(c) was not amended, which lends support to the conclusion that it was an oversight. There is no indication that the unifying of separation pay was intended to prevent the granting of travel benefits upon home of selection. Congress made no substantial changes in the eligibility for the additional pay nor did Congress substantively affect the travel and transportation entitlements. Therefore, all the rights and benefits applicable to Reserve members and Regular officers under the prior separation provision would still pertain under the new law. Thus, we are led to the conclusion that a member involuntarily separated with separation pay would be entitled to the same benefits as a member released with readjustment pay or discharged with severance pay. *Cf.* 55 Comp. Gen. 166 (1975). When we read 37 U.S.C. § 404(c) in light of 10 U.S.C. § 1174, and the amendments to 37 U.S.C. § 406 discussed above, we find that members who have served continuously for 8 years and subsequently are discharged or involuntarily released with separation pay are entitled to travel and transportation allowances to a home of selection.

Accordingly, amendment of the Joint Travel Regulations to that effect is authorized.

[B-207318]

Appropriations—Availability—Seizure of Private Property—Marshals Service—Storage Costs

After the Marshals Service takes custody of property seized by the United States pursuant to the execution of a warrant *in rem,* it becomes the obligation of the Marshals Service rather than the agency under whose substantive statutory authority the goods were seized to pay unpaid storage costs that are the responsibility of the United States Government. Since the Marshals Service has the statutory responsibility to seize and hold property attached pursuant to *in rem* action, the appropri-

ations for the Marshals Service should be used to pay such expenses. There is no authority in the legislation governing the Marshals Service or the other agencies involved, such as the Dept. of Agriculture or the Food and Drug Administration, that would allow those agencies to pay such expenses either initially as "substitute custodian" or by reimbursing the Marshals Service.

Appropriations—Permanent Indefinite—Unavailability—Storage Charges—U.S. Marshals Service Seizures—Meat Products

Permanent judgment appropriation, 31 U.S.C. 1304 is not available to pay storage charges assessed against the United States, where the Marshals Service has the legal responsibility to pay such charges once it seizes the property pursuant to the execution of a warrant *in rem.*

Matter of: Payment of Storage Fees—United States Marshals Service, February 2, 1983:

This decision is in response to a request from the United States Department of Agriculture (USDA) for our Office to render a legal opinion concerning the payment of fees for the storage of goods seized by the United States. The specific question we were asked to address is whether the responsibility for paying storage costs when goods are seized and held by the United States rests with the Marshals Service which executes the seizure warrant, or the Federal agency—such as USDA or the Food and Drug Administration (FDA)—under whose substantive statutory authority the goods are seized initially. Our decision specifically addresses FDA's legal authority in this respect, because FDA advised us that the same issues of statutory and fiscal responsibility have arisen between it and the Marshals Service.

For the reasons set forth hereafter, it is our opinion that after the Marshals Service takes custody of property seized by the United States pursuant to the execution of a warrant *in rem,* it becomes the obligation of the Marshals Service, rather than the other agency involved, to pay any storage costs that are the responsibility of the United States Government.

USDA's request for our legal opinion to resolve this matter was triggered by the dispute that arose between the USDA and the Marshals Service in the case of the *United States of America* v. *2,116 Boxes of Boned Beef,* 516 F. Supp. 321 (D. KAN 1981). Accordingly, a discussion of what happened in that case is a useful starting point for the purpose of understanding and exploring the broader issues involved.

That case began in April 1980, when a meat inspector for the Food Safety and Inspection Service (FSIS) of USDA discovered what he suspected were illegal implants of diethylsilbesterol (DES) in 237 animals which were being slaughtered at a federally inspected slaughtering establishment. Under the authority set forth in section 402 of the Federal Meat Inspection Act, 21 U.S.C. § 672, the carcasses were initially detained administratively by the FSIS at the slaughter facility pending further inquiry. Subsequently, after

concluding that the DES had been implanted, FSIS referred the matter to the United States Attorney for the District of Kansas with a recommendation that further action be taken to seize, condemn, and dispose of the boned beef and offal under sections 403 and 404 of the Act, 21 U.S.C. §§ 673 and 674.

On May 14, 1980, the United States Attorney filed a complaint *in rem* alleging that the beef and offal were adulterated with DES within the meaning of subsections 1(m)(1), (2), and (3) of the Act, 21 U.S.C. § 601(m)(1), (2) and (3). Pursuant to a motion made by the United States, the court issued a warrant of arrest for the allegedly contaminated meat products. Subsequently, acting under the warrant *in rem,* the United States Marshal for that jurisdiction seized the beef and offal which remained in the custody of the Marshals Service, at the United Refrigerator Services cold storage warehouse in Kansas from August 1980 until the seized products were released by court order in August 1982.

After the seizure, the owner intervened as claimant on behalf of the seized meat products. In a trial before the United States District Court for the District of Kansas, the court determined that the boned beef and offal were not adulterated within the meaning of the Federal Meat Inspection Act. By order dated May 7, 1981 (which was modified on July 17, 1981), the court dismissed the complaint *in rem* and ordered that the beef be returned to the claimant and that costs of the action "including cost of storage of beef" be assessed against the United States. The court then granted a stay of its order that the beef be released, pending appeal by the Government. At that time, the court orally ordered the United States to begin to pay the storage costs that previously had been paid by the claimant. However, as a result of the dispute between the Marshals Service and the USDA as to which agency had the legal responsibility and obligation to pay the storage costs, United Refrigerator Services was not paid by anyone.

By letter dated August 18, 1982, the Department of Justice advised us that the Government's appeal has been dismissed and that the Department did not plan to seek further review of the judgment. The Department furnished us with a copy of the final order of the trial court, dated August 9, 1982, which after acknowledging the action of the Tenth Circuit Court of Appeals in dismissing the Government's appeal, with prejudice, lifted its earlier stay and directed the United States Marshal to release the beef. In that order, the court directed the United States to pay storage costs up to the effective date of that order.

When USDA submitted this question to us, it expressed the view that the permanent judgment appropriation, 31 U.S.C. § 1304 (formerly 31 U.S.C. § 724a) could be used to pay the storage costs incurred in that specific case. Nevertheless, the matter was submitted to us because of USDA's concern that the same problem could occur in other instances where allegedly adulterated or misbranded

articles were seized by the Federal Government under any one of a variety of statutes. Examples of such statutes include the Federal Meat Inspection Act, the Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.*, or the Egg Products Inspection Act, 21 U.S.C. § 1031 *et seq.*, all of which are administered by USDA, or the Federal Food, Drug and Cosmetics Act, 21 U.S.C. § 301 *et seq.*, administered by the FDA. Therefore, after resolving the general question of which agency is responsible for paying the unpaid storage costs when the Marshals Services executes a warrant *in rem*, our decision further addresses the specific issue of whether the judgment appropriation can be used to pay the storage costs in this particular case or any other case of this type.

Under the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq.*, USDA has authority to take various actions to insure that meat and meat products are wholesome, not adulterated, and are properly marked, labeled, and packaged. Pursuant to section 402 of the Act, 21 U.S.C. § 672, USDA has the administrative authority to detain carcasses and meat products that it reasonably believes to have been adulterated or misbranded for a period not to exceed 20 days pending further action under section 403 of the Act, 21 U.S.C. § 673. Under that section, a seizure and condemnation action against the allegedly adulterated meat may be brought in a United States District Court in the name of the United States by the Department of Justice. Although USDA may refer a case to the Department of Justice, the responsibility for deciding whether or not to pursue the case in the courts and how to conduct the litigation rests solely with the Department of Justice. *See* 28 U.S.C. § 516.

If the Justice Department pursues the case, it files a complaint *in rem*. The court may then issue a warrant of arrest for the meat, which a United States Marshal executes by seizing and holding the meat pending the outcome of the case. As stated in Rule E(4)(b) of the Supplemental Rules of the Federal Rules of Civil Procedure, if the type of property involved is such that the taking of actual possession is impracticable, the Marshal may seize the goods in place by affixing a copy of the process to the goods. Then the goods will remain in the constructive possession of the court until final disposition of the case.

If the Government prevails in the court proceeding and the meat is condemned, section 403 of the Act, 21 U.S.C § 673, provides that "* * * court costs and fees, and storage and other proper expenses shall be awarded against the person, if any, intervening as claimant of the article or animal." However, the statute does not cover situations in which the United States does not prevail or in which no claimant intervenes.

All of the parties involved in this dispute, including the Marshals Service, agree that the primary responsibility for executing an arrest warrant *in rem* that is issued by a Federal court when prop-

erty is attached and held by the United States rest with the Marshals Service. In that respect, 28 U.S.C. § 569(b) reads as follows:

> United States marshals shall execute all lawful writs, process and orders issued under authority of the United States * * * and command all necessary assistance to execute their duties.

More specifically, Rule E(4)(b) of the Supplemental Rules of The Federal Rules of Civil Procedure, governing actions *in rem*, provides that when "tangible property is to be attached or arrested, the Marshal shall take it into his possession for safe custody." Also, see Rule C(3) of the Supplemental Rules which provides that after a complaint is filed in an *in rem* action "* * * the clerk shall forthwith issue a warrant for the arrest of the property that is the subject of the action and deliver it to the marshal for service."

It is clearly a statutory responsibility of the Marshals Service to seize and hold property that is attached pursuant to an arrest warrant *in rem*, especially so when the seizure is on behalf of the United States. Accordingly, it logically follows that the monies appropriated for the functions and activities of the Marshals Service should be used to pay the expenses incurred in connection with the seizure and storage of the attached property. This has been recognized both in decisions of the Comptroller of the Treasury as well as the Comptroller General. For example, in 26 Comp. Dec. 702 (1920), the Comptroller of the Treasury explicitly recognized this when he said the following:

> This section [section 26 of the National Prohibition Act] imposes upon United States marshals and their deputies as officers of the law the duty of making seizures and arrests in accordance with its requirements. * * * The making of these seizures and arrests is a duty added by the law to the other duties of the marshal's office. Any expense incident to the discharge of this added duty is payable from the proper judiciary appropriation [which at that time contained the appropriation for the Marshals Service] and not from the special appropriation for its enforcement carried by the National Prohibition Act.

Also, see 22 Comp. Dec. 280 (1915) and the following decisions of the Comptroller General in which the propriety of using the Marshals Service appropriation to pay expenses of this type was recognized and upheld—27 Comp. Gen. 111 (1947), 14 *id.* 880 (1935), and B-62620, April 16, 1947.

Additional support for the conclusion that the moneys appropriated for the Marshals Service are available to pay expenses of this type is set forth in the United States Marshals Financial Management Manual (pages 330.03 and 330.04) which includes "Storage expenses" in a list of the different types of expenses that should be paid out of the Marshals Service appropriation. *Also, see* pages 320.14 to 320.20 of the Financial Management Manual and page I-N8 of the Appendix to the Budget for Fiscal Year 1982.

The Marshals Service does not dispute its role in executing *in rem* actions or the availability of its appropriations to pay, at least initially, the expenses incurred, including storage costs, in connection with such seizures. However, in its letter to us the Marshals

Service maintains that "it is only fair that the initiating agency pay for expenses and costs attendent to the transportation, storage and disposal of goods seized by the Marshals Service in support of *in rem* actions initiated by the specific agency." Such a result could be effected in its view either through payment by the agency in the first instance under a "substitute custodian approach" or by the agency reimbursing the Marshals Service for its expenditures.

We believe that since the primary responsibility for executing *in rem* warrants clearly rests with the Marshals Service, as stated above, its appropriations, and not those of the initiating agencies, should be used for that purpose at least in the absence of specific statutory authority for those agencies to use their own funds. Having examined the relevant legislation, including the statutes governing USDA and FDA on the one hand, and the Marshals Service on the other, we do not believe that either FDA or USDA generally has such authority.

First, since USDA does not have the statutory responsibility or authority either to hold the meat beyond the initial 20-day period of administrative detention, or to initiate formal court proceedings, we do not believe that the Federal Meat Inspection Act would authorize USDA to reimburse the Marshals Service for storage costs that are incurred after the Marshals Service executes the warrant *in rem* and seizes the meat. In this respect, we agree with USDA that its appropriations are available and should be used to pay the storage costs that arise during the period of USDA's administrative detention of the property.

Our conclusion is the same with respect to seizures by the FDA, which operates under similar statutory authority—the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* Seizures under section 304 of that Act, 21 U.S.C. § 334, are also actions *in rem* brought by the Department of Justice with the Marshals Service having the responsibility to execute the arrest warrant.

Second, as for the so-called "substitute custodian approach," we do not believe that provides any basis for transferring the legal responsibility for paying the costs incurred in connection with the storage of property seized by the Marshals Service from the Service to another agency. In this respect, the Marshals Services cites Rule (E)(d) of the Supplemental Rules to support this argument. While Rule E(4)(d) does authorize the marshal to "apply to the court for directions with respect to property that has been attached or arrested" it says nothing about appointing a substitute custodian or transferring the legal obligation for paying expenses of seizing and keeping property away from the Marshals Service to another agency. In fact, Rule E(4)(e) specifically states that none of the preceding rules alters the provisions of 28 U.S.C. § 1921 concerning such expenses. As amplified below, 28 U.S.C. § 1921 does not allow the Marshals Service to recover its fees from another Federal agency.

Finally, having concluded that the Marshals Service appropriations are initially chargeable with the storage costs, and that there is no explicit requirement that the initiating agencies reimburse the Service, we must determine whether there is any implicit statutory authority for requiring or authorizing USDA or FDA to reimburse the Marshals Service for its expenditures. We are not aware of any such authority.

The primary argument of the Marshals Service is based on 28 U.S.C. § 1921. The Marshals Service does not argue that this provision authorizes it to recover its costs from the owner of the seized property who intervened since the purpose of the statute is "to reimburse the federal government for services rendered to private litigants by United States marshals." See *Hill* v. *Whitlock Oil Service Inc.*, 450 F.2d 170 (10th Cir. 1971). In fact, since the complaint in this type of case is brought by the Justice Department in the name of the United States, the seizure by the Marshals Service is really effected on behalf of the United States, rather than any particular agency. Nevertheless, the Marshals Service maintains that provision "gives it mandatory authority to charge initiating agencies any and all costs and expenses relative to the transportation, storage and disposal of goods seized in support of an *in rem* action." However, our review of 28 U.S.C. § 1921 as well as several other relevant statutory provisions and their legislative histories not only fails to provide any support for this position, but actually supports the contrary interpretation.

In this respect, 28 U.S.C. § 1921 provides as follows:

> Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:
>
> * * * * * * *
>
> For the keeping of property attached (including boats, vessels, or other property attached or libeled) actual expenses incurred, such as storage, * * *. The marshals shall collect, in advance, a deposit to cover the initial expenses for such services and periodically thereafter such amounts as may be necessary to pay such expenses until the litigation is concluded * * *.

The Marshals Service states in its letter to us that the statute "makes no exception for the billing of Government agencies for the kind of expenses indicated by that statute." However, the legislative histories of this and related provisions clearly indicate that the statute was only intended to apply to situations in which the Marshals Service acts on behalf of private litigants. For example, when 28 U.S.C. § 1921 was most recently amended in 1962 to read as it now does (for the purpose of increasing the amount of the fees specified therein), the report of the Senate Committee on the Judiciary explained the purpose of the legislation as follows:

> Section 1921 of title 28, United States Code, specifies the fees to be charged by U.S. marshals for the service of various types of process on behalf of private litigants. Those fees have remained substantially the same since they were prescribed by the act of February 26, 1853 (10 Stat. 164), over 100 years ago.
>
> * * * * * * *

In the past, the fees charged under this system were adequate to pay for the services and travel expenses of marshals. The result was that service of process on behalf of private litigants cost the Government little or nothing.

In 1896, this system for the payment of marshals was changed. All fees were to be paid into the Treasury. Marshals and gradually all deputy marshals were put on a salary basis and were paid for their expenses in accordance with general regulations.

Since 1886 both salaries and expense allowances have increased substantially. However, the fees charged by the Government for the services of marshals have, with the exception of mileage, remained the same as they were in the middle of the 19th century.

Recently the Department of Justice and the General Accounting Office conducted a joint survey of the cost of serving process. The survey disclosed that the annual cost of serving process on behalf of *private litigants* exceeded the fees charged by approximately $411,000.

The committee believes that the bill which would make modest increases in fees charged to *private litigants* for the services of U.S. marshals is meritorious and recommends it favorably. [Italic supplied.] See S. Rep. No. 1785, 87th Cong. 2d Sess. (1962).

Also, see *Hill* v. *Whitlock Oil Services, Inc.*, *supra*.

The 1896 legislation referred to in the Senate Report that converted the system by which the marshals were paid from a fee to a salary basis also contained the following provision concerning marshals' fees:

That * * * all fees and emoluments authorized by law to be paid to United States district attorneys and United States marshals shall be charged as heretofore and shall be collected, as far as possible, and paid to the clerk of the court having jurisdiction, and by him covered into the Treasury of the United States; and said officers shall be paid for their official services * * *:

Provided, That this section shall not be construed to require or authorize fees to be charged against or collected from the United States * * *. [Italic supplied.] See Act of May 28, 1896, ch 252, 886, 295 Stat. 179.

The purpose of this provision was clear—to insure that fees collected by United States marshals were to be used to reimburse the Government for the services provided by the marshals to *private litigants*. The provision expressly provided that collection of marshals' fees from the United States was neither required nor authorized. Subsequently, this provision, with some modifications, was set forth in title 28 of the United States Code as follows:

* * * all fees and emoluments authorized by law to be paid to United States marshals shall be charged and collected, as far as possible, and deposited by said marshals in accordance with the provisions of section 495 of Title 31, *Provided*, That this section shall not be construed to require or authorize fees to be charged against or collected from the United States . * * *. See 28 U.S.C. § 578a (1940).

In 1948, when title 28, was recodified, the foregoing provision was revised and incorporated into 28 U.S.C. § 551 (1952) in the following form:

Each United States Marshal shall collect, as far as possible, his lawful fees and account for the same as public monies.

The identical provision is currently set forth at 28 U.S.C. § 572(a). When the current language was adopted in 1948 as part of the recodification of title 28, the revision was explained in the following manner:

Section 578a of title 28, U.S.C. 1940 ed., is rewritten in simplified terms *without change of substance*. The proviso of such section 578a, prohibiting the collection of

fees from the United States, was omitted as covered by section 2412 of this title, providing that the United States should be liable only for fees when such liability is expressly provided by Congress.

The provision of section 578a of title 28 U.S.C. 1940 ed., requiring that fees and emoluments collected by the marshals shall be deposited by him in accordance with the provisions of section 495 of title 31, U.S.C. 1940 ed, * * * was omitted as said section 495 governs such deposits without implementation in this section. [Italic supplied.] *See* 28 U.S.C. § 572 note (1976).

Thus, the clear intent of Congress in 1896 when the office of United States marshal was made a salaried position that marshals collect fees for services furnished to *private litigants* in order *to reimburse the Government* for the cost of providing such services was never changed, even though the statutory language was amended and the express statutory provision prohibiting the Marshals Service for collecting fees from other Federal agencies was deleted from the section. Although 28 U.S.C. § 2412 was amended in 1966 to allow judgments against the United States to award costs to the prevailing party, that should have no impact on the interpretation of 28 U.S.C. § 1921 which does not concern costs awarded to a prevailing party. Accordingly, we do not believe that 28 U.S.C. § 1921 in any way authorizes either the Marshals Service to charge or another Federal agency to pay such storage charges.

As stated above, numerous decisions of the Comptroller of the Treasury including 4 Comp. Dec. 637 (1898), 5 *id.* 871 (1899), 22 *id.* 280 (1915), 26 *id.* 702 (1920), and 26 *id.* 938 (1920), as well as several decisions of the Comptroller General support our position here. For example, in 14 Comp. Gen. 880 (1935), our Office held as follows:

* * * Under the circumstance stated, the expense of guarding the vessel from the date of its seizure until the present time, the vessel being under the jurisdiction of the court and in custody of the United States marshal, is authorized under the appropriation "Salaries, fees, and expenses of marshals, United States courts" as a proper expense of guarding seized property held by the marshal under order of the court.

Also, see 27 Comp. Gen. 111 (1947) and B-62620, April 16, 1947.

The Marshals Service contends that these three Comptroller General decisions are not applicable to the issue raised in this case because those decisions merely held that expenses incurred after the execution of an *in rem* warrant can be paid out of the appropriation for the Marshals Service but did not address the impact of 28 U.S.C. § 1921 or the right of the Marshals Service to be reimbursed for its expenditures by the other agencies involved. We disagree with their assessment of the meaning and applicability of those decisions.

In each of the Comptroller General decisions, and in several of the cited decisions of the Comptroller of the Treasury as well, the basic issue involved was the same one involved here—whether the expenses incurred in connection with the seizure and storage of property seized and held by a United States marshal should be paid out of the Marshals Service appropriation or the appropriation of the other agency involved. In each of those decisions, it

was determined that once the marshals executed the *in rem* warrant and seized the property, any related expenses should be paid out of the marshal's appropriation. Those decisions would not be consistent with the position now being urged by the Marshals Service of allowing the appropriated funds of the other agency involved to be used to reimburse the appropriation of the Marshals Service. While it is true that those decisions did not expressly consider 28 U.S.C. § 1921, it is our view, as explained above, that nothing contained in that provision authorizes such reimbursement or would otherwise have any effect on the result reached in those decisions.

Accordingly, it is our conclusion that it is the responsibility of the Marshals Service rather than the other agency involved to pay the costs incurred in connection with court-ordered seizures of goods by the Marshals Service.

The final issue that must be resolved is whether the permanent judgment appropriation, 31 U.S.C. § 1304, may ever be used to pay court costs including storage charges, assessed against the United States in a case of this type. We do not believe the judgment appropriation is available to pay such storage charges for several reasons.

First, under 28 U.S.C. § 2412 costs can only be assessed against the United States for the purpose of "reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation." Ordinarily, however, payment of storage charges after property is seized and held by the Marshals Service is the responsibility of the Marshals Service, at least until the case is adjudicated and resolved. Thus, there would normally be no occasion for a court to award these charges against the United States.

In this respect, we note that what happened in the case of the *United States of America* v. *2,116 Boxes of Boned Beef, supra,* appears to be somewhat atypical. In that case, after the beef was seized by the Marshals Service and held in its custody at the United Refrigerator Services cold storage warehouse, the owner of the beef continued to pay the storage charges until the trial court dismissed the complaint and assessed costs against the United States. Nevertheless, even in this case we do not believe the judgment appropriation is available to pay the storage costs.

The judgment appropriation is only available to pay judgments and costs when "payment is not otherwise provided for * * *." However, as explained at length above, payment of these storage charges is otherwise provided for. It is the legal responsibility of the Marshals Service to use its appropriations to pay storage charges after it seizes and holds property unless costs are assessed against the owner under 21 U.S.C. § 673 or a similar statute. We do not believe the Marshals Service may refuse to pay the charges and thereby shift the burden of payment either to the owner of the property or to the judgment appropriation. Accordingly, it is our conclusion that the judgment appropriation is not available to pay

storage costs either in this particular case or in any other case of this type.

[B-208203]

Compensation—Overtime—Fair Labor Standards Act—Recordkeeping Requirement—Noncompliance Effect—Employee's Evidence

Where agency has failed to record overtime hours as required by Fair Labor Standards Act (FLSA), and where supervisor acknowledges overtime work was performed, employee may prevail in claim for overtime compensation for hours in excess of 40-hour workweek on the basis of evidence other than official agency records. In the absence of official records, employee must show amount and extent of work by reasonable inference. List of hours worked submitted by employee, based on employee's personal records, may be sufficient to establish the amount of hours worked in absence of contradictory evidence presented by agency to rebut employee's evidence.

Compensation—Overtime—Fair Labor Standards Act—"Suffered or Permitted" Overtime—Agency Directive Against Overtime—Enforcement Requirement

Where employee has presented evidence demonstrating that she performed work outside her regular tour of duty with the knowledge of her supervisor, the fact that agency sent her a letter directing that she not perform overtime work does not preclude her from receiving compensation under the FLSA for such work actually performed. Despite its admonishment, agency must be said to have "suffered or permitted" employee's overtime work since supervisor allowed employee to continue working additional hours after employee had received, but had failed to comply with, agency's directive.

Compensation—Overtime—Fair Labor Standards Act—Hours of Work Requirement—Paid Absences—Not Hours of Work

Under FLSA, overtime is computed on basis of hours in excess of 40-hour workweek, as opposed to 8-hour workday. Additionally, paid absences are not considered "hours worked" in determining whether employee has worked more than 40 hours in a workweek.

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

Employee who was previously awarded backpay for overtime work performed from June 23, 1974, through Jan. 4, 1976, seeks additional compensation for overtime work from Jan. 4, 1976, through June 17, 1978. Since prior claim was filed in General Accounting Office (GAO) on July 15, 1980, portion of claim arising before July 15, 1974, should not have been considered by agency since Act of Oct. 9, 1940, as amended, 31 U.S.C. 3702(b)(1), bars claim presented to GAO more than 6 years after date claim accrued. Therefore, agency should offset amount of prior erroneous payment against amount now due to employee.

Matter of: Frances W. Arnold—Overtime Claim Under the Fair Labor Standards Act, February 3, 1983:

This decision is in response to a request from Ms. Anita R. Smith, an authorized certifying officer with the Department of Agriculture (USDA) in New Orleans, Louisiana, concerning the claim of Ms. Frances W. Arnold for overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (1976). For the rea-

sons stated below, we hold that payment of Ms. Arnold's claim for overtime compensation may be authorized.

At the time of her retirement in March 1980, after 42 years of Federal service, Ms. Arnold was employed by the Farmers Home Administration (FmHA), USDA, in Marysville, Kansas, as a GS-5 County Office Assistant, a nonexempt position under the FLSA. In May 1980, shortly after her retirement, Ms. Arnold filed a claim with the FmHA for $12,445.48 in overtime compensation for hours she claims to have worked between January 1976 and November 1978.

The hours for which Ms. Arnold requests compensation cannot be verified by the agency now because the daily work measurement cards have been destroyed in the intervening years. Yet, Ms. Arnold's supervisor does recall seeing her work hours in excess of her normal tour of duty and has stated in a letter to FmHA's State Director, dated May 28, 1980: "I can verify [that] overtime was worked." He states, however, that he cannot verify the exact number of hours worked by the claimant. In support of her entitlement to overtime pay, Ms. Arnold submitted to the agency both a handwritten report and a typed report listing all overtime hours she claims to have worked. The agency then apparently used the reports submitted by Ms. Arnold to prepare its own reconstructed Time and Attendance reports covering the dates in question. The employee evidently reconstructed her claim from personal records that she kept from 1976 to 1978.

The certifying officer has questioned Ms. Arnold's entitlement to overtime pay in light of the information contained in two internal agency memoranda advising Ms. Arnold and her supervisor that she was not to be permitted to work hours outside of her regular tour of duty. The first of these memoranda, dated March 5, 1975, was from the FmHA District Director to Ms. Arnold. He stated as follows:

> It has come to my attention that you may be working hours beyond the regular duty hours of 8:00 a.m. to 5:00 p.m.
>
> Under the Fair Labor Standards Act of 1974 we cannot permit you to work any overtime that is not authorized and FmHA cannot authorize employees in the nonexempt status to work any hours except from 8:00 a.m. to 5:00 p.m. You must schedule, organize and give priority to work most essential. It is realized [that] some work cannot always be accomplished in the hours of 8:00 a.m. to 5:00 p.m. so it must be delayed until another time.
>
> This is to confirm the previous discussions we have had on working overtime. Please refer to Kansas Bulletin 1722(200) dated June 13, 1974 and if you have any questions, please contact me.

Despite this admonishment, the employee continued to work hours in excess of her regular tour of duty. Although Ms. Arnold's supervisor (who was the only other person working in the Marysville office) knew that she was continuing to work overtime, he apparently took no action to prevent her from doing so. Furthermore, the agency itself has submitted no evidence to show that anyone

else intervened to ensure Ms. Arnold's compliance with the March 5 directive.

Some time later, the FmHA State Director was informed that Ms. Arnold was not complying with the terms of the memorandum and was contining to work overtime. In an effort to remedy the situation, he sent her a second letter on June 8, 1978, over 3 years after the initial memorandum had been sent. In that letter, the Director stated:

> Reports indicate that * * * you are working more than eight hours per day in order to perform your job. * * *
> *This letter is notifying you that you cannot continue working more than eight hours per day for the FmHA.* This eight hours must be performed between 8:00 a.m. and 5:00 p.m. [Italic in original.]

A copy of this letter also was sent to Ms. Arnold's supervisor in Marysville, since a footnote at the bottom of the letter was specifically addressed to him. That footnote stated: "CS, Marysville—Note: If employee continues to come to work before 8:00 a.m. and leaves after 5:00 p.m., you are to pick up her office keys."

Shortly after she received the State Director's letter, Ms. Arnold went on extended sick leave pending her retirement. Her retirement became effective on March 22, 1980, and she submitted her claim for overtime compensation to the agency 2 months later.

The certifying officer's submission notes that Ms. Arnold has previously submitted a claim to the agency for overtime compensation for excess hours worked during 1974 and 1975. Although that claim was processed and paid in December 1981, the certifying officer further states, "[w]e now question the validity of [the prior] claim in view of the District Director's memorandum of March 5, 1975."

The certifying officer also has asked us whether the holding in our recent decision *Christine D. Taliaferro,* B-199783, March 9, 1981, is relevant to the pending claim. In that decision, we ruled that the FLSA requires employers to "make, keep and preserve all records of the wages, hours and other conditions and practices of employment." The certifying officer has raised the issue of the FLSA's recordkeeping obligation in this case because the FmHA did not maintain all of the records pertinent to Ms. Arnold's claim. Specifically, the certifying officer asks the following questions:

> 1. Would the fact that Ms. Arnold was formally advised in March 1975 that she could not work any overtime, unless it was authorized, nullify her claim since the time worked was in contravention of a direct order?
> 2. If the claim is allowed, would the documentation submitted by the employee be adequate to process the claim?
> 3. If the claim is disallowed, should we try to recover the amounts already paid subsequent to [the District Director's] memorandum to Ms. Arnold?

The FLSA provides that a nonexempt employee shall not be employed for a workweek in excess of 40 hours unless the employee receives compensation for the excess hours at a rate not less then 1½ times the regular rate. 29 U.S.C. § 207(a)(1). The Act defines "hours worked" as all hours which the employer "suffers or permits" the employee to work. 29 U.S.C. § 203(g). Work is "suffered or

permitted" if it is performed for the benefit of an agency, whether requested or not, provided that the employee's supervisor knows or has reason to believe that the work is being performed. Under FLSA, employers have a continuing responsibility to ensure that work is not performed when they do not want it to be performed. Furthermore, "[m]anagement *must assure* that supervisors *enforce that rule.*" Federal Personnel Manual (FPM) Letter 551-1, May 15, 1974. (Italic in original.) In addition, the courts have cited approvingly the Department of Labor's regulation on this matter which states as follows:

> * * * it is the duty of the management to exercise its control and see that [overtime] work is not performed if it does not want it to be performed. * * * The mere promulgation of the rule against such work is not enough. *Management has the power to enforce the rule and must make every effort to do so.* [Italic supplied.] 29 C.F.R. § 785.13. See *Mumbower v. Callicott,* 526 F. 2d 1183, 1188 (8th Cir. 1975).

As noted above, Ms. Arnold's supervisor was aware that she was working hours in excess of her normal tour of duty. Yet, neither he nor anyone else from the agency took the action necessary to terminate this activity. Since Ms. Arnold was performing actual overtime work both with the knowledge of her supervisor and for the benefit of the agency, and this work was accepted by the agency, we believe that the agency must be said to have "suffered or permitted" her to work overtime. The fact that the District Director sent a memorandum to Ms. Arnold directing her not to work overtime hours is in itself not sufficient to show that the agency did not "suffer or permit" the overtime work. While the proscriptive language in that memorandum would have been sufficient to prevent the claimant from collecting overtime pay under the "officially ordered or approved" language of 5 U.S.C. § 5542, it is not sufficient under the "suffered or permitted" language of the FLSA. In the absence of evidence showing that the agency or the employee's supervisor took further action and was successful in preventing her from working overtime, we conclude that the overtime work performed by Ms. Arnold was "suffered and permitted" by the agency and is therefore compensable under the FLSA. The certifying officer's first question is answered accordingly.

With regard to the standard of proof necessary to substantiate a claim under the FLSA, our decisions impose a special burden on the agencies. Initially, the employee must prove that she has in fact performed overtime work for which she was not compensated. She must then produce sufficient evidence to show the amount and extent of the that work as a matter of just and reasonable inference. *Christine D. Taliaferro,* B-199783, March 9, 1981. At that point, the burder of proof shifts to the employing agency either to show the precise amount of work performed or to rebut the employee's evidence. *Jon Clifford, et al.,* B-208268, November 16, 1982.

An agency cannot deny an employee's overtime claim on the basis of incomplete or unavailable records. The FLSA requires em-

ployers to "make, keep and preserve all records of the wages, hours and other conditions and practices of employment." 29 U.S.C. § 211(c) (1976). Where the agency has failed to keep adequate records, it must either rebut the employee's evidence by other means or pay the claim.

In *Christine D. Taliafereo,* above, the agency failed to record the employee's overtime hours as required by the FLSA. The claimant, however, was able to provide the agency with a list of overtime hours worked, which was compiled from her personal calendar. Additionally, the employee's supervisor stated that he had observed the claimant working overtime and had no reason to doubt the veracity of her records; furthermore, he actually recommended that the claim be paid. In light of the above, we held that the claimant both "prove that she in fact performed overtime work" and "produce sufficient evidence to show the amount and extent of her work as a matter of just and reasonable inference." This shifted the burden of proof to the agency, either to show "the precise amount of overtime work performed" or "to negate the reasonableness of the inference to be drawn from the employee's evidence." Since the agency could not produce any evidence on the matter, we held that it was required to pay Ms. Taliaferro's overtime claim.

The record in this case supports Ms. Arnold's claim that she performed work for which she was not properly compensated under the FLSA. Ms. Arnold's supervisor verifies that she worked overtime. Furthermore, like Ms. Taliaferro, Ms. Arnold has submitted a list, which she transcribed from her own personal records, of the dates, times and amounts of overtime hours she claims to have worked. We believe that Ms. Arnold's list, like Ms. Taliaferro's list, constitutes sufficient evidence to show the amount and extent of her work as a matter of just and reasonable inference. Since FmHA has not come forward with evidence of the precise amount of overtime work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence, Ms. Arnold is entitled to overtime pay under the FLSA.

Under the FLSA, only those hours in excess of a 40-hour workweek, as opposed to an 8-hour workday, are compensable as overtime. 5 C.F.R. § 551.501(a). In addition, "[p]aid periods of nonwork (e.g., leave, holidays, or excused absences) are not hours of work" for purposes of computing overtime under the FLSA. 5 C.F.R. § 551.401(b). In examining the reconstructed Time and Attendance reports submitted by the agency in this case, we found a number of instances in which the agency had improperly characterized the employee's annual, holiday and sick leave as "hours of work" in determining her entitlement to overtime pay. Therefore, before FmHA pays Ms. Arnold's claim, it should conduct a thorough review of its Time and Attendance reports to assure that the employee does not receive overtime pay for hours which are not in fact "hours of work" under the FLSA.

In light of the agency's apparent recent error in characterizing Ms. Arnold's annual, holiday and sick leave as "hours of work" under the FLSA, we now question the correctness of the amount paid to Ms. Arnold in 1981, in satisfaction of her prior overtime claim. Therefore, before FmHA pays the current claim, it should also review any available information concerning Ms. Arnold's prior claim, including its reconstructed Time and Attendance reports and Ms. Arnold's own notes detailing her work from 1974 to 1975. If FmHA determines that it overpaid Ms. Arnold in 1981 because it improperly classified her annual, holiday and sick leave as "hours of work" for purposes of computing FLSA overtime, the agency should offset the amount previously overpaid against the sum now due to Ms. Arnold for overtime work performed from 1976 to 1978.

Finally, the Act of October 9, 1940, as amended, 31 U.S.C. § 3702 (b)(1), provides that every claim or demand against the United States cognizable by the General Accounting Office must be received in this Office within 6 years of the date it first accrued or be forever barred. Filing a claim with any other Government agency does not satisfy the requirements of the Act. *Frederick C. Welch,* 62 Comp. Gen. 80 (1982); *Nancy E. Howell,* B-203344, August 3, 1981. Nor does this Office have any authority to waive any of the provisions of the Act or make any exceptions to the time limitations it imposes. *Frederick C. Welch* and *Nancy E. Howell,* above. We have previously held that the 6-year statute of limitations is applicable to claims for overtime pay under the FLSA. *Transportation System Center,* 57 Comp. Gen. 441 (1978). In such cases, the claim is said to accrue when the overtime work is actually performed. *Paul Spurr,* 60 Comp. Gen. 354 (1981).

Ms. Arnold's current claim for overtime pay from January 4, 1976, through June 17, 1978, is not barred by 31 U.S.C. § 3702(b)(1), since it was filed with GAO on September 5, 1980, and was thus well within the applicable 6-year limitation period. However, a portion of Ms. Arnold's prior claim should not have been paid by the agency. Since the earlier claim was initially filed in GAO on July 15, 1980, the agency should not have considered any portion of that claim arising before July 15, 1974. Therefore, the agency should now offset the amount erroneously paid to Ms. Arnold in 1981 for overtime work from June 23, 1974, through July 14, 1974, against the amount to be paid in satisfaction of the current claim.

Accordingly, with the qualifications stated above, FmHA may pay the claim.

[B-207764]

Pay—Retired—Survivor Benefit Plan—Children—Physically Handicapped Adults—Dependency Status During Employment

The adult daughter of a deceased Navy officer received a Survivor Benefit Plan annuity under 10 U.S.C. 1447(5)(B)(iii) based on a determination that she was incapable of self-support because of physical incapacity. She was quadraplegic as the result of childhood polio. Despite this disability, she later secured full-time Government employment in a grade GS-5 position. This does not warrant suspension of the annuity on the basis that she is no longer incapable of self-support, even though a grade GS-5 salary would normally be sufficient to cover the living expenses of a physically fit person, since that salary is not sufficient for her own personal needs.

Pay—Retired—Survivor Benefit Plan—Beneficiary Payments—Handicapped Beneficiaries—Implementing National Employment Policy

In view of the current national policy concerning employment of the handicapped, as reflected in law and executive proclamation, military survivor annuity plans should not be applied in a manner that would discourage handicapped beneficiaries from seeking employment, or would result in the permanent termination without notice of the annuity of one who is attempting to become self-sufficient through gainful employment. Procedures should be established to implement that policy. Further, if an annuity is suspended because the beneficiary is determined to be capable of self-support, but the original disabling condition causes a reoccurring loss of self-sufficiency, we will consider whether the annuity may be reinstated in an appropriate case.

Matter of: Sydna Jean Elrod, February 8, 1983:

This action is in response to a request for a decision from the Disbursing Officer, Navy Finance Center, on the question of whether the Survivor Benefit Plan annuity that Sydna Jean Elrod has been receiving as the result of her physical disability should be suspended because she has secured full-time gainful employment. The request was approved by the Department of Defense Military Pay and Allowance Committee and was assigned submission number DO-N-1399.

We conclude that Ms. Elrod's Survivor Benefit Plan annuity may not be suspended in the circumstances presented.

Ms. Elrod was born in 1946. When she was 4 years old she contracted polio and was permanently disabled. Although she has partial use of her right hand, she cannot stand or walk, nor can she operate hand rims on a wheelchair. Hence, military physicians have diagnosed her as quadraplegic. Despite this handicap, she was able to attend college when she was a young adult. Later, in December 1980 when she was 34 years old, she successfully completed a 10-month course in computer programming sponsored for the severely disabled by an agency of the State of Maryland. Then in May 1981 she secured full-time employment on a probationary basis with the Social Security Administration in Baltimore as a computer programmer, grade GS-5.

Ms. Elrod's father was an officer of the United States Navy. When he retired from active service in 1973, he elected to partici-

pate in the Survivor Benefit Plan, thus chosing to receive retired pay at a reduced rate in order to provide an annuity for his dependent daughter if she survived him. The Navy commenced payment of an annuity to her following his death in October 1979. The annuity was suspended on December 30, 1981, after she advised Navy officials of her full-time employment with the Social Security Administration, and it then no longer appeared to those officials that she was incapable of self-support.

Ms. Elrod subsequently questioned the propriety of the Navy's suspension of her annuity. Essentially, she acknowledged that most persons holding full-time grade GS-5 positions with the Government can be regarded as capable of self-support, since the gross yearly salary of more than $13,000 that is attached to a grade GS-5 position would be sufficient to cover ordinary and necessary living expenses. However, she pointed out that her own ordinary living expenses, because of her physical disability, included additional necessary expenditures for the purchase and maintenance of motorized wheelchairs and other essential equipment, for extra medical care and part-time medical attendants, for suitable living quarters exceeding the minimum standard requirements of physically fit persons, for transportation by taxicab or customized van, etc. She suggested that the net pay of a grade GS-5 Government employee was insufficient to cover her own ordinary living expenses, if these additional costs of living were taken into account, and she provided some cost figures to demonstrate this. She suggested that in the circumstances she was not actually capable of self-support, and that her Survivor Benefit Plan annuity therefore should not have been suspended. She also asked why the first notice she received of the suspension had been in the form of a letter from her bank advising her that her account was overdrawn.

In requesting a decision in the matter, the Disbursing Officer indicates that Ms. Elrod's continued eligibility for the annuity under 10 U.S.C. 1447(5)(B)(iii) appears doubtful, notwithstanding the facts she presents, because of the principles set forth in our decisions 44 Comp. Gen. 551 (1965), and 53 *id.* 918 (1974).

The Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, is an income maintenance program for the dependents of deceased service members. Eligible dependents include a member's child who is more than eighteen years old but "incapable of supporting himself because of a mental or physical incapacity existing before his eighteenth birthday * * *." See 10 U.S.C. 1447(5)(B)(iii).

Congress established the Survivor Benefit Plan in 1972, through enactment of Public Law 92-425, to provide a new and more comprehensive system of survivor protection for the dependents of service members and to eventually replace the then current survivor annuity program contained in the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431 *et seq.* See, generally, 53 Comp. Gen. 847, 852 (1974). That annuity program contains a similar pro-

vision extending beneficiary eligibility to dependent children over eighteen years of age who are "incapable of supporting themselves because of a mental defect or physical incapacity existing before their eighteenth birthday * * *." See 10 U.S.C. 1435(2)(B).

The decisions referred to by the Disbursing Officer, 44 Comp. Gen. 551 (1965) and 53 *id.* 918 (1974), concerned the application of 10 U.S.C. 1435(2)(B) under the Retired Serviceman's Family Protection Plan. In 44 Comp. Gen. 551, at page 558, we held, "Once it has been determined that a child over 18 years of age is incapable of self-support, evidence warranting a conclusion that the child actually is capable of sustaining an earning capacity for his own personal needs would be sufficient to remove the child from the category of one incapable of self-support." We also stated that once the annuity was terminated it could not later be reinstated because we were able to find "no provision in the Retired Serviceman's Family Protection Plan for reinstatement as an eligible beneficiary." In 53 Comp. Gen. 918, at pages 920 and 921, we observed further that whether a person was capable of self-support depended upon the individual facts of the particular case and that we were therefore unable to issue guidelines on how determinations should be made for any class or type of disability.

We find that the rationale of certain of the principles expressed in those two decisions may properly be applied to the Survivor Benefit Plan. Specifically, we conclude that an annuity payable on the basis of 10 U.S.C. 1447(5)(B)(iii) 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. Also, the determination in any given case of whether a handicapped beneficiary has become capable of self-support depends upon the individual facts of that particular case.

In the case of Sydna Jean Elrod we find no basis for the suspension of her Survivor Benefit Plan annuity in December 1981 or at the present time, since the evidence of record does not demonstrate that the salary of her grade GS–5 Government position is sufficient for her own particular personal needs. If she is able to maintain her employment and establish a career in her chosen field at a significantly higher rate of pay, then the matter of her continued eligibility for the annuity may be reconsidered.

Ms. Elrod's Survivor Benefit Plan annuity should be reinstated effective December 30, 1981, and payment issued accordingly.

More generally we recognize the established national policy that handicapped persons are to be encouraged to seek gainful employment, and that administrative obstacles hindering their employment are to be eliminated. See 36 U.S.C. 155, and Presidential Proclamation 4965, September 13, 1982. See also 5 CFR 203.1301(d)(4) (1982). Under that policy military survivor annuity plans should not be administered in a manner that would discour-

age a handicapped beneficiary from seeking employment, or would result in the permanent termination without notice of the annuity of a handicapped beneficiary who is attempting to become self-sufficient through gainful employment.

Accordingly, we find that procedures should be implemented to insure full consideration of the facts involved in case it becomes necessary to determine whether a beneficiary under the Survivor Benefit Plan or the Retired Servicemen's Family Protection Plan should be removed from the category of being incapable of self-support because of mental or physical incapacity. At a minimum the beneficiary should be advised of information the Service has indicating that he is no longer incapable of self-support, and be given a reasonable opportunity to submit rebutting evidence. Also, if it is determined that the beneficiary is, in fact, capable of self-support, advance written notice should be given prior to the suspension of the annuity, unless there is clear evidence of fraud or misrepresentation by the beneficiary.

In addition, we have reviewed the Survivor Benefit Plan and the Retired Serviceman's Family Protection Plan, and while we have found no provision in those plans specifically authorizing the reinstatement of a suspended annuity, neither have we found any provision which expressly precludes a disabled beneficiary from seeking reinstatement of his annuity following a period of suspension. In light of the beneficial purposes for which the plans were established and the current national policy concerning the employment of the handicapped, it may be that reinstatement should be allowed in an appropriate case. If eligibility for an annuity is suspended under 10 U.S.C. 1435(2)(B) or 10 U.S.C. 1447(5)(B)(iii) because the beneficiary is determined to be capable of self-support, but it later appears that the beneficiary is no longer self-sufficient because of the original disabling condition, and it appears that reinstatement is warranted, we would consider the circumstances and determine whether the rule in 44 Comp. Gen. 551 should be modified.

[B-209271]

Bids—Timely Receipt—Return to Bidder—Agency Error—Resubmission After Bid Opening Time—Hand-Carried Bid

Bid that was timely submitted at the place designated for receipt of bids, but was improperly returned to the bidder's possession where it remained until several minutes after the time set for opening of bids, may be considered for award where the bid was in a sealed envelope, the bidder possessed the bid for only 10 minutes, there was no suggestion that the bid was altered, and the bid was returned to the Government's possession prior to the opening of any bid; consideration of the bid would not compromise the integrity of the competitive bidding system.

Bids—Responsiveness—"Estimated Quantities" Provision—Interpretation

The contracting officer reasonably interpreted a clause, which provided that bids offering less than 75 percent of the estimated requirements would not be considered,

as referring to the estimated number of hours listed for each item and not to the number of items listed on the invitation for bids.

Matter of: Veterans Administration—Request for Advance Decision, February 8, 1983:

The Center Director of the Veterans Administration Medical Center, Northport, New York, requests an advance decision on a protest filed with the Center by Alert Coach Lines, Inc. regarding a bid submitted by Bimco Industries, Inc. in response to invitation for bids (IFB) No. 632-45-82. Alert contends that Bimco's bid should not be considered for award because it was submitted late. In its comments to this Office, Alert contends also that Bimco's bid was nonresponsive. We believe that the bid was not late and that the contracting officer reasonably determined that the bid was responsive. Accordingly, Bimco's bid may be considered for award.

The IFB was issued to obtain charter bus service for the Medical Center. The solicitation stated that hand-carried bids must be received in the depository located in Supply Service Building No. 10, room 201, by 2 p.m. on August 27, 1982. We are informed that the normal procedure at the Medical Center regarding a hand-carried bid is that a bidder who comes to room 201, the Purchase and Contracts Office, is instructed to take his bid to room 218, two doors down the hall. There, a secretary receives and time-stamps the bid. The bid is then taken by the secretary into the Chief of the Purchase and Contracts Section's office where the Chief or his Assistant deposits it in the safe, where it remains until the time set for bid opening. A bidder who wishes to attend the bid opening is informed where the bid opening will occur and requested to wait down in the lobby where the conference rooms are located.

Normal procedures were not followed in this case. The person who received and stamped both of the bids submitted in response to the IFB was a clerk-typist who had been temporarily assigned to act as secretary for the Chief of Supply; she had not been advised of the normal procedures for handling bids. Sometime prior to 2 p.m. on August 27, a representative of Alert submitted a hand-carried bid to the secretary in room 218. After time-stamping the bid, the secretary handed it back to Alert's representative and instructed him to go downstairs to room 114 to await the opening of bids. As the representative was leaving room 218, the bid opening officer walked past. Alert's representative, who had submitted bids on previous solicitations at the Medical Center, and who was familiar both with normal procedures and with the bid opening officer, handed the bid to her. She deposited it in the safe.

At approximately 1:52 p.m., a representative of Bimco submitted a bid to the secretary in room 218. The bid envelope was time-stamped and handed back to the representative who was told to go downstairs to room 114 to await bid opening. The Bimco representative was reportedly unaware of the normal procedure for han-

dling bids, having submitted no other bids at the Medical Center in recent years.

At 2 p.m., the bid opening officer left her office with the bid submitted by Alert. As she entered room 114, accompanied by the recorder of bids, she noticed that there were two men present. Knowing that she had but one bid envelope in her possession, the bid opening officer asked if the two men were together. She was advised that they were not. She asked the man who she did not know if he had tendered a bid. He replied, "Yes, to the girl upstairs." The bid opening officer immediately turned and left the room. She ran upstairs and asked the secretary whether she had received another bid. She was told that another bid had been received, time-stamped and returned to the bidder, who was told to wait downstairs. The bid opening officer then ran back downstairs and asked the representative from Bimco if he had his bid. He said that he did, and handed the sealed bid envelope to the bid opening officer. By this time it was several minutes after 2 p.m. The bid opening officer looked at the bid envelope and noted that it was time-stamped 1:52 p.m. Both bids were opened and the results announced. The recorder of bids, who had remained in room 114, reports that the bid opening officer was gone for approximately 1 to 3 minutes. During this time, there was no conversation and no one left the room.

The regulations provide that bids received at the office designated in the invitation for bids after the exact time set for the opening of bids are late bids, Federal Procurement Regulations (FPR) § 1-2.303-1 and that a late hand-carried bid may not be considered for award. FPR § 1-2.303-5. In this case, it is clear that Bimco's bid was received at the designated office prior to the exact time set for the opening of bids. The Bimco bid does not, therefore, come within the regulatory definition of a late bid. In this instance, however, the bid was returned to the bidder and remained in the bidder's possession until shortly after the time set for bid opening.

We are aware of no case that has considered the exact factual situation presented here. A number of our prior decisions, however, address the question of whether a bid that was timely submitted, but improperly returned to the bidder by the Government, may be considered for award when it has been resubmitted after bid opening time. *See, e.g.,* 50 Comp. Gen. 325 (1970); *Delbert Bullock,* B-208496, September 7, 1982, 82-2 CPD 201. In these cases, our primary concern always has been with preserving the integrity of the competitive bidding system. Although generally a bid that has been returned to the bidder after the opening of bids may not be considered for award, *Dima Contracting Corp.,* B-186487, August 31, 1976, 76-2 CPD 208, there have been instances where we have held that a bid resubmitted after bid opening may be considered for award where it is clear that the integrity of the competitive bidding

system would not be compromised. *E.g.,* 50 Comp. Gen. 325, *supra;* 41 *id.* 807 (1962).

In this case, Bimco's bid was timely submitted, as evidenced by the time-stamp on the bid envelope. This sealed bid envelope was then returned to Bimco's representative by the Government official authorized to receive bids with instructions to go downstairs to await the bid opening. There is no evidence that the Bimco representative was aware that this was not normal Medical Center procedure. The time that elapsed from when the bid was time-stamped to when the bid was finally surrendered to the bid opening officer was just over 10 minutes. During most of this time, Bimco's representative was in the company of the recorder of bids, the bid opening officer, or the representative from Alert. At no time during this period was the Bimco representative aware of the contents of Alert's bid. There is not the slightest suggestion by any one that Bimco's bid was altered in any way. Also, there is no indication that the Bimco representative intentionally delayed surrendering the bid to the bid opening officer. By her own admission, the bid opening officer left room 114 so quickly after discovering that a second bid had been tendered that the Bimco representative had little opportunity to disclose the whereabouts of his bid.

Given the totality of the rather unique circumstances presented by this case, we believe that the integrity of the competitive bidding system would not be compromised were the Bimco bid considered for award. Failure to consider Bimco's bid would penalize it unfairly for a situation that was created almost exclusively by Government personnel. *See* 41 Comp. Gen. 807, *supra.*

The second issue raised by Alert involves the responsiveness of Bimco's bid. The IFB consists of seven items, each requiring a different type of charter bus service and each listing the estimated number of hours of that type of service that will be required. Paragraph 8 of the Special Conditions included in the IFB, entitled "Estimated Quantities," advises bidders that while it is impossible to determine the exact quantities that will be required during the contract term, each successful bidder will be required to provide all of the services that may be ordered during the contract term, except as otherwise limited in its bid. Bidders are further advised that bids stating that the total quantities delivered shall not exceed a certain specified quantity will be considered, but that bids offering less than 75 percent of the estimated requirements will not. Alert contends that because Bimco bid on only three of the seven items of the IFB, its bid fails to comply with the 75 percent requirement and should therefore be considered nonresponsive. Alert apparently interprets the "Estimated Quantities" provision as requiring each bidder to bid on at least 75 percent of the total number of items listed in the IFB.

The contracting officer determined that Bimco submitted a responsive bid. The contracting officer reports that the 75 percent

figure used in the "Estimated Quantities" clause refers only to the estimated number of hours listed for each item and not to the total number of items listed on the IFB. Since there is no indication on the Bimco bid that it is limiting its bid to a number of hours less than 75 percent of the estimated requirements bid on, the contracting officer determined that the bid complies with the solicitation.

We believe the contracting officer's interpretation of Special Condition 8 to be reasonable. The solicitation schedule is set up substantially as follows:

Item	Supplies services	Quantity Estimated	Unit	Amount
	Bus service charter: Medical administration School bus: Not less than 40 passenger. Two (2) each day, Monday thru Friday, except Saturday, & holidays, as follows:.			
1.	ONE: 5.26 Hrs., per schedule, Pages 6 & 7.	1,323	HR	
2.	ONE: 6.5 Hrs., per schedule, Pages 8 & 9.	1,638	HR	

It is difficult to read the "Estimated Quantities" clause as referring to anything other than the number of hours listed in the IFB in the column labeled "Quantity" and followed by the typed word "Estimated." The protester fails to suggest a single reason why or how this clause could be read otherwise. Consequently, there is no basis for us to question the contracting officer's determination that the Bimco bid was responsive.

Since paragraph 10(c) of Standard Form 33, incorporated by reference into the IFB, provides for multiple awards, and nothing in the IFB indicates that award is to be made in the aggregate, an award, if otherwise proper, may be made to Bimco for those items on which it bid.

[B-207094]

Travel Expenses—Overseas Employees—Return for Other Than Leave—Separation—Time Limitation on Travel—Private Employment at Termination Location Effect

In order for employee to be reimbursed expenses incident to return travel to former place of residence, travel must be clearly incidental to separation and should commence within reasonable time thereafter. Employee who resigned position effective Oct. 2, 1981, notified agency on Mar. 2, 1982, of intent to return to former place of

residence commencing on Sept. 23, 1983, and who accepted employment at location of resigned position does not meet requirements for reimbursement.

Matter of: Consuelo K. Wassink—Time Limitation on Return to Place of Residence, February 11, 1983:

This decision is in response to a letter from counsel of Ms. Consuelo K. Wassink, a former employee of the Bureau of Land Management (BLM), Department of the Interior. Ms. Wassink is appealing a BLM decision disallowing her request for prospective authorization for reimbursement of travel expenses and transportation of household goods for return travel to Boulder, Colorado, commencing September 23, 1983. The BLM denied her request for the reason that her return travel would not be clearly incidental to her separation as required by 28 Comp. Gen. 285 (1948).

For the reasons stated below, the disallowance by BLM is sustained.

Ms. Wassink was given an appointment by BLM effective June 21, 1975, as a Public Information Officer with the Alaska Outer Continental Shelf Office (OCS), Anchorage, Alaska. At the time of her appointment she was a resident of Boulder, Colorado. She was authorized travel and transportation expenses from Boulder, Colorado, with return rights, pursuant to 5 U.S.C. § 5722 (1976), and the implementing regulations currently contained in the Federal Travel Regulations FPMR 101-7 (September 1981) (FTR).

In her appeal, Ms. Wassink states, through counsel, that she believes that her notice of intent to exercise relocation rights, which was given on March 2, 1982, exactly 5 months after her resignation became effective, was both incident to her resignation and in accordance with 28 Comp. Gen. 285 (1948). Ms. Wassink's counsel states that "[b]ased on her understanding of regulations and information provided by Alaska OCS's Management Services Division, Petitioner properly requested a departure date well within the two-year time limit—September 23, 1983." Additionally, counsel points to several circumstances which he asserts prevented Ms. Wassink from disclosing her intention to exercise relocation rights earlier, or in fact to relocate before September 1983. First, he notes that Ms. Wassink was asserting a claim before the State Employment Security Division for unemployment compensation benefits which was not resolved until January 26, 1982. Further, counsel notes that although Ms. Wassink did successfully seek further employment in Alaska after her claim with the State Employment Security Division was resolved, this was done only after being informed by the Chief of Management Services, Alaska OCS, BLM, that interim employment was " 'nothing to worry about' and would not affect her return rights." Additionally, counsel points out that Ms. Wassink owns real property in Alaska which she needs time to market before moving, and time to act responsibly toward her lease tenants.

Ms. Wassink's return travel is governed by Chapter 2 of the FTR which states in paragraph 2-1.5a(2), that:

> All travel, including that for the immediate family, and transportation, including that for household goods allowed under these regulations, shall be accomplished as soon as possible. The maximum time for beginning allowable travel and transportation shall not exceed 2 years from the effective date of the employee's transfer or appointment * * *.

With regard to an employee's entitlement to travel and transportation benefits back to the continental United States following separation, this Office has long adhered to the position that the travel of such employee be *clearly incidental* to the termination of his assignment, and that the travel should commence within a reasonable time after the assignment has been terminated in order for return expenses to be reimbursable. 52 Comp. Gen. 407 (1973); 28 *id.* 285 (1948). Therefore, any advice Ms. Wassink may have been given at the time of her separation to the effect that she had an unqualified 2-year period in which to exercise her return rights would not have been in accord with either applicable regulations or decisions of this Office. Further, Ms. Wassink was reemployed in Alaska, and we have held that acceptance of private employment at the termination location generally requires the view that subsequent return travel is not incident to the separation. 37 Comp. Gen. 502 (1958).

On the basis of the information presented, it appears that Ms. Wassink did not intend to return to the continental United States at the time she was separated or at any time prior to September 23, 1983, a date which cannot be considered clearly incidental to her termination. Her exact intentions at the time of her resignation are not clear from the record except to the extent that she did not evidence any intent to make use of her return rights to the continental United States until 5 months after her resignation became effective, and then only to propose a return date of approximately 2 years after her resignation. We also fail to note the significance of the claim filed by Ms. Wassink with the State Employment Security Division, as referred to by counsel, since its sole purpose was to obtain additional unemployment insurance benefits. Accordingly, in the circumstances her decision to move to the continental United States commencing September 23, 1983, could not revive her rights to reimbursement of the expenses involved.

Ms. Wassink failed to comply with the requirements of law as interpreted in the decisions of this Office for travel to her home in the continental United States at Government expense upon separation. Therefore, we must affirm the decision of the Bureau of Land Management.

[B-207472]

Contracts—Contract Disputes Act of 1978—Inapplicability—Matters Covered by Other Statutes—Transportation Act—Claims' Settlement

Claims for transportation services furnished under the Transportation Act of 1940 are not subject to the disputes resolution procedure of the Contract Disputes Act of 1978 (CDA) since legislative history of CDA indicates no Congressional intent to extend coverage to matters covered by other statutes.

Matter of: Department of Agriculture—Request for Advance Decision, February 14, 1983:

The Acting Director, Office of Finance and Management, Department of Agriculture, has requested an advance decision concerning the applicability of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601-613 (Supp. IV 1980), to disputes arising from transportation services furnished under a Government bill of lading (GBL). Specifically, the question presented is whether the authority granted a contracting officer under the CDA supersedes the procedures for settling claims and disputes under existing transportation law. For the reasons discussed below, we believe that the CDA does not apply to disputes arising from transportation services covered by a GBL.

By way of background, a GBL is the basic procurement document used by the Government for acquiring freight transportation services from common carriers under Section 321 of the Transportation Act of 1940, as amended, 49 U.S.C. § 10721 (Supp. IV 1980). The Act authorizes the procurement of transportation services, at published rates, from any common carrier lawfully operating in the territory where such services are to be performed.

Under the Transportation Act of 1940, as amended, 31 U.S.C. § 3726 as adopted by Pub. L. 97-258 (formerly 31 U.S.C. § 244 (1976)), Executive agencies must make payment upon presentation of bills by a carrier prior to audit, whether or not the charges are disputed. The General Services Administration (GSA) is by law the agency with authority to audit the charges, to deduct any amount deemed to be an overcharge, and otherwise to effect settlement. *Id.* Claims arising from the furnishing of transportation services, including services furnished by a carrier under a GBL, therefore must be presented in writing to GSA or its designee agency. Further, a claimant desiring a review of the transportation settlement action taken by GSA or by a designee agency may request review by the General Accounting Office (GAO).

Under the CDA, however, the disputes procedures are invoked by the filing of a claim with the contracting officer. CDA § 6(a). The CDA requires that all claims by a contractor or by the Government against a contractor be the subject of a decision by the contracting officer which is final and conclusive unless an appeal is timely

commenced. CDA § 6 (a), (b). An appeal may be filed with an agency board of contract appeals or a contractor may instead bring an action directly on the claim in the United States Claims Court (formerly the Court of Claims). CDA §§ 7, 8, 10. Thus, individual Executive agencies under the CDA are authorized to administratively resolve, at least initially, disputes concerning claims relating to contracts awarded by each agency.

Obviously, the statutory provisions concerning agency resolution of claims under the CDA and the Transportation Act of 1940 are dissimilar. As stated above, under the CDA, individual Executive agencies, through their contracting officers, are authorized to resolve disputes concerning claims relating to contracts awarded by each agency. Under the Transportation Act of 1940, the Executive agencies have no such adjudicatory authority over claims for transportation services rendered for the account of the United States. Rather, such authority is vested exclusively in the GSA, subject to an appeal to GAO.

The language of the CDA is broad enough to literally encompass all contract claims, since the CDA applies to "any express or implied contract" entered into by an Executive agency for the procurement of property or services. CDA § 3(a). In this regard, we have recognized that a GBL serves as a contract of carriage between a carrier and the Government for freight transportation acquired under the Transportation Act of 1940. 55 Comp. Gen. 174 (1975). However, the CDA itself, even though it contains a repealer section, does not repeal any provision of existing statutes relating to the disputes resolution provisions of the Transportation Act of 1940, *see* CDA § 14 ("Amendments and Repeals"), and repeal by implication is not favored by the law. 1A Sutherland, *Statutes and Statutory Construction* 23.10 (4th Ed. C. Sands 1973). Moreover, the legislative history, which we look to because the CDA, if applied to transportation services, and the Transportation Act of 1940 contain conflicting provisions with respect to disputes arising from transportation services rendered, *Kenai Peninsula Borough* v. *State of Alaska,* 612 F.2d 1210 (9th Cir. 1980), does not mention transportation services as being subject to the Act.

The legislative history does indicate that the CDA implements the recommendations of the Commission on Government Procurement. *See* S. Rep. No. 95-1118, 95th Cong., 2nd Sess., reprinted in [1978] U.S. Code Cong. & Ad. News 5235. The Commission's studies and recommendations had nothing to do with transportation claims. The Commission was concerned, among other things, with the distinction which had arisen regarding resolution of contract disputes arising "under" the contract and those arising outside the contract (*e.g.,* breach of contract claims). See *Report of the Commission on Government Procurement,* Volume 4, Chapter 2. All Congress did, in enacting the CDA, was to adopt a uniform system for

resolution of procurement contract disputes. *See* S. Rep. No. 95-1118, *supra.*

In other words, Congress merely intended to improve the disputes resolution procedures for contracts awarded under the procurement statutes. We find nothing in the CDA or its legislative history which indicates any intent on the part of Congress to extend CDA coverage to matters covered by other statutes, such as transportation claims under the Transportation Act of 1940.

Therefore, we conclude that the CDA is not applicable to the procurement of such transportation services.

[B-208270, B-208315.2]

Small Business Administration—Contracts—Contracting With Other Government Agencies—Procurement Under 8(a) Program—After Withdrawal of Small Business Set-Aside—Prior to Bid Opening

Contracting officer reasonably determined that the public interest would best be served by canceling small business set-aside before bid opening in order to set aside the procurement for award to the Small Business Administration (SBA) under its 8(a) program for small, disadvantaged businesses (15 U.S.C. 637(a) (Supp. III, 1979)) where determination was: (1) an attempt to effectuate Government's socioeconomic interests; (2) necessary since contracting agency was unaware at time it issued small business set-aside that a viable 8(a) firm was capable of performing the work; and (3) concurred in by SBA.

Contracts—Small Business Concerns—Awards—Review by GAO—Procurement Under 8(a) Program—Contractor Eligibility

The determination whether to set aside a procurement under section 8(a) of the Small Business Act (15 U.S.C. 637(a)) and issues concerning contractor eligibility for subcontract award are matters for the contracting agency and Small Business Administration and are not subject to review by General Accounting Office absent a showing of fraud or bad faith on the part of Government officials.

Small Business Administration—Contracts—Contracting With Other Government Agencies—Procurement Under 8(a) Program—Fraud or Bad Faith Alleged—Evidence Sufficiency

In protest involving 8(a) procurement, fraud or bad faith is not shown by: (1) fact that contracting agency originally considered sole-source award to large business; (2) fact that contracting agency initially issued total small business set-aside, then canceled it before bid opening in order to make 8(a) award to Small Business Administration (SBA); (3) allegation that SBA violated its own Standard Operating Procedures, since they may be waived.

Matter of: Marine Industries Northwest, Inc.; Marine Power and Equipment Company, February 16, 1983:

Marine Industries Northwest, Inc. (Marine Industries), and Marine Power and Equipment Company (Marine Power) protest against award of a contract for construction of a 140-foot icebreaking harbor tug to Bay City Marine, Inc. (Bay City), by the United

States Coast Guard. The award was made under the auspices of the Small Business Administration's (SBA) 8(a) program pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. III, 1979).

The requirement had originally been the subject of a 100-percent small business set-aside, but the Coast Guard canceled the solicitation in order to make award under the 8(a) program. The protesters charge that: (1) cancellation of the small business set-aside was improper; (2) the Coast Guard is illegally attempting to award the major portion of the work to a large business subcontractor under the guise of an 8(a) award to a small, disadvantaged business; and (3) the SBA violated its own Standard Operating Procedures by proceeding with an 8(a) procurement for this requirement.

We find no merit to the protests.

The present procurement is for the seventh icebreaking harbor tug purchased by the Coast Guard. The first six tugs were all procured from Tacoma Boatbuilding Company (Tacoma). The Coast Guard considered the possibility of making a sole-source award to Tacoma before deciding to set aside the procurement for exclusive small business participation and on June 16, 1982, the Coast Guard issued invitation for bids No. DTCG23-82-B-30002 as a total small business set-aside. On July 6, the contracting officer notified potential bidders that the set-aside was canceled and that the requirement was going to be fulfilled by award to a socially and economically disadvantaged firm under the SBA's 8(a) program.

The protesters contend that the contracting officer improperly canceled the small business set-aside. More specifically, Marine Power argues that, under section 1-1.706-3(b) of the Federal Procurement Regulations (FPR) (1964 ed., amend. 192), a small business set-aside may not be canceled unless the continuation of the small business set-aside "would be detrimental to the public interest." In response, the Coast Guard argues that the cancellation was authorized under FPR § 1-2.208(a) (1964 ed., amend. 139), which allows a contracting officer to cancel any invitation before bid opening when doing so is "clearly in the public interest." The Coast Guard determined that cancellation was in the public interest "to effectuate the Government's legitimate socio-economic interests in awarding procurements to minority owned business firms under the 8(a) program."

We cannot find unreasonable the contracting officer's determination that the public interest would best be served by fulfilling the Government's socioeconomic interests by canceling the total set-aside in favor of procuring under the 8(a) program. The notice of cancellation stated that the Coast Guard would have procured on an 8(a) basis initially, but the Coast Guard was unaware at the time the small business set-aside was issued that there was a viable 8(a) firm capable of performing the work required, and the cancel-

lation and subsequent 8(a) award were undertaken with the concurrence of the SBA.

Where, through administrative error, a total small business set-aside was issued instead of an 8(a) set-side, we have held that it is not unreasonable for the contracting officer to rectify the error by canceling the total set-aside and awarding to a socially and economically disadvantaged firm under the 8(a) program. *A.R. & S. Enterprises, Inc.*, B-194622, June 18, 1979, 79-1 CPD 433; see also *A.R. & S. Enterprises, Inc.*, B-189832, September 12, 1977, 77-2 CPD 186. Indeed, we have even found proper a post-bid-opening cancellation, in a somewhat similar situation where a portion of an invitation for bids was canceled when it was discovered that through administrative error items were included in the solicitation which should have been set aside under the "Buy Indian Act." See *Hepper Oil Company*, B-189196, November 16, 1977, 77-2 CPD 378. In the present case, the total set-aside was canceled well before bid opening, August 17, 1982.

We are not convinced by Marine Power's argument that cancellation could only be authorized in accord with FPR § 1-1.706-3(b), which allows withdrawal of a small business set-aside if the contracting officer considers procurement from a small business to be "detrimental to the public interest." While that provision of the FPR is certainly applicable to small business set-asides, small business set-asides which are formally advertised are also within the purview of FPR § 1-2.208, which covers cancellation of an invitation for bids before bid opening and allows cancellation where it is "clearly in the public interest" to cancel. In other words, the two FPR provisions are not mutually exclusive, and we cannot find the contracting officer's reliance on FPR § 1-2.208 to be unreasonable in these circumstances.

The protesters contend that the Coast Guard is attempting to funnel the major portion of the work—75 to 85 percent—to Tacoma, a large business, under the guise of award to Bay City, an 8(a) firm. As evidence of wrongdoing on the part of the Coast Guard, the protesters point out that Tacoma received contracts to build the first six icebreaking tugs and that the Coast Guard gave serious consideration to awarding this contract to Tacoma on a sole-source basis. Marine Power also points out that the SBA, by letter of September 1, 1982, rejected the Coast Guard's offer to make an 8(a) award to Bay City through the SBA on the basis that it appeared that Tacoma, a large business, would benefit substantially more than Bay City. In its September 1 letter, the SBA stated that Bay City contemplated subcontracting 67 percent of the work and that the SBA's own standard operating procedure requires an 8(a) firm to perform a minimum of 50 percent of the work with its own labor force. The protesters point to the SBA's reversal of its decision to reject the proposed 8(a) award and acceptance of an 8(a) contract with subcontract awarded to Bay City (by

letter of September 28) as further evidence of improprieties in the conduct of this procurement.

Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with any Government agency with procuring authority and to arrange the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The contracting officer is authorized "in his discretion" to let contracts to SBA upon such terms and conditions as may be agreed upon by the procuring agency and SBA. *Microtech Industries, Inc.,* B-205077, October 26, 1981, 81-2 CPD 346. The selection of an 8(a) contractor is basically within the broad discretion of the SBA and the contracting agency, and we will not question such decisions unless fraud or bad faith on the part of the Government officials can be shown or it is alleged that the SBA did not follow its own regulations. *J. R. Pope, Inc.,* B-204230, August 10, 1981, 81-2 CPD 114.

Here, the protesters have presented no evidence of fraud on the part of the Government officials. Moreover, the protesters bear a very heavy burden of proof when alleging bad faith on the part of the Government officials. *Anigroeg Services, Inc.,* B-206362.2, March 15, 1982, 82-1 CPD 241. To show that the contracting officer or SBA officials have acted in bad faith, the protesters would have to present irrefutable proof that these officials had a specific and malicious intent to injure the protesters. *Kalvar Corporation, Inc.* v. *United States,* 543 F. 2d 1298, 1301 (Ct. Cl. 1976).

In our view, the record is clear that there was no fraud or bad faith on the part of the Coast Guard or SBA personnel. We do not find any evidence of fraud or bad faith in the fact that the Coast Guard initially considered a sole-source award to Tacoma; such consideration was merely part of the many discretionary judgments a contracting officer must make before initiating a procurement action. As for the high percentage of work that Tacoma will allegedly perform as a subcontractor to Bay City, the record shows that Bay City's proposal was restructured after the initial SBA rejection so that Bay City would subcontract no more than 60 percent of the work. At the request of the Coast Guard, the SBA reconsidered its determination and decided to accept an 8(a) award on behalf of Bay City based on the increase in work to be performed by Bay City employees. We find no evidence of fraud or bad faith in this transaction. Certainly, the protesters have not carried their heavy burden of proof. In this regard, Marine Power requests our Office to independently investigate this matter to ascertain how Bay City suddenly acquired the capability to perform a larger portion of the work than it originally intended to perform. However, it is the protester that must bear the burden of proving its allegations; our Office does not investigate as part of our bid protest function to ascertain the validity of the protester's arguments. *Fire*

& Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415.

Marine Power alleges that the SBA failed to follow its own established procedures in proceeding with an 8(a) procurement in this case. More specifically, Marine Power argues that the SBA violated its own Standard Operating Procedure No. 80-05 (effective September 4, 1979), which states, among other things, that 8(a) procurements will not be considered where: (1) a public solicitation has already been issued as a small business set-aside; or (2) it is determined by SBA that a small business might suffer a major hardship if the procurement is removed from competition. We note that SBA Standard Operating Procedure No. 80-05 also specifies that an 8(a) subcontractor shall be required to perform 50 percent of the work required under a manufacturing contract.

Fraud or bad faith in the making of a set-aside is not shown by the allegation that the SBA violated its own standard Operating Procedure. *A.R. & S. Enterprises, Inc.,* B-189832, *supra.* Such procedures may be waived by the SBA. *A.R. & S. Enterprises, Inc.,* B-189832, *supra.* Here, both the paragraph in the Standard Operating Procedure concerning the situation in which a small business set-aside has already been issued and the paragraph requiring an 8(a) contractor to perform 50 percent of a manufacturing contract specifically include provision for waiver by the SBA. The manner in which the waivers are affected is a matter for SBA, not our Office, and does not affect the validity of award to Bay City. *A.R. & S. Enterprises, Inc.,* B-189832, *supra.* Moreover, regarding hardship to a small business caused by removal of a set-aside from competition in favor of an 8(a) award, the SBA specifically determined on September 28 that no small business firm would suffer a major hardship as a result of the 8(a) award to Bay City.

Finally, Marine Industries suggests that Bay City should be required under the terms of its contract to award the majority of its subcontracts to small business. However, we are unaware of any provision in statutes or regulations which requires inclusion of such restriction in an 8(a) contract for shipbuilding work, and the protesters have cited none. As previously discussed, the SBA—which is empowered by law to enter into contracts with other Government agencies and to negotiate the terms and conditions which are to be included in such contracts (15 U.S.C. § 637(a) (1976))—determined that an 8(a) contract should be awarded to Bay City even though it would perform only 40 percent of the work. The SBA recognized that Bay City "will benefit from the substantial management and technology transfer contemplated under this effort" and should be propelled to a "higher plane of development and competitive viability." Moreover, we have held that in the case of supply contracts which require a significant contribution to the manufacture of an end item by a small business contractor, a small business which will incur more than one-third of the contract costs has fulfilled

the significant contribution requirement. See *Chem-Teck Rubber, Inc.,* 60 Comp. Gen. 694 (1981), 81-2CPD 232. Accordingly, our Office will not overrule the SBA's judgment in these circumstances.

The protest is denied.

[B-210599]

Bids—Guarantees—Bid Guarantees—Requirement—Construction Contracts Under $25,000—Administrative Authority

The Miller Act as amended, 40 U.S.C. 270a, does not preclude the General Services Administration from requiring bid guarantees in connection with bids for construction contracts under $25,000.

Matter of: Pine Street Corp., February 17, 1983:

Pine Street Corp. protests and amendment to General services Administration solicitation number GS-11B-32019 (a solicitation for construction) that changed the requirement that bidders furnish a bid guarantee (bid bond) with bids exceeding $25,000 to the requirement that a bid guarantee be furnished with bids exceeding $10,000. Pine Street complains that the amendment is contrary to the Miller Act as amended, 40 U.S.C. 270a (Supp. IV 1980). The protest is summarily denied.

A bid bond is a creature of the procurement regulations; it is not a bond that is mandated by statute. The Miller Act amendment raised the dollar threshold for the requirement that performance and payment bonds be furnished from $2,000 to $25,000. The amendment did not alter the contracting officer's authority to require these bonds for bids below $25,000. See *Elevator Sales & Service, Inc.,* B-193519, February 13, 1979, 79-1 CPD 102. Similarly, the Federal Procurement Regulations (FPR), § 1-10.104 and § 1-10.105, require the use of performance and payment bonds in connection with any construction contract exceeding $25,000. The FPR does not prohibit their use in smaller construction contracts.

With respect to bid bonds, the FPR states only that the "use of a bid guarantee is required when a performance bond or a performance and payment bond is required." *Compare* Defense Acquisition Regulation § 10-102.2. The solicitation requires such bonds to be furnished. Thus, the amendment is not contrary to the Miller Act.

The protest is denied.

[B-207026]

Pay—Missing, Interned, etc. Persons—Retired Pay—Suspension—Pending Date of Death Establishment—Retiree in Private Employment

A retired service member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. In the absence of statutory authority similar to the Missing Persons Act, 37 U.S.C. 551-557, which permits continued payments until the member presumed dead by declaration of the Department of Defense, payment of retired pay may not be made for any period after the last date the member was known to be alive and his retired pay account is to be placed in a suspense status until the member returns or until information is received or judicial action is taken to establish his death and the date of death.

Debt Collections—Military Personnel—Retired—Missing, Interned, etc. Status—While In Private Employment—Erroneous Retired Pay Payments

A retired member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. Retired pay payments continued to be sent to the member's bank account (apparently a joint account with his wife) until 1981, when Finance Center first learned of missing status. Since it is not known whether the retired member is dead or alive, payments should be recouped for the period after the last date the retired member was known to be alive and credited to his account pending an acceptable determination of his existence or death.

Matter of: Major James H. Ackley, USAF, Retired, February 28, 1983:

This action is in response to a request for decision from an Air Force Accounting and Finance Officer, relating to the payment of retired pay in the case of Major James H. Ackley, USAF, Retired, who has been reported missing since March 8, 1973. We find that retired pay should not have been disbursed after the retiree became missing. This matter has been assigned submission number DO-AF-1389 by the Department of Defense Military Pay and Allowance Committee.

Major Ackley was retired from the Air Force effective July 1, 1963, under the provisions of 10 U.S.C. 8911. Subsequent to his retirement, he was employed as a civilian by Air America, Inc. His employment was neither as a member of a uniformed service, nor as a civilian officer or employee of the Federal Government.

It appears that while working for Air America, the plane in which Major Ackley was flying went down in Southeast Asia on or about March 8, 1973. He has been in a missing status ever since. The Air Force first became aware of this on October 5, 1981. Since he was receiving retired pay, action was immediately taken by the Air Force Accounting and Finance Center to suspend payment of retired pay effective October 1, 1981, and to advise Mrs. Ackley as to the reasons for payment suspension. The payments were made to the member's bank account which was apparently a joint ac-

count with his wife. Thus, Mrs. Ackley has apparently received the benefit of the continued retired pay payments. A total of $87,498.95 in retired pay had been paid by the Accounting and Finance Center between March 8, 1973, and October 1, 1981.

In response to the suspension of retired pay the Accounting and Finance Center received a letter from Mrs. Ackley's attorney, requesting reinstatement of the retired pay on the basis that Major Ackley had not been declared legally dead.

Based on the foregoing, the Air Force asks whether retired pay is payable for any period during which the member is in a missing status, and whether the Air Force is required to wait for a spouse to take action to have her husband declared dead before retired pay payments may be suspended.

The retired pay due a retired member of the armed services accures only during his lifetime. 48 Comp. Gen. 706 (1969). When the date of his death has been established, the only amounts payable are those which accrued until he died and they are to be paid in accordance with the provisions of 10 U.S.C. 2771. When a retired member is missing and there is no information concerning him, his retired pay must be suspended from the date that he was last known to be alive. 14 Comp. Gen. 411 (1934); 43 *id.* 503 (1964); B-201128, March 6, 1981.

Thus, in Major Ackley's case his retired pay was properly suspended pending a definite determination of his status. There is no provision of law similar to the Missing Persons Act, 37 U.S.C. 551-557, which would permit continued payment of retired pay as is the case with respect to active duty pay under those provisions. Further, we are not aware of any authority for the armed services to make a determination concerning whether a retired member who is missing is deceased. The Air Force must withhold payments of retired pay as soon as they are notified that the retired member is missing. Retired pay payments may not continue pending legal action by the retired member's spouse to have him declared dead.

We would like to point out that since Major Ackley was employed by a private contractor doing business with the United States, the Secretary of Labor is authorized to make presumption of death determinations under the authority of the War Hazard Compensation Act, 42 U.S.C. 1716. We suggest that the Air Force consult the Department of Labor in this case concerning any determinations which may have been made under that authority.

In any event, until such time as a definite determination concerning Major Ackley is made the Air Force should maintain his retired pay account in a suspended status and no disbursements from that account are authorized.

While not specifically stated in 48 Comp. Gen. 706 (1969) the conclusion that payments made after the date of a retiree's last known existence must be recouped, seems to be required. Accordingly, collection under the Federal Claims Collection Act, 31 U.S.C. 3711 *et*

seq. (formerly 31 U.S.C. 951-953 (1976) should be commenced, taking into consideration the factors referred to in that act and the regulations promulgated pursuant thereto. See 4 C.F.R. 101 *et seq.* The payments received pursuant to this action should be credited to the retired pay account. At such time as information is received or judicial action is taken resolving the doubt as to Major Ackley's status, a settlement will be issued by this Office based on the information. Additionally, at that time consideration will be given to any remedies available to Mrs. Ackley regarding any overpayments which may have been made.

Similar cases may be treated in accordance with this decision.

[B-207191]

Contractors—Responsibility—Determination—Review by GAO—Nonresponsibility Finding

Contracting officer's nonresponsibility determination based on data supplied by the contracting office, which showed protester delinquent on 70 percent of contract line items, and by the Defense Contract Administration Services Management Area (DCASMA), which showed protester delinquent on 26 percent of contracts due, was reasonable notwithstanding fact that some of the deliquencies may arguably have been agency's fault.

Contractors—Responsibility—Determination—Review by GAO—Nonresponsibility finding—Bad Faith Alleged

Fact that protester may have been found responsible by other contracting officers during same period in which protester was found nonresponsible under the protested procurement does not show that contracting officer acted in bad faith in making nonresponsibility determination because such determinations are judgmental and two contracting officers may reach opposite conclusions on the same facts.

Purchases—Small—Small Business Concerns—Certificate of Competency Procedures Under SBA—Applicability—Change in SBA Regulations

Where protester has not objected to contracting officer's failure to refer small business nonresponsibility determination to the Small Business Administration (SBA) for consideration under its Certificate of Competency procedures, GAO will not object to such failure to refer since the contracting officer's action was consistent with a Defense Acquisition Regulation which provides that such referral shall not be made when small purchase procedures are used, and since current SBA regulations provide that it is within the contracting officer's discretion to refer when contract value is less than $10,000.

Matter of: Amco Tool & Die Co., February 28, 1983:

Amco Tool & Die Co., a small business, protests the rejection of its quotation under request for quotations (RFQ) No. F41608-82-51332-02-23 issued on February 2, 1982, by the San Antonio Air Logistics Center, Kelly Air Force Base, Texas, for five eye lift compressors. Amco disputes the propriety of the contracting officer's determination that it is nonresponsible. For the reasons that follow, we deny the protest.

The procurement was conducted as a total small business set-aside under the small purchase procedures set forth in Defense Acquisition Regulation (DAR) § 3-600 *et seq.* Amco's quote, with a unit price of $208.85 was low. The contracting officer determined, however, that Amco was nonresponsible [1] due to that firm's high rate of delivery delinquencies on contracts it held with Kelly AFB. Award was then made to L&S Machine Company, the next low quoter with a unit price of $355.35.

The determination of a prospective contractor's responsibility is the duty of the contracting officer. In making the determination, he is vested with a wide degree of discretion and business judgment. Generally, we will not question a nonresponsibility determination unless the protester can demonstrate bad faith by the agency or a lack of any reasonable basis for the determination. *S.A.F.E. Export Corporation,* B-203346, January 15, 1982, 82-1 CPD 35.

The contracting officer's nonresponsibility determination indicates that he reviewed Amco's current performance record at the Logistics Center's contracting office and at the Defense Contract Administration Services Management Area (DCASMA), San Antonio. He found that the Center's records indicated an Amco delinquency rate of 70 percent based on the total number of contract line items due at Kelly Air Force Base, while DCASMA's figures showed a total delinquency rate of 26 percent from January 1 through March 31, 1982. DCASMA's rate was based on the total number of contracts where a delinquency existed rather than the total number of contract line items. Based on both of these figures and the fact that Amco's poor prior performance record caused it to be included on the contracting agency's Contractor Experience Information Index (an index of firms which because of their prior performance needed special attention), the contracting officer determined that Amco was not a responsible offeror.

Amco challenges the accuracy of the Center's delinquency figures. The protester argues that the method used by the Center to calculate the 70 percent figure was faulty and states that many of the delinquencies listed were in fact the Government's fault. We have reviewed the rather voluminous record submitted by the protester and find that while some of the delinquencies listed may arguably have been the agency's fault, there is no question that

[1] The contracting officer did not refer the question of Amco's responsibility to the Small Business Administration (SBA) for consideration under the Certificate of Competency (COC) procedures. This action was consistent with Defense Acquisition Regulation § 1-705.4(c) (DAC 76-24, August 28, 1980), which provides that such referral shall not be made where small purchase procedures are used. We have previously held that a contracting agency, at least in the absence of SBA agreement, may not itself decide to avoid the referral requirement in the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. IV 1980). See *Z.A.N. Co.,* 59 Comp. Gen. 637 (1980), 80-2 CPD 94; *J.L. Butler,* 59 Comp. Gen. 144 (1979), 79-2 CPD 412; *The Forestry Account,* B-193089, January 30, 1979, 79-1 CPD 68. The protester has not objected to the contracting officer's failure to refer the matter to SBA, however. Moreover, subsequent to the award made in this case, the SBA provided by regulation that "it is within the discretion of the contracting office to determine if a referral should be made when the contract value is less than $10,000." 47 Fed. Reg. 34973, to be codified at 13 C.F.R. § 125.5(d). Under these circumstances, we will not object to the failure to refer. Since there was no review of the nonresponsibility determination by SBA, the matter is appropriate for our own review. See, e.g., *Indian Made Products Company,* B-186980, November 17, 1976, 76-2 CPD 427.

Amco has had significant problems in meeting its delivery obligations on many items. Amco, in fact, does not deny that some of its contracts are delinquent.

Amco argues, however, that its delinquency rate is no worse than any of the other contractors in its area doing similar work for Kelly Air Force Base. It states that the contracting officer acted in bad faith by singling Amco out for unfair treatment while other contracting officers within the same contracting activity have found Amco responsible and have continued to award it contracts.

We do not agree that the fact that Amco has been found responsible by other contracting officers indicates that the contracting officer here acted in bad faith. Responsibility determinations are made based upon the circumstances of each procurement which exist at the time the contract is to be awarded. These determinations are inherently judgmental, and two people can reach opposite conclusions as to a firm's responsibility based on the same facts without either acting in bad faith. *GAVCO Corporation—Request for Reconsideration,* B-207846.2, September 20, 1982, 82-2 CPD 242.

Amco is also concerned by its inclusion on the contracting agency's Index. The inclusion of a firm on the Index does not constitute a nonresponsibility determination, as evidenced by the awards Amco has received despite its inclusion on the Index. The Index is merely a management tool used by the Center, and the issue of whether a particular firm should be on the Index is a matter to be determined by the agency and is not the proper subject of a protest to our Office.

In sum, the contracting officer based his conclusion on both the delinquency rate supplied by DCASMA (which the protester does not seem to question) and that calculated by the contracting activity. Considering the informal nature of the procedures required in conducting this small purchase and the low value of this procurement, we think that the contracting officer acted reasonably in relying on the figures supplied by both these activities as a basis for his nonresponsibility determination and that the protester has not met its burden of establishing that the contracting officer acted arbitrarily or in bad faith.

The protest is denied.

[B-207710]

Compensation—Overtime—Firefighting—Fair Labor Standards Act—Court Leave—Jury Duty

Labor organization asks whether firefighters are entitled to additional pay under title 5, United States Code, when their overtime entitlement is reduced as a result of court leave for jury duty. The firefighters are entitled to receive the same amount of compensation as they normally receive for their regularly scheduled tour of duty in a biweekly work period. The court leave provision, 5 U.S.C. 6322, expressly provides that an employee is entitled to leave for jury duty without reduction or loss of pay.

Matter of: Overtime Compensation for Firefighters, February 28, 1983:

This action is in response to a request from Mr. Gordon E. Grainger, President, Local 977, National Federation of Federal Employees, for a decision concerning the entitlement of firefighters at George Air Force Base, California, to additional premium pay when their overtime entitlement under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.,* is reduced due to court leave for jury duty during their regularly scheduled tour of duty. This matter has been presented under our procedures set forth at 4 C.F.R. Part 22 (1982) for decisions on appropriated fund expenditures which are of mutual concern to agencies and labor organizations. For the reasons set forth below, firefighters who are absent from work during their tour of duty while on court leave are entitled to receive the same amount of pay which they would otherwise receive for working their regularly scheduled 144-hour tour of duty in a biweekly work period.

The submission indicates that the firefighters at George Air Force Base are regularly scheduled to work a tour of duty of 144 hours in each biweekly work period and that they receive overtime compensation under the Fair Labor Standards Act for those hours in excess of 108 hours in their biweekly tour of duty. Local 977 further indicates that if a firefighter spends 8 hours performing jury duty (presumably during a regularly scheduled tour of duty) he would lose overtime compensation under the Fair Labor Standards Act for 8 hours for that biweekly work period since the 8 hours on court leave would reduce the hours on duty in the biweekly work period) from 144 to 136 hours. They contend that since 36 hours (in excess of 108 hours per biweekly work period) are scheduled as part of the employee's 144-hour tour of duty, the overtime compensation for hours in excess of 108 hours should not be lost as a result of the performance of jury duty which reduces the total number of hours during which the firefighters are on duty in a biweekly work period.

They call our attention to title 5, United States Code, and remind us that for covered employees overtime entitlement must be considered under both the Fair Labor Standards Act and title 5, with the

employee receiving the greater benefit. See paragraph 5 of Federal Personnel Manual Letter 551-5, January 15, 1975.

In a previous consideration of overtime entitlement of firefighters the Civil Service Commission (now Office of Personnel Management) advised us that, as a general practice, a Federal firefighter is scheduled for a tour of duty of 72 hours per week consisting of three 24-hour shifts. During each 24-hour shift the firefighter is normally in a work status for 8 hours and in a standby status, which includes a designated sleep period, for the remaining 16 hours. For this extended tour of duty, a firefighter receives, under title 5, United States Code, his basic rate of pay and premium pay on an annual basis for the standby duty, normally 25 percent of his basic rate of pay as authorized by 5 U.S.C. 5545(c)(1). See 55 Comp. Gen. 908 (1976). In the absence of information to the contrary we will assume that for each biweekly work period the firefighters at George Air Force Base work six 24-hour shifts. Furthermore, since the submission clearly indicates that the firefighters have not been authorized compensation for regularly scheduled overtime under 5 U.S.C. 5542(a), we will assume that they receive annual premium pay under 5 U.S.C. 5545(c)(1) for regularly scheduled standby duty.

Subsection 6(c)(1)(A) of the Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, 88 Stat. 60, added subsection 7(k) to the Fair Labor Standards Act, 29 U.S.C. 207(k), extending compensation benefits to firefighters. Subsection 207(k) of title 29, United States Code, provides that in a work period of 28 consecutive days the employee is entitled to compensation at a rate not less than one and one-half times the regular rate for all hours his tour of duty exceeds the lesser of 216 hours or the average number of duty hours (as determined by the Secretary of Labor) for employees engaged in such activities in calendar year 1975. The 216-hour standard for overtime entitlement for a work period of 28 consecutive days is applicable to firefighters. See Federal Personnel Manual (FPM) Letter 551-16, January 15, 1980. For any work period between 7 and 28 days overtime compensation is paid on the basis of the same ratio of maximum non-overtime hours and days in the work period. See FPM Letter 551-16, *supra.* Thus, as stated in the submission, firefighters are entitled to overtime compensation under the Fair Labor Standards Act for those duty hours in excess of 108 hours in a biweekly work period. Pursuant to its statutory authority at 29 U.S.C. 204(f) to administer the Fair Labor Standards Act with respect to most Federal employees, the Office of Personnel Management has issued instructions for applying the Fair Labor Standards Act to firefighters which appear in FPM Letter 551-5, January 15, 1975.

Only those hours that the employee is actually on duty during the tour of duty are included in hours worked under the Fair Labor Standards Act and paid time off is not included as hours

worked. See paragraph C7, Attachment 2 to FPM Letter 551-5, January 15, 1975, and 5 C.F.R 511.401(b) (1982). Thus, we have been asked whether the firefighters are to lose the compensation which they would otherwise receive for their regularly scheduled 144-hour tour of duty as a result of an absence on court leave which has reduced the amount of overtime compensation payable under the Fair Labor Stadards Act.

The statutory authority for court leave, 5 U.S.C. 6322, provides in pertinent part that an employee "* * * is entitled to leave, without loss of , or reduction in, pay * * *" during a period of absence for service as a juror. A similar provision pertaining to Federal employees on military leave who are engaged in training in the Reserves and National Guard is set forth at 5 U.S.C. 6323.

In view of the Office of Personnel Management's authority to administer the Fair Labor Standards Act with respect to Federal employees, including firefighters, we requested their views on this matter. In its report of January 10, 1983, the Office has called to our attention the Civil Service Commission letter of September 7, 1976, to the Department of the Navy. That letter states the opinion that absences on court leave are not included as worktime under the Fair Labor Standards Act. Thus, the Commission held that an absence on court leave during a firefighter's regularly scheduled tour of duty would reduce his actual time on duty and therefore result in a reduction to this entitlement to overtime pay under the Fair Labor Standards Act. The Commission concluded that such a result was not in conflict with the court leave provision set forth at 5 U.S.C. 6322 since "hours of work" determinations are made separately under the appropriate provisions of the Fair Labor Standards Act and title 5, United States Code, and since a Federal employee must have legal entitlement to pay under the applicable law upon which the pay entitlement is based. In its report of January 10, 1983, the Office of Personnel Management has reaffirmed this view. Thus, that Office concludes that 5 U.S.C 6322 provides authority to pay a Federal firefighter his full basic pay and title 5 premium pay for standby duty in a pay period during which he is excused for jury duty. However, it finds that 5 U.S.C. 6322 does not provide a legal basis for paying Fair Labor Standards Act overtime pay for periods of absence on jury duty when actual work is not performed.

We agree with the statement made by the Office of Personnel Management that the Fair Labor Standards Act sets minimum standards to protect employees and we acknowledge that the Office is responsible for the implementation of the Fair Labor Standards Act for Federal employees. However, we are responsible for the interpretation of the provisions of title 5, United States Code. We cannot ignore the plain wording of 5 U.S.C. 6322. Under that provision an employee is entitled to leave for jury duty without reduction or loss of pay. A similar provision at 5 U.S.C. 6323 pertains to

Federal employees on military leave who are engaged in training in the Reserves and National Guard. The requirement in these provisions is that an employee shall receive the same compensation he otherwise would have received but for the fact that he was absent on military or court leave. 27 Comp. Gen. 353, 357 (1947). There is nothing in the language of 5 U.S.C. 6322 which restricts its application to compensation otherwise payable under title 5, United States Code, and we are not aware of anything in the legislative history of that provision which would compel such a restrictive view. Furthermore, that provision does not require that an employee meet the applicable statutory criteria for compensation during a period of court leave, but provides that the compensation of the employee shall not be diminished by such absence.

The firefighters at George Air Force Base are regularly scheduled to work a 144-hour tour of duty in each biweekly work period. Although the firefighters' entitlement to overtime compensation under the Fair Labor Standards Act is reduced for those biweekly work periods in which they are on court leave during their regularly scheduled tour of duty, the court leave provision, 5 U.S.C. 6322, provides authority to pay them the same pay as they otherwise would receive under the Fair Labor Standards Act. Accordingly, under the authority of 5 U.S.C. 6322 the firefighters are entitled to the same amount of pay which they would otherwise receive for their regularly scheduled tour of duty in a biweekly pay period notwithstanding periods of court leave.

[B-207771, *et al.*]

Contracts—Damages—Liquidated—Actual Damages *v.* Penalty—Price Deductions—Reasonableness

Performance Requirements Summaries in invitations for bids (IFBs) for services contracts which permit the Government to deduct from the contractor's payments an amount representing the value of several service tasks where a random inspection reveals a defect in only one task imposes an unreasonable penalty, unless the agency shows the deductions are reasonable in light of the particular procurement's circumstances.

Regulations—Compliance—Failure To Comply—Regulations for Government's Benefit—Contract Protests

Air Force regulation concerning the development of a statement of work and quality assurance plan for base-level services contracts implements Air Force policy and is for the benefit of the Government, not potential offerors. Therefore, the Air Force's alleged failure to comply with the regulation does not provide a basis for protest.

Bids—Invitation For Bids—Clauses—Inspection of Services—Price Reduction *v.* Reperformance Provisions—Reconcilability

Performance Requirements Summaries in IFBs for services contracts which permit the Government to deduct amounts from the contractor's payments for unsatisfactory services do not conflict with any reperformance rights of the contractor. Al-

though the standard "Inspection of Services" clause permits the Government to require reperformance at no cost to the Government, the protester had failed to show that defective services may be reperformed without the Government receiving reduced value.

Matter of: Environmental Aseptic Services Administration and Larson Building Care Inc., February 28, 1983:

Environmental Aseptic Services Administration and Larson Building Care Inc. have submitted a number of protests [1] concerning the methodology employed by the Air Force to acquire various base-level services, including hospital housekeeping, custodial services, grounds maintenance and stocking commissary shelves. The thrust of the protests is that the invitations for bids implement a quality assurance program that allegedly permits payment deductions for unsatisfactory service greatly exceeding the value of the services.

We sustain the protests on the basis that the quality assurance provisions provide for unreasonable deductions.

The protesters also complain that these provisions provide for permanent deductions without regard to alleged reperformance rights of the contractors. We find this basis of protest to be without merit.

All the invitations apparently incorporated by reference the standard Inspection of Services clause contained in Defense Acquisition Regulation (DAR) § 7-1902.4 (1976 ed.). The clause generally must be included in all Air Force fixed price service contracts. *See* DAR § 7-1902. It reserves the Government's right to inspect all services, to the extent practicable, at all times during the contract term, and also provides as follows:

> If any services performed hereunder are not in conformity with the requirements of this contract, the Government shall have the right to require the Contractor to perform the services again in conformity with the requirements of the contract, at no additional increase in total contract amount. When the services to be performed are of such a nature that the defect cannot be corrected by reperformance of the services, the Government shall have the right to (i) require the Contractor to immediately take all necessary steps to ensure future performance of the services in conformity with the requirements of the contract; and (ii) reduce the contract price to reflect the reduced value of the services performed. * * *

The invitations contain additional provisions under the heading Performance Requirements Summary (PRS) that permit the Government to sample the contractor's performance of some services randomly and deduct payments for unsatisfactory service in an amount calculated to represent the value the unsatisfactory service bears to all the contract's requirements. To determine that value, the PRS breaks the total contract effort down to its basic component services. The value of unsatisfactory performance under a component service is determined by calculating the percentage any sampled unsatisfactory performance bears to the size of the entire

[1] These protests are identified in the Appendix (which is not included in this publication).

sample, and then multiplying it times a fixed percentage listed in the IFB which represents the value of the component service in comparison with the total contract effort. In some instances, however, the invitations provide an allowable deviation for which the Government will not take any deductions.

For example, an IFB for hospital housekeeping services establishes a format for randomly inspecting room cleaning (only one of several services required by the IFB) where the contractor must clean 236 rooms daily and the sample unit is one room on any given day. If we assume the following:

(a) The contract price for the performance period being sampled, *e.g.*, 1 month, is $10,000;

(b) The IFB fixes the relative value of room cleaning at 60 percent of the total contract, or $6,000 of the total contract price;

(c) The Government samples 200 room cleanings out of the possible 7080 cleanings in the month (236 rooms$\times$30 days); and

(d) The Government's random sampling procedures reveal defects in 40 room cleanings, then the deduction would be as follows:

[40 (defects)$\div$200 (sample size)]$\times$.60 (percentage value of room cleaning)$\times$$10,000 (total price)=$1,200.

The PRS provisions state that these deductions are permanent, but the Government nevertheless can require the contractor to reperform the unsatisfactory services. Concerning only those services not surveyed by sampling, the PRS provides that a defect will not be counted when the service can be reperformed in a timely manner. Neither the PRS nor any other IFB provision defines random sampling, however, so that it apparently could involve the Government's inspection of one unit or all the units in a lot. The IFB contains an informational copy of the Quality Assurance Evaluator (QAE) Surveillance Plan detailing the sampling procedures, including a statistical basis for determining the frequency of inspections and the size of the sample.

The protesters have two basic complaints regarding the PRS's methodology. The first is that the sampled service often subsumes several required tasks, and the contractor's failure to perform satisfactorily any one of these tasks provides a basis to deduct payment for all of the tasks. Using the room cleaning example, the QAE Surveillance Plan establishes a checklist of 14 items (*e.g.*, aseptic floor, furniture, fixtures, drapes, and trash) representing different tasks required by the IFB, and the PRS provides, "If a task fails, the room fails for that day." In other words, if the contractor unsatisfactorily performs only one task in each of the 40 rooms, he will suffer the same deduction as though he failed to perform all 14 tasks in each room. Thus, any deductions will be based on the value of all 14 tasks and will greatly exceed the value of the one task (trash collection, for example) actually failed. The protesters

allege that these deductions violate the Air Force's own policy directives contained in Air Force Regulation 400-28, Vol. I, September 26, 1979, and exceed the agency's needs. They contend that the contractor's increased monetary risks occasioned by the deductions for an entire service will increase the overall cost to the Government, presumably through higher bid prices and decreased competition. In this regard, we note that Larson was apparently unwilling to take the risks involved and did not submit bids under the IFBs involved.

Secondly, the protesters complain that the IFBs also permit the Government to require reperformance at the contractor's expense in the case of sampled services. The protesters contend that the standard Inspection of Services clause (quoted above) and standard specification No. MIL-STD-1050, April 29, 1963 (MIL. SPEC.), which is mandatory for use by the Department of Defense, DAR § 1-1202(a)(ii), give the contractor general rights to reperform services after deficiences are noted, subject to reinspection before the Government can reduce the contractor's payments. In particular, the protesters rely on the following MIL. SPEC. provision as establishing a contractor's right to reperformance without deduction:

> Rejected units may be repaired or corrected and resubmitted for inspection with the approval of, and in the manner specified by, the responsible authority. Paragraph 6.2.

The Air Force really does not address the protesters' complaint that the IFBs permit deductions which are unreasonably excessive, except to suggest this issue involves a matter of contract administration which this Office should not review. We disagree.

Although a contractor, during performance, may challenge deductions pursuant to the disputes clause of the contract, that does not mean potential bidders cannot protest the validity of solicitation clauses which may violate procurement principles. While we recognize that the establishment of inspection procedures to insure that services will meet the Government's needs is primarily the responsibility of the contracting agencies, we will question determinations about the provisions included in a solicitation for this purpose if the provisions are shown to restrict competition unduly or otherwise violate procurement statutes and regulations. *Inflated Products Company, Inc.,* B-190877, March 21, 1978, 78-1 CPD 221.

For reasons stated below, we believe the IFB's quality assurance provisions violate applicable procurement regulations contained in DAR § 1-310, concerning liquidated damages. The alleged violations of Air Force Regulation 400-28, however, are another matter. This regulation prescribes the methodology for developing the statement of work and a quality assurance plan for base-level services contracts, and implements Air Force policy concerning these matters. The regulation thus sets out instructions clearly for the benefit of the Government, not potential offerors, and the agency's

alleged failure to comply with it does not provide a basis for protest. See *Moore Service, Inc., et al.* B-204704.2, B-204704.3, B-205374, B-205374.2, June 4, 1982, 82-1 CPD 532; *Westinghouse Information Services,* B-204225, March 17, 1982, 82-1 CPD 253.

Liquidated damages are fixed amounts which one party to a contract can recover from the other upon proof of violation of the contract, and without proof of the damages actually sustained. See *Koth* v. *R.C. Taylor Trust,* 280 U.S. 224 (1930). While a liquidated damages provision obviously benefits the Government in that it permits contract deductions as described, DAR § 1-310 imposes certain limitations on the use of liquidated damages that clearly are for the contractor's benefit.

The regulation limits the use of such damages to instances where the time of performance is such an important factor that the Government may reasonably expect to suffer damages if the performance is delinquent, and the extent or amount of such damages would be difficult or impossible to ascertain or prove. DAR § 1-310(a). The regulation further provides that when a liquidated damages clause is used, the contract must set forth the amount to be assessed against the contractor for each calendar day of delay, and the rate must be reasonable in light of the procurement requirements. DAR § 1-310(b). Finally, the regulation expressly recognizes that liquidated damages fixed without reference to probable actual damages may be held to impose a penalty and therefore be unenforceable. DAR § 1-310(b). In this respect, while such damages might add an effective spur to satisfactory performance, it is well-settled that such a penalty to deter default is improper and unenforceable. *Priebe & Sons* v. *United States,* 332 U.S. 407 (1947).

We will object to a liquidated damages provision as imposing a penalty if a protester shows there is no possible relation between the amounts stipulated for liquidated damages and the losses which are contemplated by the parties. 46 Comp. Gen. 252 (1966); *Massman Construction Co.,* B-204196, June 25, 1982, 82-1 CPD 624. We believe the protesters initially met this burden by showing that the solicitation provisions permit deductions without regard to, and significantly in excess of, the value of tasks actually found defective. In the example of the hospital housekeeping services invitation, the IFB's QAE Surveillance Plan lists 14 tasks which comprise room cleaning, fixes the value of these tasks at 60 percent of the contract price, and the PRS authorizes a deduction for the *entire* room cleaning service if the contractor fails to perform any *one* of the tasks. The protesters point out that under circumstances very similar to this example, the Armed Services Board of Contract Appeals held that the Government's "all or none" inspection procedure, employed to inspect rooms serviced under a custodial services contract, imposed an unfair and unreasonable penalty. *Clarkies, Inc.,* ASBCA No. 22784 (1981), 81-2 BCA ¶ 15,313.

It therefore is incumbent on the Air Force to show, in response to the protester's showing, that there indeed is a reasonable basis for its measure of damages. *Cf. Professional Helicopter Services,* B-202841, B-203536, March 17, 1982, 82-1 CPD 251 (concerning the Government's burden to present a reason why an apparently restrictive specification was necessary). We recognize that not all contract tasks may have the same importance, and that some tasks may be of such importance that a deduction for an entire service would be warranted, rather than simply a pro rata amount, if the task is not performed properly. For instance, a contractor's failure to perform a single cleaning task in surgical or ward areas may render the entire room unsatisfactory because of the critical need for hygiene in those areas, whereas failure to perform one task in an administrative area should have no such effect. The IFB for hospital services, however, draws no distinction between surgical or ward areas and administrative areas for purposes of deductions.

The Air Force's failure to respond to these protests with a rationale as to why defective performance of any task in a service, without regard to the nature or seriousness of the task, warrants deduction for the entire service compels us to conclude that the IFB provision in issue imposes a penalty as to nonvital tasks and would, as the protesters indicate, unnecessarily raise the Government's costs and have an adverse effect on competition. We therefore sustain the protest to that extent.

Regarding the alleged inconsistency between provisions permitting permanent deductions and alleged reperformance rights established in the standard Inspection of Services clause and the mandatory MIL. SPEC., we believe the protesters have not established the existence of such rights concerning randomly sampled services under any of the procurements in issue here.

The Inspection of Services clause gives the Government the right, where performance is unsatisfactory, to require reperformance at no additional increase in the contract amount, and to reduce the contract price to reflect the reduced value of the services performed when the services "are of such a nature that the defect cannot be corrected by reperformance of the services." The clause does not expressly bestow any rights on the contractor, and

explicitly recognizes that circumstances may exist where reperformance would not correct a deficiency. The clause thus reserves, for that situation, the Government's right "to (i) require the contractor to immediately take all necessary steps to ensure future performance of the services in conformity with the requirements of the contract; *and* (ii) reduce the contract price to reflect the reduced value of the services performed." [Italic supplied.]

We find nothing in the MIL. SPEC. which detracts from this right. Paragraph 6.2, on which the protesters rely, does not require that the Government permit reperformance without regard to the circumstances; rather, it simply allows the Government to permit reperformance.

Therefore, the critical question is whether the services here may be reperformed after random sampling so that the Government does not receive reduced value. The Air Force contends that while defective services may be reperformed to bring them up to contract standards, the standards are thus achieved in an untimely manner, and time of performance is an important part of the IFBs' requirements. Moreover, when a contractor reperforms a sampled service, it cannot correct the entire lot to meet the quality and time requirements of the contract. Therefore, the Air Force argues, it has the right to deduct payments to reflect the reduced value of the services performed. In this respect, the Air Force also points out that the IFBs require the contractor to establish a quality assurance plan for which the Air Force presumably must pay. Any defect revealed during sampling indicates the contractor's failure to administer its plan properly, and represents a further reduction in value to the Government.

The protesters, who bear the burden of submitting sufficient evidence to establish their case, see *Line Fast Corporation*, B-205483, April 26, 1982, 82-1 CPD 382, have not shown that, under the IFBs involved here, defective services may be reperformed without the Government's receiving reduced value for them. We therefore must accept the agency's position. See *Alan Scott Industries—reconsideration*, B-201743, *et al.*, April 1, 1981, 81-1 CPD 251. Accordingly, the protests lack merit in their contentions that the deductions provisions are inconsistent with reperformance rights under the IFBs.

The protests are sustained in part concerning the provisions that permit allegedly excessive deductions. We are recommending to the Secretary of the Air Force that the deduction provisions be examined to determine where individual tasks are so vital as to warrant a deduction for the entire service. Where bids have not been opened, we are recommending that the Air Force amend the IFBs to differentiate between vital and non-vital tasks and to establish reasonable deduction rates for non-vital tasks, *e.g.,* a pro rata deduction in the same proportion as the task bears to the total number of tasks comprising the service. Where contracts have been awarded, or where bids have been opened and the needs of the agency do not readily permit canceling an IFB and reissuing a revised one, we are pointing out to the Air Force that in administering the contracts it should avoid taking unreasonable deductions for non-vital tasks but instead should pursue its other remedies under the contract so that it will not run the risk of implementing the deduction provisions in a manner that imposes a penalty.

The protests are denied concerning alleged conflicts between provisions that permit deductions and alleged reperformance rights.

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