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[B-209721]

Property—Private—Damage, Loss, etc.—Personal Property—Claims Act of 1964—Settlement Authority

The concept of administrative discretion does not permit an agency to refuse to consider all claims submitted to it under the Military Personnel and Civilian Employees' Claims Act, which authorizes agencies to settle claims of Government employees for loss or damage to personal property. While General Accounting Office will not tell another agency precisely how to exercise its discretion, that agency has a duty to actually exercise it, either by the issuance of regulations or by case-by-case adjudication.

Matter of: Scope of discretion under 31 U.S.C. 3721, September 2, 1983:

The Federal Mediation and Conciliation Service has asked our opinion regarding whether it has discretion to refuse to consider all claims filed by its employees under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended (the Act).[1] Based on the reasoning herein, we conclude that the concept of administrative discretion does not permit an agency to adopt a policy of refusing all claims submitted to it under the Act.

BACKGROUND

The Military Personnel and Civilian Employees' Claims Act of 1964 authorizes agencies to settle claims of Government employees for loss or damage to personal property. It states in part as follows:

> The head of an agency may settle and pay not more than $25,000 for a claim against the Government made by a member of the uniformed services under the jurisdiction of the agency or by an officer or employee of the agency for damage to, or loss of, personal property incident to service. A claim allowed under this subsection may be paid in money or the personal property replaced in kind. 31 U.S.C. § 3721(b).

A claim, to be cognizable under the Act, must be by a member of the uniform services or a civilian officer or employee and must be for damage or loss to personal, not real, property. The loss or damage must be "incident to service," and the agency should be satisfied with the degree of evidence submitted by the claimant before allowing the claim. The agency also must determine that possession of the property was reasonable or useful under the circumstances. If the loss or damage occurred in quarters occupied by the claimant within the 50 states or the District of Columbia, a claim is cognizable only if the quarters were assigned or otherwise provided in kind by the United States. Negligence on the part of the claimant, his agent, or his employee will preclude an award under the Act. The maximum settlement authority is $25,000. Finally, the statute of limitations is 2 years after accrual, although this may be tolled during time of war or armed conflict.

Most claims under the Act involve loss or damage suffered in the shipment of personal property in connection with a change of duty

[1] 31 U.S.C. § 3721 (formerly 31 U.S.C. § 240-243, recodified by Pub. L. No. 97-258, September 13, 1982, and Pub. L. No. 97-452, January 12, 1983).

station. See B-155619, January 18, 1965. Loss or damage to property incident to authorized nontemporary storage is also cognizable (see 44 Comp. Gen. 290, 292 (1964); B-178243, May 1, 1973), as is loss or damage to a privately owned motor vehicle while used for official business (see B-185513, March 24, 1976; B-174669, February 8, 1972).

The definition of "settlement" under the Act includes full or partial allowance or disallowance. 31 U.S.C. § 3721(a)(3). The agency's decision regarding settlement of the claim is final and conclusive. 31 U.S.C. § 3721(k). The Act does not contemplate judicial review.[2] GAO does not have jurisdiction to settle a claim against another agency or to question another agency's settlement as long as it was made in accordance with the statutory criteria and applicable regulations. *See* 47 Comp. Gen. 316 (1967).

The Act authorizes the President to prescribe uniform policies to implement the statute with respect to the civilian agencies. 31 U.S.C. § 3721(j). This authority has not been exercised, however. Each department and agency must therefore determine its own policies subject to the statutory criteria. In a 1961 decision, we said that payment under the Act "is not a matter of right but of grace resting in administrative discretion." B-144926, February 23, 1961. Noting this statement in our *Principles of Federal Appropriations Law* (1st ed., June 1982), the Federal Mediation and Conciliation Service questions the limits of its discretion. The specific issue is whether an agency can adopt a policy of refusing to consider all claims under the Act.

Analysis

The purpose of agency regulations is to support the intent of the enabling legislation. See *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U.S. 129, 134 (1936); *Dixon* v. *United States,* 381 U.S. 68, 74 (1965).

As a general rule, a statute should be construed according to its subject matter and the purpose for which it was enacted. Sutherland, Statutory Construction, section 58.06, at 474 (4th ed. 1973). The legislative history of the Military Personnel and Civilian Employees' Claims Act shows a clear purpose of allowing all Government employees the opportunity to present a claim for loss or damage to personal property.

The origin of 31 U.S.C. § 3721 was the Military Personnel Claims Act of 1945, 59 Stat. 225, applicable to military personnel and civilian employees of the military departments. The authority was extended to civilian agencies as well with passage of the Military Personnel and Civilian Employees' Claims Act in 1964 (78 Stat. 767). The Committee on the Judiciary of the House of Representatives

[2] *Macomber* v. *United States,* 335 F. Supp. 197 (D.R.I. 1971). Several other courts have reached the same result under other "final and conclusive" statutes. See also *Work* v. *Rives,* 267 U.S. 175 (1925), discussed in text, *supra; United States* v. *Babcock,* 250 U.S. 328 (1919).

stated that enactment "would extend equivalent authority to all Government agencies so that all employees of the Government and military personnel would be entitled to assert such claims." H.R. Rep. No. 460, 88th Cong., 1st Sess. 2 (1963).

In an amendment to the Act, Pub. L. No. 89-185, the Committee further discussed its purposes, as follows:

> This committee has repeatedly recognized that the United States owes a moral duty to compensate individuals who have suffered such heavy personal losses, because of their service to the Government. * * * [T]he introduction of private relief bills has served to focus attention on the fact that there is a serious lack in the existing law to cope with these losses.
>
> [I]t has seemed that there is a lack of understanding of the responsibility of the United States regarding the losses which give rise to claims cognizable under the statutes referred to in this bill. * * * It is only just that the Government assume this responsibility of paying for losses while the property is being sent under Government contract to a new place of duty. H.R. Rep. No. 382, 89th Cong., 1st Sess. 5 (1965).

Additional discussion of the intent of the Act is found in the legislative history of Pub. L. 97-226, which increased the ceiling payable on claims from $15,000 to $25,000. The report of the Senate Judiciary Committee stresses the inequities of requiring "military personnel and civilian employees of the Government to risk losses of their property incident to their service without adequate protection." It further states "the Committee believes that it is important that Government personnel have a guarantee of reasonable recompense for losses suffered as a result of Government directed moves." S. Rep. No. 97-482, 97th Cong. 2d Sess. 3 (1982).

There is also evidence in the legislative history of the 1964 Act and subsequent amendments that one purpose of the Act was to reduce the need for Congress to consider private relief bills. *See, e.g.,* S. Rep. No. 1423, 88th Cong., 2d Sess. 6 (1964). Routine denial of all claims would thwart that purpose.

It seems clear from the foregoing that Congress did not contemplate that an agency simply refuse to consider all claims.

Clearly the intent of the Act and its various amendments was to broaden, not narrow, the coverage of Government employees. On its face, the Act is broadly written; an agency "*may* settle and pay a claim." [Italic supplied.] This language is discretionary, not mandatory. It does not create a legal entitlement. Certainly, as noted earlier, an agency has considerable discretion in implementing the Act. However, a blanket refusal to consider all claims is, in our opinion, not the exercise of discretion.

Our point is illustrated by the Supreme Court's decision in *Work* v. *Rives,* 267 U.S. 175 (1925). That case concerned a statute structurally very similar to the Military Personnel and Civilian Employees' Claims Act of 1964. The statute involved was section 5 of the Dent Act, 40, Stat. 1274, under which Congress authorized the Secretary of the Interior to compensate a class of people who incurred losses in furnishing supplies or services to the Government during war. The Secretary's determinations on particular claims were to

be final and conclusive. As is the Military Personnel and Civilian Employees' Claims Act of 1964, section 5 of the Dent Act "was a gratuity based on equitable and moral considerations" (267 U.S. at 181), vesting the Secretary with the ultimate power to determine which losses should be compensated.

The plaintiff in *Rives* had sought mandamus to compel the Secretary to consider and allow a claim for a specific loss, incurred as a result of the plaintiff's obtaining a release from a contract to buy land. The Secretary had previously denied this claim because he had interpreted the statute as not embracing money spent on real estate. The Supreme Court held that it could not compel the Secretary to take any further action; the Secretary had made a decision and had articulated reasons for it.

The case is relevant here in that the Court went on to cite, and distinguish, a line of cases in which "a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator [plaintiff] in such cases does not ask for a decision any particular way but only that it be made one way or the other." 267 U.S. at 184. Thus, the Court could not compel the Secretary to exercise his discretion to achieve a particular result, but the Secretary had in fact exercised that discretion.

The concept is further illustrated in *Rockbridge* v. *Lincoln*, 449 F.2d 567 (9th Cir 1971). There, Congress had delegated to Interior Department officials the discretion to determine the specific content of regulations pertaining to 25 U.S.C. §§ 261 and 262. In a class action by Indians to compel the adoption of regulations, the Ninth Circuit noted that the term "discretion" does not include the "unbridled discretion to refuse to regulate," but rather implies that the designated officials "shall exercise discretion in deciding what regulations to promulgate and in determining specific quantities, prices and kinds." 449 F.2d at 571.

Applying this concept to the Military Personnel and Civilian Employees' Claims Act of 1964, we do not think the administrative discretion conferred by Congress is satisfied by its non-exercise, that is, by the simple refusal to consider all claims.

It is generally recognized that administrative discretion may be exercised in either of two ways—the issuance of regulations or case-by-case adjudication. (The two are of course not mutually exclusive.) See generally 2 Davis, Administrative Law Treatise ch. 7 (2d ed. 1979); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). Under the first approach, which seems to be the more common method of implementing the statute in question, an agency issues regulations defining the types of claims it will or will not consider, together with whatever other administrative requirements it wishes to impose. Under the second approach, the agency renders a decision on each claim, stating its reasons for allowance or disal-

lowance, and gradually builds a body of "regulations" through this process.

We do not purport to tell any agency which approach it must follow.[3] It seems to us, however, that either approach should include, at a minimum, the consideration of claims incident to changes of duty station. This was one of the major situations that prompted the original legislation, and it has been repeatedly emphasized in the legislative history of subsequent amendments. To exclude change-of-station claims would be clearly inconsistent with congressional intent. Beyond this, however, we recognize that there is considerable variation among agencies [4] and we would view it as inappropriate to comment on which types of otherwise cognizable claims another agency should or should not consider. We hold merely that an agency has the duty to actually exercise its discretion and that this duty is not satisfied by a policy of refusing to consider all claims.

[B-209938]

Contracts—Negotiation—Offers or Proposals—Best and Final—Additional Rounds—Auction Technique Not Indicated

Agency's requests for three best and final offers did not automatically establish an auction situation since the multiple best and final offers were required by the receipt of contingent offers and the agency's determination that several solicitation requirements, which were inhibiting the competition, were not essential to its minimum needs.

Contracts—Negotiation—Offers or Proposals—Evaluation—Discount Terms

Where a solicitation reserved to the agency the right to delay delivery without cost for a specified period of time, best and final offer which included a prompt delivery discount was properly evaluated without consideration of the discount since at that time delays in delivery appeared probable.

Contracts—Damages—Liquidated—Reduction of Amount—Reasonableness

Agency did not act unreasonably in substantially reducing the amount of liquidated damages that could be imposed where the agency could conclude that the original provision was unnecessary and, because it could have resulted in a potential risk exposure of 3.5 times the contract price, may have been unenforceable.

Matter of: CMI Corporation, September 2, 1983:

CMI Corporation protests the request for a third round of best and final offers by the United States Marine Corps under request for proposals (RFP) No. M00027-82-R-0030 and the subsequent award of a contract to IBM Corporation. The Marine Corps made its award after receipt and evaluation of the third best and final

[3] We recognize that 31 U.S.C. § 3721(j) now provides that "the head of each agency shall prescribe regulations to carry out this section." However, the mandatory "shall" was not used in the source provision—see 31 U.S.C. § 241 (1976)—and we construe the recodification in acordance with its stated intent of restating the law without substantive change.

[4] For example, agencies vary considerably on the extent to which they will consider claims for damage to privately owned motor vehicles used on official business.

offers. The RFP solicited offers to provide three systems of IBM computer equipment to be installed in mobile vans and deployed to provide mission support in combat environments. CMI contends the agency conducted an auction by repeatedly requesting subsequent rounds of best and final offers after revising the specifications to accommodate the conditions insisted upon by IBM so as to permit IBM's previously unresponsive proposals to become acceptable. CMI asserts these actions exhibit bias in favor of IBM and bad faith by the agency.

The protest is denied.

There are several RFP provisions at issue here, among them being the provision for liquidated damages, the delivery schedule, the requirement for certain manuals and certain maintenance provisions.

As originally conceived, the liquidated damages provision was to apply for late delivery of each component (about 26 in each system) as well as to each system itself, bringing potential liquidated damages to $14,000 per day or a potential expense in excess of three times the contract value. As discussed below, IBM took exception to this liability.

The solicitation also contained fixed delivery dates for each system. However, since systems 2 and 3 are to be delivered to a "van integration" contractor as Government Furnished Equipment, the solicitation contained a clause that permitted the Government to delay the delivery for these systems for a period of up to 120 days provided certain notice requirements were met. At the time of receipt of the third round of best and final offers, the "van integration" contract had not been awarded so that a delay in the need for the computer equipment was foreseeable.

Four firms responded to a synopsis for the requirement that appeared in the Commerce Business Daily, but only IBM and CMI submitted proposals on June 10, 1982. Each offered the required IBM equipment and each was found to be technically acceptable with respect to the hardware. Each proposal, however, contained exceptions, contingencies and requests for revisions. After discussions with each offeror, the specifications were amended in minor respects and the offerors were requested to submit best and final offers by August 20.

IBM's best and final offer contended that the solicitation provision imposing liquidated damages of $1,000 per day for late system delivery plus $500 per day for late delivery of each component or item of software was punitive because it could amount to $14,000 per day and reflected a potential risk exposure of 3.5 times the contract price, IBM asked that the liquidated damages be limited to a total of $1,000 per day. IBM also added a separate one time surcharge for accepting the $1,000 per day liquidated damage provision, and additional surcharges to cover its potential liability arising from a solicitation provision requiring the contractor to extend

on a day-for-day basis the 90-day component maintenance period and the 365-day central processor maintenance period whenever a component or the processor was inoperative for 8 consecutive hours or more than 10 hours in a 24-hour period.

CMI's first best and final offer took no exception to the liquidated damages provision but did not include a required configuration cost table and a specific list of manuals. CMI also offered a "prompt delivery discount" of $63,157 each from the price of systems 2 and 3 if the agency accepted them on schedule without exercising its right under the provision to delay delivery for the maximum 120 day period. IBM's price, including its proposed surcharges, was lower than that of CMI whether or not CMI's proposed prompt delivery discount was considered.

The agency states that it was uncertain whether IBM's proposed liquidated damage provision was a condition and whether CMI understood that the provision could result in liquidated damages of $14,000 per day. The agency reassessed its position and although there was some disagreement within the agency, it issued an amendment limiting the liquidated damages to $1,000 per day.

A second round of best and final offers was received on August 27. Among other things, IBM again proposed the surcharges mentioned above and took exception to a provision requiring equipment replacement and repair under certain conditions. CMI's best and final offer took no exceptions but it contained an unpriced configuration cost table and again stated that all manuals normally furnished by IBM would be furnished. CMI's prompt delivery discount was increased to $68,421 each for systems 2 and 3.

On September 29, the contracting officer recommended to the agency's contracts review board that award be made to IBM whose evaluated price was lower than that of CMI. This was so even though full consideration was given to CMI's prompt delivery discount and IBM's price included the surcharges which were evaluated at the maximum of 12 months because the agency could not determine whether these charges were meant to apply only during the 90-day period or the 1-year period. The review board rejected this recommendation because it felt that substantial agreement had not been reached and it ordered that the negotiations be reopened. The contracting officer, however, then recommended that award be made to CMI on grounds that IBM's proposal was unacceptable because of its insistence on major changes while CMI's failure to provide the cost table and list of manuals was insignificant. This recommendation was also rejected and the review board again ordered that negotiations be reopened with both parties.

The contracting officer then issued an amendment on November 16 to supersede all previous amendments. This amendment listed the required manuals, eliminated the cost table requirement and retained the liquidated damages provision, maintenance response time and downtime credit provisions as previously modified and

called for a third round of best and final offers by 2:00 p.m. November 23.

CMI and IBM submitted their offers on time and IBM's total price including surcharges for liquidated damages, maintenance response and downtime was $1,968,966. The specific amount of each of the surcharges was restricted from disclosure by IBM and the agency denied CMI's request for this information under the Freedom of Information Act. This information has, however, been provided to our Office and has been reviewed in connection with this decision.

CMI's offer was:

Hardware & Transportation	$2,189,474
Less: Prompt Delivery Discount	136,842
	2,052,632
Prompt Payment Discount (5%)	102,632
Total	1,950,000

The contracting officer recommended that award be made to CMI as the offeror with the lowest price. The review board, however, rejected this recommendation because CMI's price would be low only if the prompt delivery discount could be taken and the agency's ability to take advantage of this discount was speculative. The board recognized that the prompt delivery discount had been evaluated in CMI's previous best and final offers but pointed out that CMI's price had not been low even when the discount was considered.

CMI's offer was therefore evaluated by disregarding the prompt delivery discount. The prompt payment discount was then applied to the base price for hardware and transportation with the following result:

Hardware & Transportation	$2,189,474
Less: Prompt Payment Discount (5%)	109,474
Total	2,080,000

Award was made to IBM at an evaluated price of $1,968,005, which was $961 less than IBM's last offer because a portion of the surcharges was postponed until FY 84.

With respect to CMI's allegations of bad faith, bias and arbitrary action by the agency, we point out that a showing of bad faith requires undeniable proof that the agency had a malicious and specific intent to injure the party alleging bad faith. *Bradford National Corporation*, B-194789, March 10, 1980, 80-1 CPD 183. Further, we

will not find a discretionary action to be biased or arbitrary if the record indicates a reasonable basis for such action. *Decision Sciences Corporation,* B-183773, September 21, 1976, 76-2 CPD 260. Thus, even if it is assumed that the agency had a bias against CMI, it must be shown that it was translated into action which affected CMI's competitive position. See *Optimum Systems, Inc.,* 56 Comp. Gen. 934 (1977), 77-2 CPD 165; *Earth Environmental Consultants, Inc.,* B-204866, January 19, 1982, 82-1 CPD 43.

In our view, CMI has not submitted evidence meeting the heavy burden of proof imposed on any party alleging bad faith, bias or arbitrary action by an agency. CMI's allegations are based primarily on the fact that the agency requested three rounds of best and final offers and the agency's relaxation of the specifications which CMI views as unwarranted compromises of the agency's minimum needs in order to accommodate IBM. The record, however, supports the agency's explanation that the multiple best and final offers were required by its failure to receive unconditional offers until the receipt of the third best and final offers and its realization that some solicitation provisions which were inhibiting competition were not vital to its needs. The fact that IBM might have benefited more than CMI by these actions is irrelevant because there is no evidence that they were taken for any reason other than to promote competition by restating the agency's minimum needs more accurately. *International Computaprint Corporation,* B-207466, November 15, 1982, 82-2 CPD 440.

The factual situation presented here also does not show that an auction, within the meaning of Defense Acquisition Regulation (DAR) § 3-805.3(c), has taken place. Multiple calls for best and final offers do not automatically create an auction. See *Bell Aerospace Company,* 55 Comp. Gen. 244 (1975), 75-2 CPD 168.

Further, we do not agree with CMI's contention that after having evaluated the prompt delivery discount in all of CMI's previous offers without objection, the agency should have given CMI an opportunity to bid on the agency's "real delivery requirements" after the third best and final offers. Perhaps the agency should have earlier predicted the probability of a delay in its needs for the equipment due to the slippage in the van integration schedule but, at the time of the final evaluations, the agency had no reasonable grounds for believing that this discount could be taken. From the record it appears that CMI was aware of the delay of the van integration procurement and it should have been aware that the discount might not be evaluated. Clearly there was no need for additional best and final offers based on the real delivery requirements because CMI's offer provided a price if the discount could be taken and another price if delays made taking advantage of the discount unrealistic.

CMI also argues that the agency could have accepted, stored and shipped the systems at a cost substantially below the savings it

would have obtained if it had accepted the equipment on schedule and taken the discount. We do not agree. Consideration of CMI's prompt delivery discount would have required the agency to change its plans, locate appropriate storage and transportation, determine the attendant costs and evaluate the risks. Thus, at the time of the evaluation, the net savings to be obtained by taking the discount and the ultimate cost and risk to the Government were uncertain. In our view, the Government was not required to assume these risks.

CMI also contends that the agency had no reasonable basis for its belief that CMI may not have understood the extent to the liquidated damages provision and suspects that the agency contrived this reason as additional support for relaxing the provision to meet IBM's objections.

After IBM's objections, the using agency prepared an analysis of the initial liquidated damage clause and concluded that it was reasonable in view of the damages which could be anticipated if delivery of the equipment was delayed. Nevertheless, the contracting officer decreased the maximum liquidated damages exposure to $1,000 per day, believing that the $14,000 per day in damages would be viewed as an unenforceable penalty under DAR § 1-310.

We believe that the agency had ample grounds for revising this provision in spite of the analysis and regardless of whether CMI understood it. The analysis assumed complete inactivity on the part of all personnel to be assigned to the systems if the systems were delayed and that all components and items of software would result in equal damages to the Government if any of them were delivered late. The analysis contains no indication as to what the agency could do to mitigate its damages in case of late delivery. Moreover, the initial provision presented a total risk exposure which would exceed the contract price by 3.5 times and may therefore have been unenforceable. *See* 11 Comp. Gen. 384 (1932); *Allis-Chalmers Manufacturing Company,* IBCA No. 796-8-69, 70-1 BCA 8279.

We also find no basis to support CMI's speculation that the IBM surcharges may have been evaluated improperly. CMI contends that a correct evaluation would have resulted in IBM's price being $93,852.20 higher than CMI's price if CMI's prompt delivery discount had been included. However, as our discussion indicates, it was proper for the agency not to evaluate the prompt delivery discount and the record shows that the surcharges in IBM's best and final offer were calculated correctly.

The protest is denied.

[B-210467]

Mileage—Military Personnel—Ports of Embarkation and Debarkation—Payment Basis

Notwithstanding a Marine Corps regulation authorizing a mileage allowance and per diem from an alternate aerial port of debarkation to a new permanent duty station incident to a transfer from outside the United States to the United States, for the purpose of recovering a relocated privately owned vehicle, the member's entitlement is limited to allowances based on travel from the appropriate aerial port of debarkation serving the new station to the new station, in the absence of an amendment to the Joint Travel Regulations.

Matter of: Lieutenant Colonel Bruce L. Harjung, USMC, September 12, 1983:

Is a mileage allowance and per diem authorized for a member's travel from an aerial port of debarkation to a new station when incident to a permanent change of station from overseas the member selects a different aerial port of debarkation than the one serving his new station? Additionally, if the member arrives at the aerial port of debarkation serving his new station is he entitled to the allowances to the selected aerial port of debarkation? The answer to both questions is no, as will be explained.

These questions were submitted by Major M. K. Chetkovich, USMC, Disbursing Officer, Marine Corps Base, Camp Pendleton, California, and have been assigned Control No. 83-2 by the Per Diem, Travel and Transportation Allowance Committee.

Lieutenant Colonel Bruce L. Harjung, USMC, was ordered to make a permanent change of station from Okinawa to Camp Pendleton, California, in July 1982. Los Angeles International Airport is the appropriate aerial port of debarkation for Camp Pendleton. Apparently it is Marine Corps policy to allow a member under such circumstances to select an aerial port of debarkation nearest the place where his relocated privately owned vehicle is located. In Colonel Harjung's case, his family and his privately owned vehicle were at Quantico, Virginia. As a result he chose St. Louis as the nearest aerial port of debarkation. When Colonel Harjung traveled, however, he arrived at Los Angeles International Airport. He then traveled by commercial air and privately owned vehicle to Quantico and then to Camp Pendleton. He is claiming a mileage allowance plus per diem on a constructive basis from Los Angeles to St. Louis and then from St. Louis to Camp Pendleton.

Colonel Harjung's claim is based on an April 1982 Commandant of the Marine Corps message (ALMAR 111/82), which provides in part that when a member has a relocated privately owned vehicle, an alternate aerial port of debarkation may be selected for the purpose of picking up the vehicle. The regulation also provides that the member is entitled to a mileage allowance and per diem from the aerial port of debarkation nearest the relocated vehicle to the new duty station.

The disbursing officer notes that there does not appear to be any provision of Volume 1 of the Joint Travel Regulations (1 JTR) authorizing this entitlement and she asks whether payment may be made in this case on the basis of ALMAR 111/82. She indicates that Colonel Harjung's claim has been settled under 1 JTR, paragraph M4159, by paying a mileage allowance and per diem from Los Angeles International Airport, the appropriate aerial port of debarkation for Camp Pendleton, to Camp Pendleton.

In commenting on this situation, the Commandant of the Marine Corps supports payment of the claim on the basis of ALMAR 111/82. He advances the opinion that, which aerial port of debarkation is used is not a travel entitlement issue to be determined uner the Joint Travel Regulations, but, rather, is a matter to be decided by the service concerned. Additionally, he notes that ALMAR 111/82 is in accordance with *Matter of Fedderman and Espiritu,* 60 Comp. Gen. 564 (1981); and 60 *id.* 562 (1981).

Prior to dealing with the entitlements in this case, certain assumptions must be made. Presumably "relocated privately owned vehicle" refers to the member's vehicle that was relocated incident to the travel of his dependents to a designated place in connection with his transfer to Okinawa, a restricted station. Travel to a designated place by dependents in these circumstances is authorized under 1 JTR, paragraph M7005. When a member is transferred from a restricted station to a nonrestricted station in the United States, transportation of his dependents and household goods from the designated place to the new station is authorized at Government expense. However, the member's entitlement is limited to travel from the old station to the new station. He does not receive any entitlements for his travel to or from the designated place where his dependents, household goods, and privately owned vehicle are located.

We cannot agree with the view that the port of debarkation is not a travel entitlement issue but rather is a matter for determination by the service concerned. Paragraph M4159-1-3 of 1 JTR provides that allowances may be paid for the official distance between the appropriate aerial or water port of debarkation serving the new station and the new station in connection with permanent change-of-station in the United States. Clearly, this is a travel entitlement issue since it affects the travel costs to the Government on permanent changes of station. To authorize alternate ports of debarkation which do not service the member's new station would be tantamount to authorizing circuitous travel to the member's new station at Government expense, which was never intended. See 54 Comp. Gen. 850 (1975) and 47 *id.* 440 (1968). Accordingly, we must conclude that the appropriate aerial port of debarkation in this case is Los Angeles.

While two decisions of this Office were cited by the Marine Corps in support of the authorization contained in ALMAR 111/82, a dis-

cussion of only one, 60 Comp. Gen. 562 (1981), will sufficiently explain our position. That decision involved travel entitlements of members who because of their assignments are entitled to transportation of their dependents and household goods to a designated place. We concluded that the Joint Travel Regulations could be amended to provide travel and transportation entitlements to the member in such cases before and after the permanent change of station if the travel was based on the need of the member to assist in arranging for transportation of dependents, household or personal effects, or a privately owned vehicle.

Amendments to Volume 1 of the Joint Travel Regulations authorizing travel in the circumstances described above have not been issued. Accordingly, no authority for such travel existed at the time of Colonel Harjung's change of station.

We recognize that the pertinent provision of ALMAR 111/82 was designed to defray the costs incurred by a member in traveling to the location of his dependents, household or personal effects, or privately owned conveyance incident to his return from a restricted station. However, 37 U.S.C. § 411 requires that regulations promulgated pursuant to 37 U.S.C. § 404 (which provides for members' travel entitlements) be uniform as far as practical in application to all the services. As a result an individual service is not authorized to promulgate regulations allowing an entitlement which has not been authorized by Volume 1 of the Joint Travel Regulations.

Accordingly, the settlement of Colonel Harjung's claim on the basis of mileage allowance and per diem for his travel from Los Angeles to Camp Pendleton was proper, and his claim for allowances from Los Angeles to St. Louis and then to Camp Pendleton may not be allowed.

[B-211820]

Appropriations—Availability—Air Purifiers (Ecologizer)

Purchase of air purifers that would clean the air of tobacco smoke in Department of Interior public reading room does not violate rule against purchasing equipment for personal benefit of individual employees, since all employees and members of public who use the room would benefit. 61 Comp. Gen. 634 is distinguished.

Matter of: Department of Interior—Purchase of Air Purifiers, September 12, 1983:

This is in response to a request by a Department of Interior contracting officer for our decision as to the propriety of the proposed procurement of two air purifiers for use in the Arizona Public Land Records Room. For the reasons stated below, we find that the proposed expenditures may be made.

The Acting Chief of the Branch of Lands and Minerals Operation, Bureau of Land Management, Department of the Interior, has requisitioned two "Smokeeaters," a type of air purifer, to be installed in a public land records room at a cost of $1200 plus instal-

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lation costs. The small, enclosed room where the air purifiers will be installed is the sole source of public land records in the State of Arizona. The room was designed to service about one-third of the traffic it now accommodates. Typically about 100 people use the room daily. Users of the room often smoke cigarettes, cigars and pipes. As a result, the area is often filled with smoke, causing discomfort, annoyance and complaints from both the public and Government employees. The air conditioning system is not able to relieve the air of so much smoke. Also, while "No Smoking" signs have been posted, the policy of prohibiting smoking has not been effectively enforced.

The question posed by the contracting officer is whether our decision in 61 Comp. Gen. 634 (1982), where we held that the purchase of an air purifier for the use of an employee suffering from asthma was improper, applies to the proposed purchase. We conclude that it does not.

Our objection to the purchase in 61 Comp. Gen. 634 was that appropriated funds were used to make a purchase that was for the personal use of an individual employee. We have frequently held that such expenditures cannot be made from appropriated funds unless they are expressly authorized by Congress. See cases cited in our decision, *id.*, at 635.

The proposal to purchase air purifiers for a public reading room presents no such problem. From the justification for the purchase provided us, the air purifiers will benefit the public users of the reading room as well as improve the working conditions of Government employees who work in the area. Besides the obvious improvement in the comfort of all who use the reading room, the contracting officer notes that through the use of air purifiers the morale of employees who use the work area is expected to improve from the reduction in tobacco smoke. We reached a similar result in B-119485, April 15, 1954, where we concluded that the Public Health Service could purchase portable air conditioners for use in a dental clinic since the air conditioners would improve patient comfort and the efficiency of employees. Accordingly, we have no objection to the purchase of the air purifiers in this case if the appropriation used is otherwise available for this purpose.

[B-210338, B-202116]

Corporations—Legal Services Corporation—Conducting Training Programs—Advocacy of Public Policies

During January 1981, the Denver Regional Office of the Legal Services Corporation (LSC) held a training session for grantee personnel of the region. The training session speakers included Corporation headquarters officials and officials from grantees, who presented material on the LSC Survival Plan. These officials advocated the public policy of resisting the threatened Reagan Administration cuts in the legal services and other social benefits programs. These same speakers encouraged those in attendance to engage in political activities of building coalitions in order to mount a grass roots campaign to lobby Congress to vote against measures to curtail

these programs. This activity constituted a violation of 42 U.S.C. 2996f(b)(6) which prohibits the use of corporate funds by grantees to conduct training programs that advocate public policies or encourage political activities.

Corporations—Legal Services Corporation—Coalition and Network Building

The LSC held a training session in its Denver Region in January 1981. Representatives of grantees in the 5-state region attended. Corporate officials and grantee staff attorneys presented lectures and workshops on how grantees could build coalitions with community groups and agencies to form a grass roots organization to lobby Congress for legal services and other social benefit programs. Grantee representatives described coalition building projects that were underway. This activity constitutes a violation of 42 U.S.C. 2996f(b)(7) which prohibits grantees from using corporate funds to build organizations such as coalitions and networks.

Corporations—Legal Services Corporation—Advocacy or Opposition of Ballot Measures

During a January 1981 training session at the LSC Denver Region, Alan Rader, a staff attorney with the Western Center on Law and Poverty in Los Angeles, an LSC grantee, gave a presentation on how he had organized a campaign with LSC funds to defeat a 1980 California tax reduction ballot measure entitled "Proposition 9." He hired campaign coordinators and organized broad-based coalitions with community groups and agencies. This activity constitutes a violation of 42 U.S.C. 2996e(d)(4) which prohibits the Corporation and its grantees from using corporate funds to advocate or oppose ballot measures.

Corporations—Legal Services Corporation—Enforcement Responsibilities—Compliance of Recipients with LSC Act

The LSC and certain grantees conducted a training session in the LSC Denver Region in January 1981 during which grantee officials violated certain restrictions on training and coalition building activities contained in 42 U.S.C. 2996f(b)(6) and (7). The Corporation failed to carry out its enforcement responsibilities under 42 U.S.C. 2996e(b)(1) to insure the compliance of recipients and their employees with the provisions of the Legal Services Corporation Act of 1974, and assumed a contrary role of encouraging grantees to violate the aforementioned provisions.

To The Honorable Orrin G. Hatch, United States Senate, September 19, 1983:

This is in response to your recent letters requesting this Office to render a legal opinion concerning whether any of the documents and other materials that you recently obtained from the Legal Services Corporation (LSC) files and turned over to this Office contain evidence of violations of certain restrictions in the Legal Services Corporation Act of 1974 (42 U.S.C. § 2996).

BACKGROUND

At the end of 1980, Representative Sensenbrenner provided this Office with certain internal memoranda he had obtained from the LSC and requested an opinion on whether these documents indicated that the Corporation had violated Federal anti-lobbying laws. We rendered our opinion in 60 Comp. Gen. 423 on May 1, 1981, holding that the material in the memoranda indicated that LSC had itself engaged and allowed its grant recipients to engage in lobbying activities prohibited by Federal law. You have now provided

us with several hundred additional internal memoranda and other materials from the LSC headquarters and regional office files covering primarily the 1981 calendar year period and have requested a determination concerning whether these materials contain evidence indicating that LSC or its fund recipients violated statutory restrictions on its training and coalition building activities as well as restrictions on advocating or opposing ballot measures, initiatives and referendums.

It would require several months for us to review the enormous volume of material you have supplied and we plan to accomplish this task in connection with our investigation of the LSC survival plan that you requested. However, in order to comply with the short time frame of your request to provide you with a response regarding the issues referred to above by mid-September 1983, we have selected certain material that, in our opinion, indicate violations of restrictions you mentioned.

TRAINING SESSION

One piece of documentary evidence we reviewed was a video cassette recording of a training session at a Denver Regional Project Directors meeting conducted by the Corporation and certain grantees beginning on January 12, 1981, at the Hilton Harvest House in Boulder, Colorado. Similar meetings were held at the other regional offices during December and January 1981. Several officials from the Corporation headquarters in Washington and from grantee organizations located in the Western region of the country were present at the session and made presentations. These officials included Dan Bradley, President of the Corporation, Jeanne Connolly, Assistant Director of the Corporation's Government Relations Office, Alan Houseman, Director of the LSC Research Institute, Jonathan Asher, Executive Director of the Legal Aid Society of Metropolitan Denver, Alan Rader, Staff attorney with the Western Center on Law and Poverty in Los Angeles, a Corporation-funded California State Support Center, and Don Wharton from the Oregon Legal Services Corporation, a Corporation-funded Oregon State Support Center. The session was attended by approximately 100 persons, including program officials and staff attorneys from states comprising the Denver region and representatives of outside organizations.

We have summarized and in some cases quoted from the presentations of the above-mentioned speakers. This material is included as Appendix I (excluded from this publication but available upon request to the General Accounting Office). In analyzing the content of the first day presentations contained on the recording, we must conclude that the remarks of the speakers provide evidence of violations of statutory restrictions on the use of Corporation funds for certain activities which we shall explain below.

TRAINING PROHIBITION

The training prohibition is contained in 42 U.S.C. § 2996f(b)(6) and reads as follows:

> (b) No funds made available by the Corporation under this subchapter, either by grant or contract, may be used—
> (6) to support or conduct training programs for the purpose of advocating particular public policies or encouraging political activities, labor or antilabor activities, boycotts, picketing, strikes and demonstrations, as distinguished from the dissemination of information about such policies or activities, except that this provision shall not be construed to prohibit the training of attorneys or paralegal personnel necessary to prepare them to provide adequate legal assistance to eligible clients;

This provision restricts grantees and contractors from using funds provided by the Corporation to support or conduct training programs for the purposes of advocating particular public policies or encouraging political activities as distinguished from the dissemination of information about such policies or activities.

The legislative history contained in the House Committee on Education and Labor Report to accompany H.R. 7824, the Legal Services Corporation Act of 1974 (H. Rep. 93-247, 93rd Cong., 1st Sess. 11) is instructive regarding the intent of Congress concerning this provision. The section-by-section analysis explains the provision as follows:

> The Committee would like to assure that the legal services provided to eligible clients are of the highest quality. Although a recipient, therefore, should be funded to carry out an appropriate training program, *the Committee expects that no grantee—under the guise of fulfilling program training functions—will advocate any political action* including, but not limited to, boycott, demonstrations, strikes or picketing. Training programs should seek to fully inform attorneys and their clients about indigents' legal rights and how such rights can be implemented, but *the training sessions should not be organized to advocate particular political actions.* Moreover, while information is disseminated about public policies that affect poor people's lives, and while training programs should set forth relevant information concerning alternative means that can be utilized to enforce poor people's rights, the training sessions should not be organized to advocate any particular political action. The provision, setting forth the responsibilities of training programs, is not intended to prohibit attorneys, who are paid for by corporation funds, from providing legal advice to eligible clients and their organizations. [Italic supplied.]

It is clear from the legislative history that grantees and contractors are restricted from using funds provided by the Corporation for training programs that advocate particular public policies or encourage political activities, but are allowed to provide information about public policies and how they may affect clients. During training programs for attorneys and other staff personnel, grantees and contractors may legitimately disseminate information about such public policies that impact on poor people and discuss legal remedies that may be attempted on behalf of such clients. However, they are prohibited from advocating specific public policies or urging the use of political activities in connection with training programs. Grantees and contractors may neither directly conduct such training programs nor provide support to other organizations that are conducting such programs where such support involves the use of funds provided by the Corporation.

The January 1981 Denver Regional Project Directors Meeting was an official Corporation sponsored training function. Numerous grantee organizations within the boundaries of the Multi-state Denver region, and some from without, sent representatives to the session and paid their salaries, travel and transportation expenses from funds provided by the Corporation. A meeting agenda and participants' list was published which we assume was provided to participants in advance (see Appendix II). (Appendix II is excluded from this publication but available upon request to the General Accounting Office.) The agenda characterized many of the presentations in such descriptive terms as to put participants on notice that the presentations would almost surely constitute violations of statutory restrictions on the use of corporate funds. For example, some of the presentations by grantees were listed as: "Mobilization and Coalition Building Case Studies—The California Prop. 9 and Oregon Experiences"; Strategy Workshops in Network Building Skills"; "Client and Community Organization Networking"; and "Mobilization and Coalition Building." During the session, speakers from the Corporation and grantee organizations advocated particular public policies and encouraged political activities. Some speakers advocated a policy of resistance to Reagan administration-announced objectives to reduce the budget for, and scale down, all social benefit programs. For example, Mr. Houseman described the nature of the threat by stating:

> What is at stake is not solely the survival of the Legal Services program. What is at stake is the survival of many social benefits—entitlement programs that we struggled, since 1965, to make real for poor people. We have struggled since 1965 to bring into the belt federal, state and local benefits. What is at stake is a number of other kinds or programs like affirmative action, civil rights programs. That, in the end, is what is at stake in this battle. Those, in the end, are far more important than legal services. Legal services is a tool to get them. Both of those kinds of things, both of those problems—legal services, social benefits, entitlement programs, civil rights. Those are what are at stake in this battle.

Don Wharton stated that his group decided that it would be a kind of malpractice if his grantee organization failed to fight for all those programs of social benefits that people had worked so hard for over the past decade. Mr. Houseman's presentation was entitled "Strategies for the Future" and advocated a policy that the budget, structure and authority of the Legal Services Corporation be preserved at then current, or near then current, levels in the face of the threat that the Reagan Administration might adopt a policy to significantly reduce the budget and curtail the operations of the Corporation. Mr. Houseman analyzed specific proposals that might be adopted by the Reagan Administration and discussed some counter strategies. He pointed out Reagan could appoint many new directors to LSC's Board who might be hostile to aggressive legal services and the staff attorney system. The counter strategy was to attempt to persuade moderate Reagan supporters such as former Senator Ed Brooke to apply for appointment to the LSC Board. Mr. Houseman also anticipated opponents would attempt to impose ad-

ditional restrictions on legislative representation and cases that involve suits against the Government, aliens, education and abortion. He anticipated major efforts to eliminate the National and State Support Center System and recovery of attorneys' fees in suits against the Government. His counter to these threats was to establish a massive nationwide grass roots lobbying effort in order to influence Congress to vote against any legislation designed to implement any of these measures. Most of the speakers encouraged those in attendance to engage in political activities. These activities included building coalitions and networks with other organizations with shared interests, such as elderly groups, private attorneys, League of Women Voters chapters, labor unions, church groups and community organizations to establish a grass roots lobbying campaign to lobby Congress in support of Legal Services and other social benefit and entitlement programs and in opposition to Reagan Administration proposals to curtail these programs. For example, Mr. Wharton told grantees that they were in a political campaign and urged them to build coalitions with groups such as unions, attorneys and minority groups to be effective. For another example, Jeanne Connolly urged members of the audience to engage in political activities by encouraging their friends to write letters to Members of Congress on behalf of the Legal Services Program. She also suggested that grantees designate a staff person to write letters for outside community organizations and agencies to send to Members of Congress requesting their support for the Program. We cite this as an example of political activities prohibited by the training prohibition in 42 U.S.C. § 2996f(b)(6). However, such activity may violate antilobbying provisions contained in 42 U.S.C. § 2996e(c), applicable to the Corporation and 42 U.S.C.§ 299f(a)(5), applicable to grantees, to the extent that specific legislation was pending before the Congress that they were attempting to influence. See, for example, 60 Comp. Gen. 423, *supra.*

In sum, the above activity constitutes a violation of the training prohibition contained in 42 U.S.C. § 2996f(b)(6) because grantee officials at the Denver meeting were supporting and were conducting a training program for the purpose of advocating particular public policies and were encouraging grantees to engage in political activities. Although Corporation officials did not technically violate this provision, they are not blameless for reasons set forth in the next section.

CORPORATION ENFORCEMENT RESPONSIBILITY

We should point out that 42 U.S.C. § 2996f(b)(6) is a restriction on the use of corporate funds for training activities by grantees and contractors. The Corporation has a responsibility under 42 U.S.C. § 2996e(b)(1)(A) to insure the compliance of recipients and their em-

ployees with the provisions of the Legal Services Corporation Act of 1974. That section reads as follows:

(1)(A) The Corporation shall have authority to insure the compliance of recipients and their employees with the provisions of this subchapter and the rules, regulations, and guidelines promulgated pursuant to this subchapter, and to terminate, after a hearing in accordance with section 2996j of this title, financial support to a recipient which fails to comply.

This provision authorized the Corporation to enforce restrictions in the Act on fund recipients. Instead of carrying out this statutory enforcement authority, the Corporation assumed a contrary role of encouraging grantees to engage in training activities prohibited by 42 U.S.C. § 2996f(b)(6). The Corporation scheduled the Denver Regional Office training session, invited recipients to send representatives to be trained, established the agenda to present material on the LSC Survival Plan and arranged for high level corporate officials and grantee representatives from other regions to make presentations that in certain cases advocated activities that violated provisions of the Act. It should also be noted that even apart from subsection (1)(A), every granting agency has an affirmative duty to insure that its grantees do not expend grant funds for unallowable purposes.

The corporate officials and grantee representatives advocated a public policy of fighting threatened cuts in the Legal Services and other Federal social benefit and entitlement programs and encouraged persons in attendance to engage in political activities including the building of networks and coalitions of organizations so as to effectively operate a nationwide grass roots campaign to lobby Congress in support of policies advocated by the Corporation. Because the Corporation encouraged grantees to engage in activities prohibited by the Act it was in no position to discipline grantees for their violations by taking the sanction required in 42 U.S.C. § 2996e(b)(1)(A).

PROHIBITION AGAINST CREATING ORGANIZATIONS

The prohibition against the use of appropriated funds to create organizations and coalitions is contained in 42 U.S.C. § 2996f(b)(7) and reads as follows:

No funds made available by the Corporation under this subchapter, either by grant or contract, may be used–

(7) To initiate the formation, or act as an organizer, of any association, federation, or similar entity, except that this paragraph shall not be construed to prohibit the provision of legal assistance to eligible clients;

As with the training prohibition discussed above, this provision prohibits grantees and contractors of the Corporation from using funds provided by the Corporation to organize any association, federation or similar entity. However, this provision is not to be interpreted in a manner that prohibits eligible clients from receiving legal assistance.

The legislative history of this provision provides information essential to an understanding of the intent behind the statutory language. Originally the Legal Services Corporation Act of 1974 contained a more detailed prohibition against establishing organizations. In the section-by-section analysis of the House Committee on Education and Labor Report to accompany H.R. 7824, the Legal Services Corporation Act of 1974 (H. Rep. 93-247, 93rd Cong., 1st Sess. 11), the original provision was set forth and explained. The analysis stated that funds made available by the Corporation may not be used either by grantees or contractors:

(5) to organize, to assist to organize, or to encourage to organize, or plan for, the creation or formation of, or the structuring of, any organization, association, or coalition, alliance, federation, confederation, or any similar entity, except for the provision of appropriate legal assistance in accordance with guidelines promulgated by the corporation.

The Committees believes that recipients and their employees should not be permitted to utilize program funds to organize any organization, association, coalition, alliance, federation, confederation, or similar entity. The Committee expects that pursuant to guidelines issued by the corporation, recipients shall provide appropriate legal assistance to eligible clients and organizations of eligible clients. Recipients and their employees are prohibited from organizing a group, but shall be permitted to prepare papers of incorporation and rendered other legal assistance as necessary.

In 1977, Congress decided to clarify the prohibition and amended the original provision in Public Law 95-222, 91 Stat. 1619, December 28, 1977, to read as it does today. The House Report No. 95-310, 95th Cong., 1st Sess. 14, that accompanied the Legal Services Corporation Act Amendments of 1977 (H.R. 6666) explains the clarifying amendment as follows:

The vague and overly broad language in current law prohibiting the use of Corporation funds "to assist" or "to encourage" the organization of any group has caused legal services programs to refrain from providing the advice and legal assistance Congress intended should be available to clients who are engaged in organizing activities. The American Bar Association, among others, has criticized the present law as unconstitutionally vague and violative of First Amendment rights. Section 7(b)(7) cures this vagueness. *It prohibits the use of Corporation funds for direct organizing activities*, but permits advice and legal assistance to clients who may themselves be engaged in such activities.

The committee recognizes a distinction between proper activities such as (1) assisting groups of poor people to organize by providing advice on matters of incorporation, by-laws, tax problems and other matters essential to the planning of an organization; (2) providing counsel to poor people regarding appropriate behavior for group members; and (3) encouraging poor people aggrieved by particular problems to consider organizing to foster joint solutions to common problems on the one hand, and those activities *that are improper* on the part of legal services programs in that they usurp the rightful roles of poor people, as potential members of such organizations, *namely, actually initiating the formation of or organizing directly, an association, group, or organization.* [Italic supplied.]

The legislative history makes it plain that grantees and contractors may not use funds provided by the Corporation to intitiate the formation, or act as organizer, of any organization, network or coalition. However, providers of legal services may give advice to eligible clients and assist them with matters that would enable them to plan, establish and operate an organization that the clients believe is in their best interest. For example, this provision would not prohibit a fund recipient from providing legal advice necessary to

establish a neighborhood day care center or a tenants' organization whenever such organizations are needed by clients for their own particular interests and direct benefit. On the other hand, recipients should not act as organizers of organizations on the basis of the recipients' perception that a particular organization would be beneficial to clients as a class or to the Legal Services Program. Also recipients should not initiate the formation of organizations where the initiating action is with the recipients and not with the clients. For example, this provision would prohibit a Corporation funded provider of legal services from organizing a group to campaign for the reduction of Defense spending on the theory there would be more funds available for Federal programs that assist poor people.

Almost without exception, each of the first-day speakers at the Denver Regional Project Directors Meeting that we named above devoted a large portion of time to a discussion of coalition building and networking, which is the establishment of informal organizational relationships on matters of mutual interest. Ms. Connally described the State Coordinator system that the Corporation and grantees had established in each state which served as a communications link between the Corporation headquarters and an informal state-wide organization of Legal Services Program supporters comprised of various organizations and individuals. Legal Services grantee organizations served as the core of State coalitions and provided financial and other support. Mr. Houseman outlined a plan to establish what he termed as an "outside Washington lobbying entity" that he referred to as "Action for Legal Rights." He stated that the organization was scheduled to be formally incorporated within the next week. He further indicated that plan called for LSC support centers (grantee fund recipients) to become affiliated with the organization, along with outside entities such as migrant farm workers groups.

Mr. Rader described a successful campaign that his support center funded with Corporation funds in California to defeat Proposition 9, a tax reduction ballot measure. He mentioned that his program had hired four field coordinators and built a coalition from organizations such as public employee unions and organizations interested in education, elderly groups and voluntary agency groups. Many of the 30 different Corporation funded Legal Services Programs in California committed staff time to the campaign and were involved in building the coalition of organizations involved in the campaign to defeat Proposition 9.

Don Wharton from the Oregon Legal Services Program explained that the Corporation fund recipients in his state were well on their way to building a state-wide coalition dedicated to the survival of Legal Services. Oregon Legal Services Programs had assigned staff members to perform liaison functions with organizations comprising the coalition. The state-wide coordinator, a Legal Services Pro-

gram deputy director, was responsible for coordinating the activities of these staff persons. Local programs were providing funds to pay the salary of a newly hired media and materials person whose efforts were devoted to the coalition.

These remarks by the above-named speakers reveal that a large number of Legal Services recipients were expending funds provided by the Corporation on organizing entities such as coalitions and networks in connection with the Legal Services survival program. These organizing activities were initiated and conducted by fund recipients themselves rather than in the course of providing a direct legal service to clients. In our opinion, such activities by LSC fund recipients violated the prohibition contained in 42 U.S.C. § 2996f(b)(7) against the use of funds provided by the Corporation to form organizations. Here again, the Corporation avoided its responsibilities under 42 U.S.C. § 2996e(b)(1) to insure the compliance of recipients and their employees with the provision of the Legal Services Corporation Act of 1974 and instead encouraged grantees to engage in the prohibited activities.

PROHIBITION AGAINST ADVOCATING OR OPPOSING BALLOT MEASURES

The prohibition against the use of appropriated funds to advocate or oppose any ballot measures, initiatives or referendums is contained in 42 U.S.C. § 2996e(d)(4) and reads as follows:

(4) Neither the Corporation nor any recipient shall contribute or make available corporate funds or program personnel or equipment for use in advocating or opposing any ballot measures, initiatives, or referendums. However, an attorney may provide legal advice and representation as an attorney to any eligible client with respect to such client's legal rights.

This provision restricts the Corporation and its fund recipients from making use of corporate funds or any personnel or equipment belonging to any LSC program organization to support, advocate, oppose, or urge the defeat of any ballot measures, initiatives, or referendums at the State, local or national levels of Government. On the other hand, a program attorney is free to provide advice and representation, as an attorney, to an eligible client with respect to such client's legal rights.

A review of the legislative history of this provision does not shed much light on what Congress intended beyond the plain meaning of the language of the section. The Conference Report of the Legal Services Corporation Act of 1974 (S. Rep. 93-845, 93rd Cong. 2d Sess. 22) makes the following comments concerning this provision:

The House bill and the Senate amendment prohibited the Corporation and any recipient from making available corporate funds, program personnel, or equipment for use in advocating or opposing ballot measures, referendums, or initiatives. The Senate amendment contained an exception to this prohibition where such provision of legal advice and representation is necessary by an attorney, as an attorney, for any eligible client with respect to such client's legal rights and representation. The House bill contained no comparable provision. The conference agreement prohibits advocating or opposing such measures, but provides that an attorney may provide

legal advice and representation as an attorney to any eligible client with respect to such client's legal right.

While the prohibition element of the provision is entirely clear, it might be helpful to offer our interpretation of the scope of the exception. Under the exception, a program attorney is authorized to provide legal advice and representation, as an attorney, with respect to such client's legal rights. The words "as an attorney" are significant because this restriction limits the attorney's role to that of protecting the client's rights and not of serving as a campaign manager, public relations advisor or major contributor. Persons desiring to offer a ballot measure need legal advice to know what legal rights they have under the law of the jurisdiction in which they are located. Accordingly, a program attorney is authorized to provide eligible clients with advice concerning their legal rights to offer ballot measures. Such advice would normally contain information on the requirements of law that the client must satisfy. For example, there is a general requirement that ballot measures be circulated among residents or registered voters of the jurisdiction in the form of a petition to obtain a certain number of signatures in order to have it placed on the ballot. Opponents of a measure frequently allege some defect(s) in the petition, such as irregularities with the qualifications of those signing the petition. Consequently, the matter may become the subject of litigation. A program attorney, as an attorney, may represent an eligible client who is sponsoring or opposing a ballot measure where the client's legal rights to offer or oppose the petition are at stake.

On the other hand, we think that a program attorney would be precluded by the above prohibition from providing any assistance in the form of Corporate funds or program personnel and equipment to a client waging a campaign in support of, or in opposition to, a ballot measure that is already on the ballot and before the voters. In this situation, the client's rights to offer or oppose a measure are not at issue so as to require the representation of an attorney.

Prior to launching the campaign against Proposition 9, Mr. Rader drafted a legal memorandum construing 42 U.S.C. § 2996e(d)(4) as allowing program attorneys to engage in a ballot measure campaign so long as they are representing an eligible client. Mr. Rader argued that the ballot measure restriction should be construed in the same manner as the restriction on legislative advocacy contained in 42 U.S.C. § 2996f. Mr. Rader also argued that the provision requiring "representation as an attorney" in 42 U.S.C. § 2996e(d)(4) concerning ballot measures should be considered to be amended by implication, inasmuch as a similarly worded provision in 42 U.S.C. § 2996f(a)(5) was amended by Congress in 1977 to read "representation by an employee of a recipient." Therefore, according to Mr. Rader, legislative advocacy activities could be performed by non-attorney employees of recipients.

We are not persuaded by Mr. Rader's arguments. Section 2996e(d)(4) of 42 U.S. Code is a blanket prohibition on both the Corporation and recipients which is a much broader prohibition against ballot measures than is the one against legislative advocacy contained in 42 U.S.C. § 2996f(a)(5) which affects only activities of fund recipients and includes several exceptions. Also, to be effective, an amendment of a provision must be express. Amendments by implication, like repeals by implication, are not favored in the law, and generally will not be upheld by the courts in doubtful cases. The Congress is generally not held to have changed a provision it did not have under consideration while enacting the amendment, unless the terms of the amendment are so inconsistent with the provisions of the prior law that they cannot stand together. See 1A Sutherland, Statutory Construction (4th ed. 139-140, citing cases).

In our opinion, based on Mr. Rader's description, the Corporation, the Western Center on Law and Poverty and certain other unidentified California Legal Services grantees violated the provision of 42 U.S.C. § 2996e(d)(4) in providing funds and personnel support for the Proposition 9 Task Force that operated a large scale opposition campaign to the Proposition 9 ballot measure during the first half of calendar year 1980. Mr. Rader in this campaign against Proposition 9 expended funds made available by the Corporation. He obtained a "Special Needs" grant from the Corporation for the Proposition 9 Task Force in the amount of $61,655 and also obtained staff commitments from approximately 30 California Legal Services Programs funded by the Corporation. The cost of these staff commitments is unknown and would be very difficult to compute, considering the lapsed time. However, we know that the campaign lasted approximately 3 months and that many staff persons at field offices throughout California devoted at least half their time to the campaign. With the grant, according to Mr. Rader, the Task Force hired 4 coordinators who had experience working with poor people and in political campaigns. Funds were also expended on clerical staff, travel, printing and postage associated with campaign activities. The Task force assembled a coalition of organizations, trained their members on the issues involved in opposing Proposition 9, and in voter registration and in get-out-the-vote techniques. The Task force activities described by Mr. Rader were the precise sort of activities that are prohibited by the statute's injunction against using corporate funds to oppose a ballot measure that is already on the ballot and where client's legal rights are not at issue.

SUMMARY

In summary, we wish to point out that we have not made a thorough review of all the LSC documents provided us by your office

concerning the LSC survival compaign. Therefore, we are unable to determine whether the January 1981 Denver Regional Project Directors Meeting is representative of LSC activities during the period in question. Indeed, we selected the material on this training session because it appeared to contain evidence indicating violations of the statutory prohibitions, that you cited in your request, by LSC fund recipients. After reviewing the training session material, we determined that certain LSC fund recipients had violated these statutory prohibitions, as has been described above.

Although appropriated funds were expended by these fund recipients contrary to law, we are of the opinion that the Government would be unable to recover the illegally expended sums from the recipients. In each instance the Corporation authorized and encouraged fund recipients to make the expenditures. By separate correspondence, we are recommending that the Corporation take appropriate action to amend its regulations governing the activities of fund recipients and Corporation officials in order to prohibit such expenditures in the future.

In accordance with your request, we are continuing our work on the overall investigation of the LSC survival campaign and members of our staff will contact your office from time to time to discuss this project.

[B-210437]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Husband and Wife Both Members of Armed Services—Dependent Children from Prior Marriage—Parent Not Occupying Government Quarters

Both of two uniformed service members, who are married to each other, and had dependent children in their own right prior to their marriage, may be paid an increased basic allowance for quarters on account of their respective dependents when the spouses do not reside together as a family unit because of their duty assignments. Whether the dependents reside with one, both, or neither of them would not affect their entitlement, provided that each member individually supports his or her dependent and is not assigned to Government family quarters.

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Husband and Wife Both Members of Armed Services—Dependent Children from Prior Marriage—Parent Not Occupying Government Quarters

When two uniformed service members who are married to each other, and who had dependent children in their own right prior to their marriage, are assigned to the same or adjacent bases, are not assigned Government quarters, and live together as a family unit, only one member may receive a quarters allowance at the increased "with-dependents" rate, and the other member may receive it at the "without-dependents" rate. Only one set of family quarters is required and all the dependent children belong to the same class of dependents upon which the increased allowance is based whether the children live with the members or not. To the extent that 60 Comp. Gen. 399 may be understood to contradict this holding, it is hereby modified.

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Husband and Wife Both Members of Armed Services—Dependent Children from Prior Marriage—Parent Not Occupying Government Quarters

When a uniformed service member's child meets the qualifications for becoming the member's dependent following the member's marriage to another member who is not the child's natural parent and the members have other dependent children, the child joins the class of dependent children upon which the member-parent's increased basic allowance for quarters entitlement is determined.

General Accounting Office—Jurisdiction—Military Matters—Dependency

Under 37 U.S.C. 403(h) the Secretary of the service concerned may make dependency and relationship determinations for enlisted members' quarters allowance entitlements and the determinations are final and may not be reviewed by the General Accounting Office. However, that provision does not apply to officers and the Comptoller General renders decisions in officers' cases and also in enlisted members' cases when requested by the service. In the interest of uniformity it seems appropriate to forward doubtful cases to the Comptroller General for decision particularly where an officer is married to an enlisted member.

Matter of: Chief Warrant Officer Ronald G. Hull, USCG, and Petty Officer Doris H. Hull, USCG, September 20, 1983:

This action responds to questions submitted by an authorized certifying officer of the United States Coast Guard concerning the propriety of payment of increased basic allowance for quarters on account of dependents, as claimed by Chief Warrant Officer Ronald G. Hull, USCG, and Petty Officer Doris H. Hull, USCG, who are married to each other and are not assigned to Government quarters. When the members reside together as a family unit, one is entitled to basic allowance for quarters at the with-dependent rate and one at the without-dependent rate. When the members are prevented from residing together as a family unit by their duty assignments, they both may be entitled to the allowance at the with-dependent rate.

The submission has been assigned control number ACO-CG-1411 by the Department of Defense Military Pay and Allowance Committee.

Facts and Questions Presented

Ronald and Doris Hull were married in January 1982. Prior to their marriage Mr. Hull received an increased allowance on account of his daughter of a previous marriage (to a non-member), and a son for whom he provided judicially ordered support. Mrs. Hull received an increased allowance on account of her daughter of a previous marriage (to a non-member).

It appears that both of Mr. Hull's children reside with their mother, and Mrs. Hull's daughter resides with her. The record further indicates that since their marriage, Mr. and Mrs. Hull and her

daughter have at times resided together as a family unit, but presently the two members are residing in different geographical areas. Both Mr. and Mrs. Hull claim an increased basic allowance for quarters on behalf of their dependent(s), each in his or her own right.

Concerning the propriety of payment of their claims, the certifying officer asks the following questions:

1. Are both members entitled to basic allowance for quarters at the with-dependent rate?

2. Would your answer be the same if the children were in the custody of another (not a member)?

3. If the answer to question 1 is affirmative, would the answer be the same if the members were living together as a family unit at the same or adjacent duty stations, under each of the following situations:

a. All children resided with the family unit.

b. Only one member's child (children) resided with the family unit.

c. None of the children resided with the family unit.

4. If both members had a child prior to the marriage but one of these children had not been approved as a dependent, could that child subsequently be approved after the marriage to entitle that member to basic allowance for quarters at the with-dependent rate?

Discussion

If adequate Government quarters are not provided for the dependents of a service member entitled to basic pay, that member is also entitled to an increased basic allowance for quarters on account of his or her dependents. 37 U.S.C. § 403 (1976), and Coast Guard Comptroller Manual (CG-264), Volume 2, para. 2B01031-F. The increased quarters allowance is paid at a single rate based on the member's pay grade regardless of the number of dependents. When two members are married to each other, only one of them may claim an increased allowance on account of the child or children of their marriage. Comptroller Manual, Table 2B01031-6, Rule 11; and 54 Comp. Gen. 665, 667 (1975). If one of the spouses is receiving an increased allowance for his or her children not born to the present marriage, any children born to or adopted by them are a part of the class of dependents for which the increased allowance is already being paid. 54 Comp. Gen. 665 (1975); 51 *id.* 413 (1972); *Matter of Cruise*, B-180328, October 21, 1974.

When a member has or acquires a stepchild as a consequence of a marriage to another member, the stepchild may qualify as a dependent child for increased basic allowance for quarters purposes. 37 U.S.C. § 401, and Comptroller Manual, para. 2B01033-B4.

Ordinarily, when a member is married to a member and they are assigned to the same or adjacent duty stations, but are not assigned Government quarters, only one member is entitled to the quarters allowance at the higher with-dependents rate based on the dependency of their children. The other member receives the allowance at the without-dependents rate. 51 Comp. Gen. 413 (1972), and Comptroller Manual, Table 2B01031-6, Rule 11. Also, generally when a member is married to a member and they are living in the same household and one of the members is receiving a quarters allowance at the with-dependents rate because of minor dependent children from a previous marriage not residing in the household, a child born of the two service members does not authorize the payment of another quarters allowance at the with-dependent rate. That is because the child of the present marriage is automatically included in the class of dependents (children) for which one of the members is already receiving the allowance. *Matter of Cruise*, B-180328, October 21, 1974; 54 Comp. Gen. 665 (1975); and *Matter of Sandkulla*, 59 Comp. Gen. 681 (1980). However, where married members are living separate and apart due to their military assignments, though married to each other, quarters allowance entitlement is to be determined on an individual basis. *Matter of Sandkulla*, cited above. The answers to the questions concerning Mr. and Mrs. Hull's quarters allowance entitlements should be based on the rules set out above.

Answers to Questions 1 and 2

Regarding questions 1 and 2, when Mr. and Mrs. Hull are residing separate and apart due to their duty assignments, their quarters allowance entitlements should be determined on an individual basis. Since each member has children of his or her own from previous relationships, when the members are living separately, they must provide separate sets of quarters, that is assuming that all the children do not live with one member. In such circumstances each is entitled to a quarters allowance at the with-dependents rate. This is the case whether each member's children are in the member's custody or in the custody of another. However, in the latter case, the member must be providing the required child support payments. In the case of an illegitimate child, the member-father must have been judicially decreed to be the father of the child or judicially ordered to contribute to the child's support. 37 U.S.C. § 401. Accordingly, subject to the conditions set out above, questions 1 and 2 are answered yes.

Answer to Question 3

As to question 3, when the members live together as a family unit, at the same or adjacent duty stations, they only need provide one set of quarters for the family unit and their quarters allowance

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entitlement is determined accordingly. That is, only one member may receive the quarters allowance at the with-dependents rate based on the single class of dependents (children) whether all, some, or none of the children reside with the members.

In *Matter of Dependency Determination,* 60 Comp. Gen. 399 (1981), a member married to another member was held to be entitled to a basic allowance for quarters at the "with-dependents rate" on account of her child of a previous marriage, even though she was then married to a member also receiving a with-dependents quarters allowance on behalf of his children. Such dual with-dependents rate entitlements are proper when the two member-spouses live separate and apart due to the location of their duty assignments. To the extent that *Matter of Dependency Determination* may be read to mean that two members living in the same household may both be paid a "with-dependents rate" basic allowance for quarters on account of their dependent childern born to previous relationships, the holding in that decision is hereby modified.

Answer to Question 4

Concerning question 4, if a child of one of the members had not qualified as a dependent prior to that member's marriage to the other member but subsequently met the requirements for a dependent, it would become one of the dependent children. That is, it would join the class of dependent children upon which the member's quarters allowance entitlement is based, as discussed in regard to questions 1, 2, and 3.

Authority to Make Dependency Determinations

In addition to the four questions discussed above, the certifying officer also asks whether the Secretary of the service concerned should make dependency determinations under 37 U.S.C. § 403(h) for the enlisted member in cases involving enlisted members married to officers. Under 37 U.S.C. § 403(h) the Secretary concerned may make determinations of "dependency and relationship" for quarters allowance entitlements for enlisted members only, and such determinations are final and not subject to review by "any accounting officer of the United States or a court, unless there is fraud or gross negligence." Thus, we are precluded from reviewing such determinations in most cases. However, as the certifying officer recognizes, we are not precluded from reviewing similar determinations regarding officers' dependents, and we also do render decisions determining the status of enlisted members' dependents when we are requested to do so by the services. See, for example, *Matter of Ranazzi,* B-195383, November 6, 1979; and *Matter of McCoy and Cooper,* 62 Comp. Gen. 315 (1983). In the interest of uniformly applying the rules to officers and enlisted members, particu-

larly in cases such as the present case where an officer is married to an enlisted member, it seems appropriate to forward doubtful cases to us for advance decision.

[B-212601]

General Accounting Office—Jurisdiction—Foreign Service Grievance Board Decisions

An employee of the Agency for International Development (AID) filed a grievance with the Foreign Service Grievance Board under 22 U.S.C. 1037(a) for credit of unused sick leave earned while he was employed by a United Nations agency. The Board found for the employee. An AID certifying officer thereafter submitted the case to General Accounting Office for review and decision. Under 22 U.S.C. 1037a(13) such decisions of the Board are final, subject only to judicial review in the District Courts of the United States. Therefore, this Office is without jurisdiction to review the Board's decision in this case. 57 Comp. Gen. 299 is distinguished.

Matter of: Pierre L. Sales—Foreign Service Grievance Board—GAO Jurisdiction, September 20, 1983:

This decision is in response to a request from a certifying officer, Agency for International Development (AID), on the question of whether an individual reemployed by AID following a period of "secondment" (transfer) to a United Nations (UN) agency may be credited with sick leave earned while with the UN agency, as ordered by the Foreign Service Grievance Board.

Before that issue may be considered, we must consider the threshold issue as to whether we have the jurisdiction to entertain the question. We conclude that we do not have the jurisdiction to consider the matter because by statute the Board's decisions on such matters are final, subject only to judicial review.

FACTS

The employee, Mr. Pierre L. Sales, was employed by AID. On February 1, 1969, he was separated for the purpose of transfer to the United Nations to serve as Deputy Resident Representative of the UN Development Program in Kinshasa, Democratic Republic of the Congo.

On May 1, 1976, following his separation from the UN agency, Mr. Sales exercised his reemployment rights with AID under section 528 of the Foreign Service Act and was appointed as a Program Officer. All annual, sick, and home leave hours which he had to his credit on the date he was transferred to the UN were restored to his account under the authority contained in section 3582(b) of title 5, United States Code.

On February 2, 1979, Mr. Sales requested that all sick leave (570 hours) which he had accrued, but did not use, during the period of UN employment from February 1, 1969, through April 30, 1976, be credited to his account. On February 12, 1979, AID disallowed his claim.

Following his retirement on February 28, 1979, Mr. Sales filed a grievance with the Foreign Service Grievance Board to overturn AID's action. On February 6, 1980, the Board found in favor of Mr. Sales. In paragraph VII of the Record of Proceedings No. 79-482-AID-145, the Board ruled that,

> AID is directed retroactively to recalculate the grievant's retirement annuity so as to reflect the crediting of his unused UN sick leave time.

In response to a request by AID in June 1981 that the case be reopened and reconsidered, the Board, on August 4, 1981, reaffirmed its February 6, 1980, decision.

By letter dated February 9, 1983, Bruce M. Berry, a Certifying Officer, questioned the propriety of the Board's action and requested a Comptroller General adjudication. We understand that Mr. Sales' case was submitted here based on an earlier case submitted by AID to this Office requesting our review and determination of the validity of the substantive finding on an entirely different issue, but by the same grievance board.

The case in question was *Frank H. Denton,* 57 Comp. Gen. 299 (1978). That case was presented here for decision because this Office had previously ruled on and approved AID's method of computing the post differential allowance authorized under 5 U.S.C. § 5925 (1976). Because we had previously ruled on the matter, which ruling was binding on AID, and because of the position in which AID found itself as a result of the contrary ruling of the grievance board in the *Denton* case, we did not consider the question of jurisdiction. Hence the issue of our jurisdiction to review the Board was not specifically raised or addressed.

The law creating the Foreign Service Grievance Board and establishing the grievance procedures thereunder, was contained in title IV of Public Law 94-141, November 29, 1975, 89 Stat. 765, 22 U.S.C. § 1037-1037c (1976). Subsequent to the Board's ruling in the present case, those provisions were repealed and reenacted without substantial change as Subchapter XI, Chapter 52 of title 22, United States Code (Supp. IV, 1980), 22 U.S.C. §§ 4131-4140, by Public Law 96-465, 94 Stat. 2142, October 17, 1980.

Section 1037a(13) of Title 22, United States Code (1976), provides, in part:

> (13) If the board finds that the grievance is meritorious, the board shall have authority * * * (B) to reverse an administrative decision denying the grievant compensation or any other perquisite of employment authorized by law or regulation when the board finds that such denial was arbitrary, capricious, or contrary to law or regulation * * * . *Such orders of the board shall be final, subject to judicial review as provided in section 1037c of this title,* * * *. [Italic supplied.]

Section 1037c of title 22, United States Code (1976) provides, in part:

> * * * any aggrieved party may obtain judicial review of * * * final actions of * * * the board * * * in the District Courts of the United States, * * *.

It is our position, therefore, that when the Foreign Service Grievance Board has rendered a final determination in an individual

case, over which it has jurisdiction, this Office is without jurisdiction to reverse, modify or otherwise review that ruling, even though we may disagree with the Board's conclusion. The forum for such review, if timely brought, is in one of the District Courts of the United States. If the time for judicial review has expired here, the certifying officer must comply with the Board's ruling in Mr. Sales' case.

[B-211737]

Payments—Prompt Payment Act—Waiver of Payment—Propriety

A Government contractor may waive an interest penalty payment issued to it under the Prompt Payment Act either by an express written statement or by acts and conduct which indicate an intent to waive.

Matter of: Central Intelligence Agency—Waiver of Interest under Prompt Payment Act, September 27, 1983:

By letter of May 5, 1983, the Central Intelligence Agency (CIA) requested our opinion as to the propriety of a contractor's waiver of a Government interest penalty payment under the Prompt Payment Act. Upon delay in payment of a completed contract, the CIA, in compliance with the Act, tendered the payment of interest. It did this by preparing a separate check in the proper amount to cover the interest penalty on the overdue bill. However, the contractor refused to accept the interest check and stated that it did not want or claim the interest penalty payment. The question presented is whether a Government contractor may waive the right to an interest penalty payment. If waiver is permissible, the next question is the method by which such right may be validly waived. We hold that waiver of an interest penalty payment under the Prompt Payment Act is permissible as long as the intent to waive is unmistakably clear.

The Prompt Payment Act, Pub. L. No. 97-177 (May 21, 1982), codified at 31 U.S.C. §§ 3901-3906, requires every Federal agency to pay an interest penalty on amounts owed to contractors for the acquisition of property or services when the agency fails to pay on time. The legislative history of the Act indicates that the interest penalty is a mandatory charge "that Government agencies will automatically be obligated to pay * * * without the necessity for business concerns to take action to collect such payments." H.R. Rep. No. 461, 97th Cong., 2d Sess. 8 (1982). Under the Act, it is clear that an agency must pay an interest penalty on all overdue bills. The implementing regulations of the Office of Management and Budget (OMB Circular No. A-125, August 19, 1982) confirm that payment is generally to be automatic.

As to whether a contractor must accept the penalty payment, the general rule is that rights granted by statute may be waived pro-

vided such waiver does not infringe on the rights of others and provided waiver of the right is not forbidded by law. See, *e.g. Office & Prof. Employees International Union Local 2* v. *Washington Metropolitan Area Transit Authority,* 552 F. Supp. 622, 631 (D.D.C. 1982). The determination of whether a statutory right is freely waivable "depends upon the intention of Congress as manifested in the particular statute." *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 704, 65 S. Ct. 895, 89 L. Ed 1296 (1945).

Nowhere in the language or legislative history of the Act does it state that a contractor is forced to accept the penalty payment. While the Act was enacted largely for the benefit and protection of Government contractors, it was also designed to "stigmatize" slow-paying agencies. H.R. Rep. No. 461, *supra.* Since a Government agency is legally obligated to tender payment, the policy behind the Act is not precluded if the contractor voluntarily refuses to accept. Also there is no practical way to compel the contractor to accept the money. The contractor is always free to return the money as a gift to the United States or, if the contracting agency has statutory authority to accept gifts, directly to it. Therefore, we hold that a Government contractor may legally waive his right to an interest penalty payment issued under the Prompt Payment Act.

The CIA also asks whether the contractor's act of refusal in this particular case constitutes a valid waiver. In general, waiver occurs when one evinces an intention to relinquish a known right. *Matter of Garfinkle,* 672 F.2d 1340, 1347 (11th Cir. 1982). Inasmuch as waiver is the abandonment of a known right, the right claimed to have been waived must have been in existence at the time of the waiver. Consequently, waiver could not be accomplished prospectively by means of a contract clause because the contractor would not yet be in a position to assert the right. In this case, however, the contractor is relinquishing a present right.

Waiver, involving as it does the notion of intention, may be either express or implied from conduct. To make out a case of implied waiver of a legal right, there must be a distinct, positive act which is inconsistent with the continued assertion of the right in question. *Weisbart & Co.* v. *First National Bank of Dalhart, Texas,* 568 F.2d 391, 396 (5th Cir. 1978). We hold, therefore, that a contractor may waive his right to a penalty payment either by an express, written statement, or by acts and conduct which indicate an intent to waive. In this case, by refusing to accept the check, the contractor has pursued such a course of conduct as to evidence an intention to waive his right to the penalty payment, and his conduct therefore constitutes a valid waiver.

Where waiver is implied, the acts or conduct relied upon to show waiver must make out a clear case. *Matter of Garfinkle,* 672 F.2d 1340, 1347 (11th Cir. 1982). Furthermore, the party alleging that waiver has occurred has the burden of proof to set forth the cir-

cumstances which establish the waiver. *Robinette* v. *Griffith,* 483 F. Supp. 28, 35 (W.D. Va. 1979). Certainly, an express written statement from the contractor is the clearest evidence of waiver. Absent such a statement, the agency should document the conduct establishing the waiver. If waiver is to be implied from the contractor's conduct, the conduct

> should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible. *Buffum* v. *Chase National Bank,* 192 F. 2d 58, 61 (7th Cir. 1951).

Thus, if the contractor does not return the penalty check, but simply never cashes or deposits it, waiver should not be implied because a Treasury check is payable without limitation of time.[1] 31 U.S.C. § 3328(a)(1) (formerly 31 U.S.C. § 132(a)).

In view of the foregoing, we conclude that the contractor's waiver in this case is permissible and valid.

[B-212756]

Officers and Employees—Senior Executive Service—Bonuses, Awards, etc.

Fiscal Year 1982 bonuses and presidential rank awards were paid to members of the Senior Executive Service (SES) at various times depending on the particular agency's payment schedule. Under 5 U.S.C. 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award is considered paid on the date of the Treasury check.

Officers and Employees—Senior Executive Service—Bonuses, Awards, etc.

Career Senior Executive Service members who receive presidential rank awards under 5 U.S.C. 4507 are entitled to either $10,000 or $20,000, subject to the aggregate amount limitation in 5 U.S.C. 5383(b). For Fiscal Year 1982 rank award recipients who received a reduced initial payment by Treasury check dated on or after Oct. 1, 1982, an agency is required to make a supplemental payment up to the full entitlement, limited only by the new Executive Level I pay ceiling of $80,100. No supplemental payment may be made if the check is dated before Oct. 1, 1982.

Officers and Employees—Senior Executive Service—Bonuses, Awards, etc.

Performance awards (bonuses) may be paid to career Senior Executive Service members under 5 U.S.C. 5384, not to exceed 20 percent of annual basic pay and subject to the aggregate limitation in 5 U.S.C. 5383(b). If a bonus was paid by Treasury check dated on or after Oct. 1, 1982, an agency may, in its discretion, make a supplemental payment limited only by the new Executive Level I ceiling of $80,100, provided the bonus amount was calculated on a percentage basis. No supplemental payment may be made if the check is dated before Oct. 1, 1982.

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[1] This of course would not be a problem in the presumably more common situation where an agency includes both principal and interest in a single check. On the assumption that a contractor is unlikely to return the entire check just to waive the interest, the contractor would have to negotiate the check and then take the affirmative step of writing its own check and returning it, presumably with a written statement that it is waiving the interest.

Matter of: Senior Executive Service—Supplemental Payments to Rank and Performance Award Recipients, September 27, 1983:

This decision responds to the request of the Assistant Attorney General for Administration, Department of Justice, for a decision whether members of the Senior Executive Service (SES) of that agency who were awarded presidential ranks or performance awards for Fiscal Year 1982, but who did not receive the full dollar amount of their respective awards because of the aggregate pay limitation contained in 5 U.S.C. § 5383(b), may now receive supplemental payments as a result of the December 18, 1982, increase in the Executive Level I pay ceiling.[1] For the reasons which follow, we conclude that supplemental payments may be made to those SES members who were partially paid their bonuses or rank awards in Fiscal Year 1983, limited only by the annual rate payable for Level I of the Executive Schedule, i.e. $80,100, effective December 18, 1982. No such supplemental payments may be made to those who were paid their awards in Fiscal Year 1982.

According to the Assistant Attorney General, Presidential Executive Rank Awards were approved by the President on September 29, 1982, pursuant to 5 U.S.C. § 4507(c), for a number of Senior Executive Service members of the Department of Justice. In addition a number of SES performance awards ("bonuses") under 5 U.S.C. § 5384 were approved by the Deputy Attorney General on September 30, 1982. All the rank awards and bonuses were certified for payment to the Treasury Department disbursing officer on September 30, 1982. However, checks were not dated and mailed by the Treasury Department until Fiscal Year 1983 (approximately October 5, 1982) nor received by the employees in question until approximately October 8, 1982. We understand that in other agencies some SES recipients received their payments before October 1, 1982.

Some of the senior executives who were given rank awards or bonuses received less than the approved amount because the approved amount when combined with their respective base salaries would have resulted in aggregate amounts in excess of $69,630 (the annual rate payable under Executive Schedule, Level I, during Fiscal Year 1982) in contravention of 5 U.S.C. § 5383(b). That section provides as follows:

> In no event may the aggregate amount paid to a senior executive during any fiscal year under sections 4507 [rank awards], 5382 [basic pay], 5384 [performance awards] * * * of this title exceed the annual rate payable for positions at level I of the Executive Schedule in effect at the end of such fiscal year.

Effective December 18, 1982, the statutory annual salary rate payable under Executive Schedule, Level I, was raised to $80,100.

[1] Other agencies have also encountered similar problems with SES award payments during that period. For that reason, our decision is not confined to the specific facts and payment dates involved in the Justice Department request.

Public Law 97-377, § 129(b), December 21, 1982, 96 Stat. 1830, 1914. It is this increase in the Executive Level I pay ceiling and its impact on the limitations of 5 U.S.C. § 5383(b) which have precipitated the questions raised by the Department of Justice and other Federal agencies as to the potential eligibility of senior executives to additional payments for SES ranks and bonuses awarded for Fiscal Year 1982.

In our opinion, it is clear that, for purposes of the aggregate amount limitation in 5 U.S.C. § 5383(b), employees who are given SES rank awards or bonus awards are paid on the date of payment rather than on the date of approval. In the example given by the Department of Justice, therefore, the date of approval, September 29 or September 30, would not be controlling for limitation purposes.

The next question is whether "payment" takes place on the date payment is scheduled for disbursement, the date of the Treasury check, or the date the check is received by the employee. We believe that the date of the check furnishes the most definite and certain answer to this question. That conclusion is consistent with the Prompt Payment Act, Public Law 97-177, § 6, May 21, 1982, 96 Stat. 85, which provides that a payment thereunder is deemed to be made on the date a check for the payment is dated. 31 U.S.C. § 3901(a)(5).

Therefore, for purposes of establishing aggregate amounts paid during a fiscal year under 5 U.S.C. § 5383(b), a senior executive is considered paid on the date of the Treasury check. Since the checks in payment of the awards to the Justice executives were dated on or about October 5, 1982, the senior executives in question were paid in Fiscal Year 1983 for the aggregate pay purposes of 5 U.S.C. § 5383(b). In other cases, if a check or checks were issued on or before September 30, 1982, those payments are considered to have been made in Fiscal Year 1982 for those purposes.

The remaining questions are whether supplemental payments to SES members are mandatory, discretionary, or prohibited. We shall address these questions below.

If an award under either section 4507 or section 5384 of Title 5, U.S. Code, was paid by a Treasury check dated on or before September 30, 1982, the payment is subject to the Fiscal Year 1982 ceiling of $69,630, and no supplemental payment may be made that would cause the aggregate amount paid during Fiscal Year 1982 to exceed that ceiling.

If, however, an award under either section was paid by Treasury check dated on or after October 1, 1982, the following conclusions apply.

For presidential rank award recipients under 5 U.S.C. § 4507 paid during Fiscal Year 1983, whose initial payment was reduced because of the $69,630 ceiling, an agency is required to make a supplemental payment so that the senior executive receives the full

amount of the $10,000 or $20,000 statutory entitlement under section 4507(e)(1) or (e)(2), limited only by the new Executive Level I pay ceiling of $80,100.

However, the amount of a performance award under 5 U.S.C. § 5384 is not fixed by statute; it is determined by the agency head but may not exceed 20 percent of the employee's basic pay. Accordingly, for performance award (bonus) recipients under 5 U.S.C. § 5384, paid during Fiscal Year 1983, an agency may, in its discretion, make a supplemental payment, limited only by the new ceiling of $80,100, if the initial payment was reduced because of the then applicable ceiling of $69,630.

The foregoing analysis and conclusions are intended to answer the Justice Department's inquiry and other questions that have arisen concerning SES awards. If there are specific situations not covered by the foregoing, they should be submitted for decision.

[B-210160]

Appropriations—Availability—Contracts—Amounts Recovered under Defaulted Contracts—Disposition—Funding Replacement Contract

Excess costs of reprocurement recovered from a breaching contractor by the Bureau of Prisons may be used to fund a replacement contract. It is illogical to hold a contractor legally responsible for excess reprocurement costs and then not permit the recovery of those costs to be used for the purpose for which they were recovered. As long as the Bureau receives only the goods and services for which it bargained under the original contract, there is no illegal augmentation of the Bureau's appropriation. Therefore these funds need not be deposited into the Treasury as miscellaneous receipts. Comptroller General decisions to the contrary are modified.

Matter of: Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action, September 28, 1983:

The Assistant Attorney General for Administration at the Department of Justice has requested our decision on whether certain funds, which were paid by a contractor in settlement of the Government's claim for breach of contract, may be used to replace defective work completed by the breaching contractor, without constituting an illegal augmentation of the appropriation from which the breached contract was initially funded. For the reasons given below, we conclude that the expenditure of those funds, as contemplated by the Department of Justice, would not constitute an illegal augmentation.

BACKGROUND

In June 1974, the Bureau of Prisons awarded to the General Electric Company a contract (number GS 09B-C-9021 SF) in the amount of $152,850 for the design, manufacture, and installation of laminated polycarbonate LEXGARD security windows for the Fed-

eral Correctional Institution, Pleasanton, California. When General Electric allegedly breached the contract by providing defective materials, the United States initiated legal action against it. The lawsuit was settled when General Electric agreed to pay $406,111.30 into the registry of the District Court for the Northern District of California. This amount was in full satisfaction of any and all claims by the United States against General Electric arising from that contract. (We have been informally advised by the Department of Justice that the large difference ($253,261.30) between the amount awarded under the contract and the amount of the damages which General Electric agreed to pay is due to inflation and substantial underbidding on General Electric's part when it originally obtained this contract. Justice also advised us that the $406,111.30 settlement amount was based upon the results of a new invitation for bids to secure a replacement contract.)

The District Court ruled that the money paid pursuant to the settlement agreement must be used to pay for the replacement of the faulty windows to the specifications required by the original Bureau of Prisons contract with General Electric. The court directed the Government to secure a replacement contractor whose bills for services and materials would be submitted to the court for payment from the amount paid by General Electric. The court also ruled that upon completion of the required work, the residue (if any) of the amount paid by General Electric would be turned over to the United States Bureau of Prisons. *United States* v. *General Electric,* Stipulation and Order Approving Compromise Settlement, Civ. No. 80-3485 TEH (N.D. Cal March 4, 1982). With regard to any residue which it may receive from the court upon completion of the replacement contract, Justice proposes to deposit such amounts into the Treasury as miscellaneous receipts. However, Justice is concerned that because the amount paid by General Electric greatly exceeds the amount paid under the breached contract, the balance of the court's order (requiring the use of the compromise settlement payment to fund a replacement contract) may result in an illegal augmentation of the Bureau of Prison's appropriation (number 15X1003) which was the funding source for the original contract.

Justice has reviewed our decisions in order to obtain guidance on this matter. Under those decisions, the "general rule," as prescribed by statute, is that all money received by and for the use of the Government must be deposited into the Treasury as miscellaneous receipts. *See* 31 U.S.C. § 3302 (formerly 31 U.S.C. § 484); 52 Comp. Gen. 45, 46 (1972). To the extent that such receipts are instead credited to a specific appropriation, they consititute an unlawful augmentation of that appropriation. Justice sees in our decisions two broad classes of exceptions. First, collections may be credited to a specific appropriation, rather than to miscellaneous receipts, when expressly authorized by statute. *See, e.g.,* 57 Comp.

Gen. 674, 685-86 (1978). Second, collections may be credited to an appropriation when they represent refunds or repayments of amounts which were improperly or erroneously paid from that appropriation. *E.g.* 61 Comp. Gen. 537 (1982); *see* 7 GAO Policy and Procedures Manual for Guidance of Federal Agencies §§ 13.2(2), 13.3.

Justice proposes that the present case be resolved by the creation of a new exception to the general rule. Justice argues that to the extent that the funds paid by General Electric in settlement of the breach of contract litigation are used to complete the work originally contracted for, they should be credited entirely to the appropriation which originally funded the contract rather than to miscellaneous receipts, and that such use for the replacement contract should not constitute an illegal augmentation of that appropriation.

PREVIOUS DECISIONS

We have on a number of occasions applied the exception for refunds of erroneous payments, described above by Justice, in the context of contractors who deliver defective work necessitating replacements. We have ruled that to the extent that a collection from the breaching contractor (or his surety) represents the recovery of payments which were in excess of the value of the goods or services that the agency actually received from the contractor, the collection is a repayment or refund, which may be credited to the agency's appropriation and used to pay for a replacement contract. *See, e.g.,* 44 Comp. Gen. 623 (1965); 34 *id.* 577 (1955); 8 *id.* 103 (1928).

Application of this reasoning in the instant case would justify the use of only $152,850, the amount of the original contract payments to GE, for the costs of a replacement contract. This is the only amount which can be said to represent an erroneous payment because no value was received from the original contractor. This amount, as explained above, falls far short of the amount needed to replace the defective work. As Justice has observed, unless there is a basis to apply a third exception to the general rule of 31 U.S.C. § 3302(b), the balance of the settlement would have to be deposited in miscellaneous receipts. This means that unless the agency has another source of funds available to recover the rest of the expenses of the replacement contract, a critical need might have to go unmet.

An argument could be made that since in this case the disposition of the entire settlement was ordered and controlled by a court, the usual rule does not apply. We have chosen not to consider the merits of that argument because the plight of Justice may be replicated many times by agencies who have reached agreements with the breaching contractor without instituting litigation. Resolution of contract disputes without resort to litigation is generally desired.

We have therefore elected to reconsider a number of our old cases without reference to the presence or absence of a court-approved or ordered settlement.

The majority of GAO decisions which deal with excess reprocurement costs involve defaults by the original contractor rather than completion of the work in a defective manner. In both situations, the contract has been breached, and in both, the need for a replacement contract is attributable to the contractor's breach. We will therefore discuss our decisions on excess reprocurement costs without reference to the event that gave rise to the need for the replacement contract—that is, whether occasioned by a default or by defective workmanship.

GAO has long held that excess reprocurement costs—*i.e.,* costs incurred by the Government because of the breach of contract which exceed the amounts originally obligated for the procurement in question—should be charged to the account of the original contractor. However, any such amounts which the agency is able to recover must immediately be deposited in the Treasury as miscellaneous receipts. (See 14 Comp. Gen. 729, 730 (1935) for a clear statement of that principle.)

Moreover, we have held this to be the rule despite the possibility that the agency involved might not have enough unobligated funds in the balance of the applicable appropriation to fund a replacement contract. In one decision, for example, we quoted the General Counsel of the Office of Economic Opportunity who offered this analysis:

> * * * It would seem that the controlling consideration in determining the disposition of recoveries from defaulting contractors should be whether such recoveries augment the agency's appropriation, in which case they should be deposited in the Treasury as miscellaneous receipts, or whether they merely offset additional government expenses resulting from the contractor's breach, in which case they should be considered in the nature of an adjustment and returned to the appropriation account. In this latter situation, the recoveries do no more than permit the agency to carry out the program contemplated by the Congress without having to return for an additional appropriation because of the failure of the contractor to perform * * *. 46 Comp. Gen. 554, 555 (1966).

While we acknowledged that those reasons "are not regarded as being without merit," we refused in that case to alter or deviate from the general rule that recovered excess reprocurement costs must be deposited into the Treasury as miscellaneous receipts. *See also,* 10 Comp. Gen. 510, 511 (1931).

More recently, we addressed the question of defaulting contractors and replacement contracts without dealing directly with how collections from the defaulting contractor should be handled. In 60 Comp. Gen. 591 (1981), we decided that when a contract is terminated because of default by the contractor, the amounts obligated to fund the original contract remain available to fund a replacement contract. With regard to reprocurement costs in excess of the amount of the original contract, we stated:

* * * Legally, the defaulting contractor is liable to the Government for the additional cost of the replacement contract. However, recovery of such funds by the Government may be subject to a great deal of uncertainty and delay * * *. Hence, the agency may utilize unobligated funds, if any, from its prior year's appropriations to increase the amount of obligations chargeable in that year for the original contract in order to pay the replacement contractor the full amount owed (while continuing to attempt collection from the defaulting contractor * * *). *Id.* at 595.

We stopped short of explaining how the replacement contract was to be funded if there were no unobligated funds available to cover the excess reprocurement costs.

DISCUSSION

After carefully reconsidering our earlier decisions in light of the arguments presented by the Department of Justice, we are convinced that our rule (requiring the entire amount of excess costs recovered from a defaulting contractor to be deposited into the Treasury as miscellaneous receipts) is wrong. The rule disrupts the procurement process and is not required by 31 U.S.C. § 3302.

The existing rule penalizes an agency for an event which lies beyond its control—a breach by the contractor. Because the agency may not use the excess reprocurement costs which it recovers from the contractor, even though the recovery is entirely adequate for that purpose, if it lacks adequate unobligated funds to pay such costs, it must either forgo an urgently needed procurement or else it must seek a supplemental appropriation from the Congress. Thus, our present rule places an added burden on the legislative process, as well as on the procurement process.

We do not think it is logical to insist that a breaching contractor is legally responsible for excess reprocurement costs and then, when the contractor fulfills that obligation, refuse to permit his payments to be used for that purpose. We regard the contractor's payments as being analogous to a contribution to a Government trust account, earmarked for a specific purpose. Just as the proceeds of a trust are considered to be appropriated for the purpose for which the funds were deposited, so too should excess reprocurement collections be considered to be available only for the purpose of funding a replacement contract.

This use of the recovered excess reprocurement costs does not, in our view, constitute an illegal augmentation of the agency's appropriation. The agency is being made whole at no additional expense to the taxpayer. It will merely be receiving the goods or services for which it bargained under the original contract.

We, therefore, decided that to the extent necessary to cover the full costs of a replacement contract, excess reprocurement costs recovered by an agency from a breaching contractor need not be deposited in the Treasury as miscellaneous receipts, but rather may be applied to the costs of the replacement contract. The replacement contract must be coextensive with the original contract; that is, it may procure only those goods or services which would have

been provided under the breached contract. Any recovered excess reprocurement costs which are not necessary or used for such a replacement contract must still be deposited into the Treasury as miscellaneous receipts. To the extent that they are inconsistent with this decision, the following (and any other similar) decisions are hereby modified: 52 Comp. Gen. 45 (1972); 46 *id.* 554 (1966); 44 *id.* 623 (1965); 40 *id.* 590 (1961); 34 *id.* 577 (1955); 27 *id.* 117 (1947); 14 *id.* 729 (1935); 14 *id.* 106 (1934); 10 *id.* 510 (1931); 8 *id.* 284 (1928).

CONCLUSION

We conclude that the use of General Electric's settlement payment to fund the replacement contract under the terms of the court's order will not result in an illegal augmentation of the Bureau of Prison's appropriation number 15X1003. Of course, as Justice is aware, any residue from General Electric's payment which the agency may receive from the court upon completion of the replacement contract must be treated as damages and deposited into the Treasury as miscellaneous receipts.

[B-201164]

Contracts—Payments—Assignment—Set-Off—"No Set-Off" Clause

Under the Assignment of Claims Act, now codified at 31 U.S.C. 3727, a lender is not protected against set-off by the presence of a no-set-off clause in the assigned contract unless the assignment was made to secure the assignee's loan to the assignor and only if the proceeds of the loan were used or were available for use by the assignor in performing the contract that was assigned. To the extent that our holdings in 49 Comp. Gen 44. (1967), 36 Comp. Gen. 19 (1956), and other cases cited herein are not consistent with this decision they will no longer be followed. 60 Comp. Gen. 510 (1981) is clarified.

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

When a contract containing a no-set-off clause is validly assigned under the Assignment of Claims Act, now codified at 31 U.S.C. 3727, to an eligible assignee who substantially complies with the statutory filing and notice requirements, the Internal Revenue Service cannot set off the contractor's tax debt against the contract proceeds due the assignee, even if the tax debt was fully mature prior to the date on which the contracting agency had received notice of the assignment. B-158451, Mar. 3, 1966, and B-195460, Oct. 18, 1979, are modified accordingly. 60 Comp. Gen. 510 (1981) is clarified.

Matter of: Reconsideration of 60 Comp. Gen. 510 (1981) Involving Set-Off Authority of Government When Contract Contains a "No Set-Off Clause," September 29, 1983:

This decision is in response to a request from the Internal Revenue Service (IRS) for us to reconsider and modify our holding in 60 Comp. Gen. 510 (1981) concerning the set-off authority of the IRS when a Government contract containing a "no set-off clause" is assigned.

In that decision we considered the relative priority of a Federal tax lien against a Government contractor and the claim of the bank to which the contractor had assigned his rights under the contract in accordance with the provisions of the Assignment of Claims Act, formerly 31 U.S.C. § 203, now codified at 31 U.S.C. § 3727. The bulk of that decision dealt with the situation that existed when the contract involved did not contain a no-set-off clause. We held that in the absence of a no-set-off provision, a claim by the IRS or other Federal entity that arose before the assignment became effective could be set off against the amount otherwise payable to the assignee under the assigned contract. The IRS is not asking us to reconsider that portion of our decision.

However, our decision in that case also addressed the matter of priority when the Government contract did contain a no-set-off clause. In this respect we said the following:

> It is well settled that the presence of a no set-off clause in a contract prohibits IRS or any other Government agency from making any claims to the monies due the assignee under the contract.

Similarly, one of the digests in the decision states that:

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

The IRS is now requesting us to reconsider our holding regarding the priority question when a no-set-off clause is contained in an assigned contract, particularly as that holding would apply to the facts of a specific case described in the IRS request (which is discussed at greater length below). Specifically, the IRS requests us to adopt the position that our holding concerning the protection afforded assignees by the no set-off clause should be narrowed so that it only applies (1) if the assignee files a proper notice of assignment that satisfies the statutory requirements prior to the IRS tax levy or request for set-off and (2) if the proceeds of the loan secured by the assignment were used or at least were available for use by the assignor in the performance of the assigned contract.

For the reasons set forth hereafter, we agree with the IRS' second point that the no-set-off clause does not prohibit set-off when the underlying loan is not used or available for use by the assignee in performing the assigned contract.[1] However, we do not concur with IRS' first contention that notwithstanding the presence of a no set-off clause, set-off is permissible if the IRS tax claim arises before the assignee notifies the contracting agency of the assignment.[2]

The specific case that appears to have prompted the IRS to request us to reconsider our earlier decision was summarized as follows in the IRS letter and accompanying attachments. In July

[1] Set-off is also permissible, notwithstanding the presence of a no set-off clause, if the assignment was not made to secure the assignor's indebtedness to the assignee or to the extent the contract proceeds exceed that indebtedness.

[2] In our 1981 decision which held that if the contract does not contain a no set-off clause the IRS can set-off a tax claim that arises before notification of the assignment is received, we took the position that set-off was permissible if the tax debt of the assignor was in existence even if not yet due (mature) before notification.

1973, Ward La France Trucking Corporation (Ward La France) entered into a defense contract with the United States Army. The contract contained the standard no set-off clause authorized by 31 U.S.C. § 203 (now codified at 31 U.S.C. § 3727) and section 7-103.8 of the Armed Services Procurement Regulation. Subsequently, on August 3, 1978, Ward La France assigned the contract to Marine Midland Bank (Marine) "in order to secure new operating capital loans." At the time of the assignment, Ward La France had already completed performance of the assigned contract. Moreover, IRS states that the "loans secured by the assignment were not used in Ward La France's performance of the subject defense contract." The IRS further states that it "levied on the contract proceeds prior to the filing of the notice of the assignment with the defense contract disbursing officer and the Army contracting officer."[3]

In order to facilitate payment of the uncontested monies due under the assigned contract and to preserve the rights of the parties pending litigation, an escrow agreement dated August 24, 1981, was entered into between Marine and the IRS. The agreement preserved the set-off claims, tax liens, or other statutory claims of the Government and also the contractual and statutory claim of Marine in the $625,000 escrow fund. We also note that paragraph 7 of the escrow agreement specifically provides that if the parties are unable to reach a satisfactory agreement as to the disposition of the escrow account "then the respective rights of the parties to such account shall be submitted to a federal court of competent jurisdiction, for adjudication as to the relative priority status and validity of all competing setoffs, liens, and claims."

As explained at greater length hereafter, it is our view that since Marine's loan to Ward La France was made after Ward La France had already completed performance on the contract, Marine was not protected against set-off by the presence of the no-set-off clause in the assigned contract.

The matter at issue here turns on the proper interpretation and application of a provision, contained in certain Federal contracts, that is commonly referred to as a "no set-off clause." In this respect 31 U.S.C. § 3727 [4] reads as follows:

(d) During a war or national emergency proclaimed by the President or declared by law and ended by proclamation of law, a contract with the Department of Defense, the General Services Administration, the Department of Energy (when carrying out duties and powers formerly carried out by the Atomic Energy Commission), or other agency the President designates may provide, or may be changed without consideration to provide, that a future payment under the contract to an assignee is not subject to reduction or setoff. A payment subsequently due under the contract (even after the war or emergency is ended) shall be paid to the assignee without a reduction or setoff for liability of the assignor—

[3] While the IRS letter goes on to state that the disbursing officer's files do not contain any record of the assignment notice, IRS does not argue that the notice was legally insufficient under the Act. Moreover, it appears that the contracting officer did receive formal written notice of the assignment and that the disbursing officer did receive "actual" notice. Accordingly, the adequacy of the notice received by the IRS was not considered to be an issue in this case.

[4] Prior to the revision and codification of title 31, United States Code by Pub. L. No. 97-258, 96 Stat. 877, September 13, 1982, this provision was set forth in 31 U.S.C. § 203 in essentially the same terms.

(1) To the Government independent of the contract; or
(2) Because of renegotiation, fine, penalty (except an amount that may be collected or withheld under, or because the assignor does not comply with, the contract), taxes, social security contributions, or withholding or failing to withhold taxes or social security contributions, arising from, or independent of, the contract.

As stated above, in 60 Comp. Gen. 510 we said that the presence of a no-set-off clause in a contract prohibits the Government from setting off the assignor's tax debts against the monies due the assignee under the assigned contract. While that statement and the related digest may have been somewhat broader than was necessary (or perhaps advisable), we believe that when read and considered in the context of the entire decision, our intended meaning should not be unclear. That is, in making that broad statement, we assumed that the contract involved was validly and properly assigned to an eligible assignee in accordance with all of the statutory requirements contained in the Assignment of Claims Act. For example, in digest 1 of the decision we said the following:

Assignment of claim to proceeds under Federal Government contract must be recognized by contracting agency and all other Federal Government components including * * * IRS, *if assignee complied with filing and other requirements of Assignment of Claims Act* * * *. [Italic supplied.]

Since the validity of the assignment under the Assignment of Claims Act was not at issue in 60 Comp. Gen. 510, that decision did not address the statutory requirements that must be satisfied in order for an assignment to be deemed valid.

Clearly, we would agree that if a contract is assigned improperly or if the assignor or assignee does not fulfill all of the statutory requirements, the assignment would be invalid and would not be recognized by our Office. In that case, the presence of a no set-off clause in the assigned contract would not provide the assignee with any protection against set-off by the Government. See 58 Comp. Gen. 619 (1979); 55 *id.* 155 (1975); 54 *id.* 137 (1954); 49 *id.* 44 (1969); B-171063, February 16, 1971; and cases cited in the decisions.

The IRS' second contention (which we have considered first since it is dispositive of the instant dispute between Marine and the IRS) is that an assignment is not valid under the Assignment of Claims Act unless the assignment was made to secure a loan whose proceeds were used or were available for use by the contractor in the performance of the contract. The decisions of our Office have consistently upheld the view that an assignment of a Government contract, and any no-set-off clause contained therein, is only valid if the assignment was made to secure a loan made by the assignee to the assignor and only then to the extent that the assignor remains indebted to the assignee. B-177648, December 14, 1973; B-176905, November 1, 1972; B-175670, May 25, 1972; B-171063, February 16, 1971; B-159320, July 7, 1966; B-137321, October 13, 1958; 37 Comp. Gen. 9 (1957); 35 *id.* 104 (1955). Also see *Beaconwear Clothing Co.,* v. *United States,* 174 Ct. Cl. 40, 355 F.2d 583 (1966). Therefore, even if a no-set-off clause is present, it always has been and remains our

position that whether or not the Government's claim arises before notice of the assignment is received, the Government can set off the assignor's debts to the extent the contract proceeds exceed the assignor's remaining indebtedness, if any, to the assignee.

However, as to whether a loan must be made for a particular purpose relating to the performance of Government contracts by the assignor in order for the assignment to be recognized as valid, our decisions have reflected a somewhat different interpretation of the Assignment of Claims Act over time. Initially, our Office took the position that a validly executed assignment of a contract containing a no-set-off clause could defeat the Government's set-off claim even if the loan secured by the assignment was not made for the purpose of financing the assignor's Government contract work. See 36 Comp. Gen. 19 (1956); B-131183, March 13, 1958; B-138974, May 23, 1960; and B-142275, March 26, 1965. Thereafter, we modified our prior interpretation and held that the no-set-off clause did not preclude set-off "unless the outstanding indebtedness represents loans made to the assignor for the purpose of carrying out contracts with the Government." See 49 Comp. Gen. 44 (1967) and 54 *id.* 80 (1974).

In 1974 we adopted our current position in this respect. In 54 Comp. Gen. 137 (1974) we considered a case in which the loan secured by the assignment was made after performance of the assigned contract was completed. After analyzing several judicial opinions interpreting the Assignment of Claims Act, we said the following:

> We take these cases, therefore, to affirm a policy of encouraging the financing of Government contracts by not limiting to the initial amount loaned the no set-off protection of parties which lend a contractor several sums for the performance of a contract. However, * * * [none of these cases] stand for the proposition that parties which lend money to a firm having both completed (from the contractor's point of view) and on-going contracts are protected against setoff under the completed contract.
>
> First National City loaned Trilon $250,000 believing that the subject contract was fully performed. It therefore quite reasonably anticipated that no further funds would flow to Trilon from this contract. Yet, when funds did become available the bank asserted a claim against them.
>
> * * * the bank's entitlement is secondary to the setoff rights of the Federal Government. And, since we conclude that the Assignment of Claims Act does not extend no setoff protection to First National City Bank in this instance, the Government may properly exercise its right of setoff to the $54,369.37 in question.

Thus, in 54 Comp. Gen. 137, we held that the presence of a no-set-off clause in the assigned contract does not preclude setoff by the Government if the loan secured by the assignment is made after the contract has been fully performed, presumably making the lender assignee aware that "the money lent will not be applied to performance of the contract." Our Office interpreted the Assignment of Claims Act in a similar manner to reach a similar result in 55 Comp. Gen. 155 (1975). As stated above, this interpretation of the Act and the no-set-off clause represents our current position in

this respect. It is entirely consistent with the most recent judicial interpretation of the Act and the no-set-off clause.

The leading court case in this respect is *First National City Bank* v. *United States,* 212 Ct. Cl. 357, 548 F.2d 928 (1977), which IRS cited and relied upon in its request to us for reconsideration. In that case the court considered the same factual situation that we had addressed previously in 54 Comp. Gen. 137. While the court's disposition of the case was not entirely consistent with that of the Comptroller General (differing in some respects that are not at issue here), the court did concur in our view that an assignment was not valid against the Government unless the proceeds of the loan secured by the assignment were available for the performance of the contract. In this respect the court held as follows:

> The objective of the 1940 Act was to authorize the financing of individual government contracts in the sense that Congress wished the holder of such a pact to be free to receive financial help in performing his agreement in reliance on the security of the expected government payments from that contract. At the same time Congress did not, we think, wish to eat into the Government's normal right of setoff against the assignor more than would be necessary to induce such monetary aid in performing. *Where a contract has been fully completed, further aid is not needed for that contract and there is no occasion to give up the right of setoff.*
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> * * * * * * *
>
> This view does not mean that loans must be tied to particular contracts nor does it go counter to the endorsement of the revolving-credit plan in *Continental Bank & Trust Co.* v. *United States,* 416 F.2d 1296, 189 Ct. Cl. 99 (1969). In all of our prior cases, including Continental Bank, which have upheld the financing institutions' right to recover free of setoffs, the loans were made before the completion of the particular contract and were available to help in the performance of that work—even though the loans may not have been tied to, or designated as directed to, a or the specific contract * * *. *It is only where the contract has been fully performed before the loan is made that the institution cannot call upon that right* [*of no setoff*] *under that particular contract.*
>
> * * * * * * *
>
> For these reasons, we hold that plaintiff does not belong within the class of assignees or of those "participating in such financing" under the 1940 Act, and has no rights under that statute. [Italic supplied.]

Subsequently, in *Manufacturers Hanover Trust Co.,* v. *United States,* 590 F.2d 893 (Ct. Cl. 1978), the Court of Claims reaffirmed its holding in *First National City Bank* that "in order for a lending institution to achieve the status of an assignee under the Assignment of Claims Act of 1940, it had to be shown that the monies which that institution had advanced to the contractor were actually used in, or at least made available for, the performance of the contract(s) in question." Also, see 58 Comp. Gen. 619 (1979), in which we cited the court's holding in *First National City Bank* as standing for the same proposition at least when the issue is as it is here, whether an assignee bank is protected by a no-set-off clause in the assigned contract.

Thus, we concur in the IRS's second contention that under the Assignment of Claims Act a lender is not protected against set-off by the presence of a no-set-off clause in the assigned contract, if the proceeds of the loan secured by the assignment were not used or

available for use by the assignor in performing the contract that was assigned. Our decision in 60 Comp. Gen 510 (1981) is clarified in accordance with our position as set forth herein. Moreover, to the extent that any of our prior decisions, cited above, have taken a contrary position they will no longer be followed by our Office.

Applying our position in this respect to the instant case, we would advise the IRS as follows in connection with its negotiations with Marine under the terms of the August 24, 1981, escrow agreement mentioned above.

Based on the information contained in the IRS submission, it appears that the contract proceeds were assigned Marine after the contract had been fully performed, in order to secure new operating loans. Obviously, therefore, these new loans could not have been used or available for use by Ward La France in performing the already completed contract. Accordingly, it is our view that the presence of the no-set-off clause in the assigned contract would not prevent IRS from setting off the contractor's tax debts against the contract proceeds otherwise payable to the assignee.

While the foregoing is dispositive of the specific case involved here, we note that the IRS request for us to reconsider our decision in 60 Comp. Gen. 510 also asks that we rule on its other contention. Accordingly, in order to clarify our position in this respect, and since it is not unlikely that this issue could arise again in the future, we have addressed the IRS' other contention as well.

IRS contends that a lender is not a valid assignee under the Act, and is therefore not entitled to the protection provided by the no-set-off clause, if "the notice provisions imposed upon an assignee by the statute were not carried out prior to the Internal Revenue Service's levy and set-off actions." In this respect, 31 U.S.C. § 3727(a)(3) (formerly set forth in substantially the same terms in 31 U.S.C. § 203) provides that assignments to financing institutions are valid if:

> The assignee files a written notice of the assignment and a copy of the assignment with the contracting official or the head of the agency, the surety on a bond on the contract, and any disbursing official for the contract.

In accordance with this provision, it has consistently been held by our Office (and the courts) that an assignee who does not at least substantially comply with the notice and filing requirements would not have any enforceable rights against the Government under the assignment. 58 Comp. Gen. 619 (1979); B-185962, April 7, 1976; 20 Comp. Gen. 424 (1941); *Uniroyal Inc.* v. *United States,* 197 Ct. Cl. 258, 454 F.2d 1394 (1972); and other cases cited therein. As necessary corollary of that rule, it is also recognized that an assignment does not become effective until the contracting agency (through the contracting or disbursing officer) receives formal written notice of the assignment. 60 Comp. Gen. 510, *supra;* B-177648, December 14, 1973, *supra;* and 29 Comp. Gen. 40 (1949).

The position of the IRS in this respect, however, would require an unwarranted extension of the foregoing principles. That is, the IRS states where a no-set-off clause is included in the contract, a financing institution would "not qualify as an assignee within the meaning of 31 U.S.C. § 203 * * *" if it does not notify the contracting agency of the assignment before the tax levy is filed. We disagree. The Assignment of Claims Act does not specify any period of time within which the contracting officer and disbursing officer must be notified of the assignment. 22 Comp. Gen. 520 (1942). There is absolutely no basis, in our view, for holding that an otherwise proper assignment to an otherwise eligible assignee under a contract containing a no-set-off clause is invalidated because the notice of the assignment was not received by the agency officials prior to the filing of a claim by IRS. That is not to say that the "timing" of the notice is irrelevant where a no-set-off clause is not present. As stated above, the assignment does not become effective until proper notice is received by the contracting agency. Therefore, if the Government has a competing claim against the contract proceeds, the date on which the agency receives notice, while not affecting the basic validity of the assignment, may determine which claim will have priority. However, our Office has consistently held that this is only true if the contract involved does not contain a no-set-off clause. For example, in 56 Comp. Gen. 499 (1977) we said the following in this respect.

> In regard to the priority between this IRS and the assignee, both the courts and this Office have held that *in the absence of a no-set-off provision in the contract, the Government, i.e., the IRS, is entitled to set-off* against the assignee-bank any of its claim against the assignor-contractor which had matured prior to the assignment. [Italic supplied.]

See also B-177648, December 14, 1973; B-170454, August 12, 1970; B-157394, October 5, 1965; B-152008, September 10, 1963; 37 Comp. Gen. 318 (1957); and numerous other cases cited in those decisions.

Conversely, we have consistently held that when a no-set-off clause is included in the assigned contract, neither the IRS or any other Government agency can set off amounts due from the assignor against the contract proceeds owed to the assignee even if the IRS claim matures prior to the date on which the assignment becomes effective, *i.e.,* the date on which notice of the assignment is received by the contracting agency. Our decision in 37 Comp. Gen. 318, *supra,* is precisely on point. In that decision we said the following:

> But for the no-set-off provisions of the Assignment of Claims Act, as amended, we would perhaps agree with the position of the Internal Revenue Service. We think it is clear, however, that that part of the act expressly nullifies the effect of section 6321 of the Internal Revenue Code of 1954, Title 26, in the present case.
>
> * * * * * * *
>
> Other provisions of the Assignment of Claims Act permit the assignment of moneys due under a Government contract which theretofore was prohibited. If the act had permitted only this, without the no set-off provision, an assignee's rights

would be governed by common law. Indeed, this is the situtation where the contract does not include a no set-off provision. In such case, the assignee stands in the shoes of the assignor and the Government may set off against the assignee any claims of the Government against the assignor which had matured prior to the assignment. *South Side Bank & Trust Co.* v. *United States,* 221 F.2d 813. However, under the common law applicable to assignments, debts of the assignor which mature after an assignment is made may not be set off against payments otherwise due the assignee. 20 Comp. Gen. 458, 459, and cases cited there.

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

It is clear that the no set-off provision of the act operated to reduce the Government's common law right of set-off against an assignee. As was stated in *Central Bank* v. *United States,* 345 U.S. 639, 643:

"* * * The Act authorized the War and Navy Departments to limit the Government's previous rights of set-off. * * *

"The Assignment of Claims Act of 1940 was evidently designed to assist in the national defense program through facilitating the financing of defense contracts by limiting the Government's power to reduce properly assigned payments. Borrowers were not to be penalized in security because one contracting party was the Government. Contractors might well have obligations to the United States not imposed by the contract from which the payments flowed, as for example the contractor's income tax for prior earnings under the contract. The taxes here involved are another illustration of the dangers to lenders."

While no mention is made in the Central Bank case of tax debts which might have accrued prior to the making of a Government contract, and as to which a tax lien might have arisen, it is plain that such debts would pose an even greater danger to prospective lenders than tax debts arising during the course of performance of the contract.

In that decision we held that even though the contractor's tax debt arose long before the assignment, and even the execution of the contract, the no-set-off clause precluded the IRS from setting off any of the contractor's tax debts against the contract proceeds (except for any portion of the contract proceeds that may have exceeded the assignor's indebtedness to the assignee). Our Office has reached a similar conclusion in a number of other cases, including the following: B-176905, November 1, 1964; B-166531, November 10, 1969; B-156781, August 4, 1965; B-153171, October 8, 1964; and B-138974, May 23, 1960.

To conclude that whether or not a no-set-off clause is present the Government's set-off authority is to be determined solely on the basis of which claim arose, or became effective first, would nullify the effect and meaning of the no-set-off clause in our view. Accordingly, it remains our position that where a no-set-off clause is present in a contract that is validly and properly assigned to an eligible assignee who substantially complies with the statutory filing and notice requirements, the IRS cannot set off the contractor's tax debt (whether arising under or independently of the assigned contract), against the contract proceeds due the assignee, even if the tax debt was fully mature prior to the date on which

the contracting agency received notice of the assignment.[5] This, of course, would not prohibit set-off if the contracting agency had not been notified of the existence of the prior assignment before the set-off was made (assuming payment was already due under the assigned contract). In this case the contracting agency could not be bound by an assignment of which it was unaware.

We note that B-158451, March 3, 1966, and B-195460, October 18, 1979, in apparent reliance on the conclusion reached in a case in which the contract at issue did not contain a no-set-off clause (37 Comp. Gen. 808 (1958)), concluded that a no-set-off clause did not overcome a Government claim which arose prior to receipt of the notice of assignment. Those decisions are modified to conform to our holding in this case.

[B-208637]

Appropriations—Availability—Intervenors

Section 502 of Nuclear Regulatory Commission fiscal year 1982 appropriation act, which prohibits use of funds to "pay the expenses of, or otherwise compensate" intervenors, prohibits NRC from using 1982 funds to pay Equal Access to Justice Act awards to intervenors, to the extent the underlying proceedings were funded under the 1982 appropriation act. However, 1982 appropriation is available to pay award for fees and expenses incurred incident to that portion of a proceeding funded by a prior year's appropriation not subject to section 502.

Appropriations—Obligation—Attorney Fees

Under section 203 of Equal Access to Justice Act (5 U.S.C. 504) which authorizes agencies to award attorney fees and expenses to prevailing party upon final resolution of adversary adjudication, the obligation for purposes of 31 U.S.C. 1501(a) arises when the agency makes the award, that is, when the adjudicative officer renders his decision in response to the prevailing party's fee application.

Equal Access to Justice Act—Awards, Judgments, etc.—Payment—Permanent Judgment Appropriation

Section 207 of Equal Access to Justice Act (EAJA) (5 U.S.C. 504 note) prohibits use of permanent judgment appropriation established by 31 U.S.C. 1304 as alternative source of funds for payment of awards newly authorized by EAJA unless and until Congress makes a specific appropriation for that purpose.

Matter of: Availability of funds for payment of intervenor attorney fees—Nuclear Regulatory Commission, September 29, 1983:

This responds to a request by the General Counsel of the Nuclear Regulatory Commission (NRC) for answers to a number of questions concerning the availability of appropriated funds for the payment of awards under the Equal Access to Justice Act (Act) to intervenors in NRC adversary adjudications. Most of the questions

[5] We note that this only applies with respect to tax debts, whether arising under or independently of the contract, or other debts that arise independently of the assigned contract. In accordance with the express language of the Assignment of Claims Act, the no-set-off clause does not protect the assignee against set-off by the Government of any non-tax debt that arises under the assigned contract. Moreover, our Office has held that where the claim to be set off is acquired "under the same transaction or contract, the prior notice of assignment does not defeat the right of set off" by the Government. See 46 Comp. Gen. 441, 546 (1966) and 30 *id.* 98 (1950). This is true whether or not the assigned contract contains a no-set-off clause.

center around the issue of whether the NRC may pay such awards in light of section 502 of the agency's fiscal year 1982 appropriation act, the Energy and Water Development Appropriation Act, 1982, Public Law 97-88 (95 Stat. 1135 (1981)). Below, we have stated each question and our answer to it. However, before addressing the specific questions, we believe that a brief discussion of the Act's applicability to intervenors may be helpful.

APPLICABILITY TO INTERVENORS

The Equal Access to Justice Act, Title II of Public Law 96-481, effective October 1, 1981, generally authorizes the awarding of attorney fees, expert witness fees, and other costs to private parties in certain administrative and judicial proceedings against the United States in which they were not previously allowed. Specifically, as relevant to this decision, 5 U.S.C. § 504(a)(1) (added by 203(a)(1) of the Act) provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

The Act defined "adversary adjudication" as "an adjudication under section 554 of this title [Administrative Procedure Act] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license." 5 U.S.C § 504(b)(1)(C). However, according to the legislative history, the exclusion for licensing hearings does not extend to proceedings involving the suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980); S. Rep. No. 253, 96th Cong., 1st. Sess. 17 (1979). (The NRC had indicated informally that it conducts such proceedings in which intervenors participate and in which the position urged by the intervenors might prevail.)

The Act further defines "party" as a party for purposes of the Administrative Procedure Act, but having a net worth under a specified amount or less than 500 employees. 5 U.S.C. § 504(b)(1)(B). This expressly includes a person "admitted by an agency as a party for limited purposes." 5 U.S.C. § 551(3). This language would seem sufficiently broad to encompass intervenors.

This is also the view of the Administrative Conference of the United States although the Conference believes that intervenors will rarely actually receive awards. The conference acts as consultant to Federal agencies which must establish uniform procedures for awarding fees in their administrative proceedings. 5 U.S.C. § 504(c)(1).

The Conference has published model rules to provide guidance to agencies in establishing their own regulations. 46 Fed. Reg. 32900 (June 25, 1981). The comments proceeding the model rules state:

Intervenors: The National Screw Machine Products Association, the National Association of Manufacturers, and DOE suggested that the rules should limit or eliminate the eligibility of intervenors. We don't believe that the Act provides for this. We note, however, that situations in which intervenors actually receive awards will probably be rare. The Act excludes rulemaking, licensing, and ratemaking proceedings, in which voluntary intervention is very likely. In adversary adjudications such as enforcement proceedings, intervention by parties without a direct financial stake in the outcome is relatively infrequent, so the Act seems unlikely to become a substantial source of funds for advocacy organizations promoting generalized points of view in agency proceedings. *Id.*, at 32903.

Thus, if an intervenor qualifies as a "prevailing party" in an adversary adjudication as defined in the Act and its legislative history, it is eligible to apply for a fee award under 5 U.S.C. § 504.

THE SPECIFIC QUESTIONS

Against this background, the questions raised by the NRC and our answers to them are are follows:

(1) Does the language of section 502 of the NRC's fiscal year 1982 appropriations measure, Pub. L. No. 97-88, preclude the agency from disbursing NRC fiscal year 1982 appropriated funds to an intervenor who is otherwise found to be entitled to an EAJA award as a prevailing party in an adversary adjudication funded under the fiscal year 1982 appropriations act?

Restated, the question is whether section 502 overrides the more general authority of the Equal Access to Justice Act with respect to NRC proceedings. We believe it does.

The Energy and Water Development Appropriation Act, 1982, appropriated funds to the NRC to carry out its responsibilities under its major authorizing legislation, the Energy Reorganization Act of 1974 and the Atomic Energy Act. Pub. L. No. 97-88, 95 Stat. 1135, 1147 (1981). Since, as will be discussed later, agency funds are at present the sole source for EAJA award payments, funds appropriated by Pub. L. No. 97-88 ordinarily would be available for NRC awards, including those made to intervenors. Section 502, however, limits the availability of the NRC's fiscal year 1982 appropriation with respect to intervenors. It provides:

None of the funds in this Act shall be used to pay the expenses of, *or otherwise compensate,* parties intervening in regulatory or adjudicatory proceedings funded in this Act. 95 Stat. 1148. [Italic supplied.]

We note that the NRC's 1984 appropriation contains the same prohibition. Energy and Water Development Appropriation Act, 1984, Pub. L. No. 98-50 (July 14, 1983), § 502, 97 Stat. 247, 261. The same appropriation act includes a similar prohibition applicable to the Department of Energy. Pub. L. No. 98-50, § 305 97 Stat. 259. The Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1984, also includes a similar provison. Pub. L. No. 98-45 (July 12, 1983), § 410 97 Stat. 219, 239. Thus, the effect of section 502 and similar provisions appears to be a continuing and more general question, apart from the relatively limited scope of the original question NRC raised. While we will respond in terms of NRC's 1982 appropriation, our comments apply

to any agency in any fiscal year in which it is subject to a prohibition like section 502.[1]

We note further that the NRC's "Salaries and Expenses" appropriation for 1982 remains available until expended; that is, it is a no-year appropriation. The same is true for 1984. However, some agencies subject to section 502 or similar restrictions may be operating under one-year appropriations. We will address both situations in the remainder of this decision whenever the distinction is relevant.

The plain terms of section 502, particularly the underscored phrase, unambiguously prohibit the use of appropriated funds for payments of any kind to intervenors. On its face, this would include awards under the EAJA. EAJA payments would constitute a form of compensation to intervenors and are therefore within the scope of the prohibition.

Thus, section 502 prohibits NRC award payments to intervenors while the EAJA appears to provide for such payments; the issue arises as to which statute is controlling. It is a well-settled principle of statutory construction that specific terms covering a given subject matter will prevail over general language of the same or another statute which might otherwise apply. *Kepner* v. *United States,* 195 U.S. 100, 125 (1904); B-152722, August 16, 1965. The EAJA is a general statute. It generally authorizes awards of fees and expenses for prevailing parties in covered proceedings against any governmental agency to which the Act applies. In comparison, section 502 is the more specific provision in that it concerns only payments to intervenors in NRC proceedings funded under the 1982 Energy and Water Development Appropriation Act. Accordingly, section 502 controls and the NRC's 1982 funds are not available to pay intervenor EAJA awards.[2]

(2) To what extent does the language of section 502 of the NRC's fiscal year 1982 appropriations measure, Pub. L. No. 97-88, preclude the agency from disbursing fiscal year 1982 funds to an intervenor as payment of an award for its participation in an adversary adjudication, portions of which were funded under earlier NRC appropriations legislation that did not include the section 502 restriction.

Implicit in this question is the premise that the award is not actually made until fiscal year 1982 or later. This is because the statute does not permit the making of an award prior to final disposition of the adjudication. Also, it should be kept in mind that the following discussion pertains to the NRC, an agency which receives no-year appropriations.

As indicated in our answer to question 1, by enacting section 502, Congress clearly intended to insure that none of the Commission's fiscal year 1982 appropriated funds would be paid to intervenors.

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[1] The relevant provision of the Equal Access to Justice Act, 5 U.S.C. § 504, is subject to a "sunset" provision and is scheduled to expire as of October 1, 1984. Legislation to make the Act permanent has been introduced in the 98th Congress (S. 919) but has not yet been acted upon.

[2] For fiscal year 1983, NRC did not receive a "regular" appropriation but has been operating under a continuing resolution. Pub. L. No. 97-377 (December 21, 1982), § 101(f), 96 Stat. 1830, 1906. It is clear from the conference report that conditions in the 1982 appropriation act were intended to remain applicable. H.R. Rep. No. 980, 97th Cong., 2d Sess. 184 (1982).

In view of the definitive nature of this limitation, we conclude that funds restricted by section 502 may not be used to satisfy an award in an adversary adjudication regardless of the fact that part of the proceeding was conducted in an earlier "unrestricted" fiscal year. Section 502 thus precludes the NRC from disbursing fiscal year 1982 appropriated funds to an intervenor to satisfy an award stemming from participation in an adversary adjudication which was funded in part by an earlier unrestricted appropriation.

On the other hand, the Commission may make and pay such an award from the earlier unlimited appropriation provided funds are still available for obligation from that appropriation at the time the Commission makes its award. An earlier appropriation not limited by section 502 may be used to pay awards to intervenors. The fact that the Commission issues an award during a restricted fiscal year does not prevent its being paid out of a previous fiscal year's appropriation so long as part of the proceeding giving rise to the award was funded by an unrestricted appropriation.[3]

As noted, generally, the Commission annually receives a no-year appropriation which "remains available until expended." For the purposes of determining the availability of funds to make awards of the type in question, the Commission should consider that it obligates its funds in the order in which they are appropriated. Under this approach, the Commission should subtract its total obligations since the effective date of the earlier appropriation from the amount of that appropriation. If the amount of funds obligated is less than the amount of the unrestricted appropriation, then the Commission should consider the difference as the amount of the unrestricted appropriation still available for obligation to pay the award. The award may be satisfied up to the amount of the difference. Conversely, the Commission should consider itself as operating on restricted funds if the obligated amount is greater than the unrestricted appropriation and the award should not be made.

(3) Does the EAJA's alternative provision for payment of an NRC award out of the permanent judgment fund now provide a source of funds in the absence of a specific appropriation to that fund for the payment of EAJA awards?

No. Another provision of the EAJA, section 207 (classified to 5 U.S.C. § 504 note) clearly prohibits the use of the judgment appropriation for the payment of awards unless Congress makes a specific appropriation for that purpose or otherwise amends the legislation.

The "alternative payment provision" refers to the second sentence of 5 U.S.C. § 504(d)(1). Subsection 504(d)(1) provides:

> Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by an agency, the fees and

[3] This of course would not be true if we were dealing with annual appropriations because the prior appropriation would have expired for obligational purposes.

other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code.

The permanent indefinite appropriation established by 31 U.S.C. § 1304 (formerly 31 U.S.C. § 724a) is generally the source of payment of final judgments covered by 28 U.S.C. § 2414.

In a letter to the Administrative Conference of the United States, B-40342.1, May 15, 1981, we noted that the report of the House Judiciary Committee on the bill that became the Equal Access to Justice Act states "Funds may be appropriated to cover the costs of fee awards or may otherwise be made available by the agency (e.g., through reprogramming)." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 16 and 18 (1980). We concluded that agency operating appropriations were available to pay EAJA awards without the need for specific appropriations.

Read alone, 5 U.S.C. § 504(d)(1) would appear to make the judgment appropriation available as a back-up in limited situations.[4] However, section 207 of the EAJA negates this possibility. Section 207 provides:

> The payment of judgments, fees, and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriation Acts.

The legislative history clearly establishes that section 207 was intended to prevent the expansion of the permanent judgment appropriation. We discussed section 207 and its origin in detail in another letter to the Administrative Conference, B-40342.2, October 21, 1981. The remainder of our response to Question 3 is taken essentially from that letter.

The entire legislative history of section 207 is found in the Congressional Record for October 1, 1980, pages H-10213 through H-10218. (Page references are to the daily edition.)

The conference report on H.R. 5612, which became Pub. L. No. 96-481, was issued on September 30, 1980 (H.R. Rep. No. 96-1434). The conference version of Title II (Equal Access to Justice Act) was identical to the version enacted into law except that it did not include section 207.

The House of Representatives took up its debate on the conference report on October 1, 1980. Representative Danielson raised a point of order, charging that the payment provisions of Title II constituted "an appropriation on a legislative bill, in violation of clause 2 of rule XX of the rules of the House of Representatives." (H-10214). The cited rule prohibits House conferees from agreeing to such a provision without prior authority of the House.

The Chair summarized the provisions in question and then stated:

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[4] The Conference Report on the EAJA stated "The conference substitute directs that funds for an award * * * come first from any funds appropriated to any agency * * *." H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 24 and 26 (1980). One of the major concerns leading to the inclusion of the judgment appropriation as a limited back-up was to prevent a small agency from being "disassembled" by a very large award. See Cong. Rec., October 1, 1980 (daily ed.), H-10223 (remarks of Rep. Kastenmeier).

Thus the provision in the Senate amendment contained in the conference report extends the purposes to which an existing permanent appropriation [31 U.S.C. § 1304] may be put and allows the withdrawal directly from the Treasury, without approval in advance by appropriation acts, of funds to carry out the provisions of title II of the Senate amendment. (H-10214)

Accordingly, for the specific reason that the bill would have expanded the availability of the judgment appropriation, the Chair sustained the point of order. Thus, at this point, the bill was dead without some further legislative action.

Representative Smith then offered an amended version of the bill to cure the defect. The Smith amendment was identical to the conference version with the addition of one new section—section 207. Representative Smith explained that his amendment "modifies those provisions which have been ruled to be an appropriation on an authorization bill. It makes no other changes in the language." (H-10218)

Representative Danielson again raised a point of order, contending that the Smith amendment still amounted to an appropriation on a legislative bill. Representative Smith, arguing against the point of order, offered the following explanation:

Mr. Speaker, I think it is very clear the way it [section 207] is worded that it is just an authorization for an appropriation. There has to be a specific appropriation, the same procedure we use in almost all laws around here. (H-10218)

Representative McDade then confirmed Representative Smith's statement, pointing out that section 207 "is boilerplate language." (The language has in fact become very common since enactment of the Congressional Budget Act of 1974, and is usually found in cases of contract authority.)

The Chair then overruled the second point of order, the House accepted the conference report with the Smith amendment after some further debate, and the bill was ultimately signed into law with section 207.

Reviewing this legislative history, it seems clear that the purpose of section 207 was to cure the defect which prompted the Chair to sustain Representative Danielson's first point of order—the expansion of the availability of 31 U.S.C. § 1304. By virtue of section 207, we view the Equal Access to Justice Act as neither expanding nor diminishing the availability of the permanent judgment appropriation.

Accordingly, the alternative payment provision, 5 U.S.C. § 504(d)(1), together with section 207, merely authorizes funds to be appropriated to the judgment appropriation for the payment of EAJA awards. Since this has not been done, the judgment appropriation is not available as a secondary payment source.

(4) If there is no present source of funds for the payment of EAJA awards to NRC intervenors, would an NRC award, issued during a fiscal year in which there is no source of funds, be subject to payment at any time in the future when unrestricted funds are available to the agency or in the permanent judgment appropriation?

The effect of section 502 is to prohibit the obligation of funds for awards to intervenors. At this point, therefore, it is useful to note exactly when an obligation arises under the Equal Access to Justice Act. An award under 5 U.S.C. § 504 is not automatic. Upon final disposition of the adversary adjudication, the party seeking an award must apply to the agency. The application must show that the applicant is a "prevailing party." The agency adjudicative officer must then issue a written decision on the application. An award may be made only if the adjudicative officer finds that the agency's position was not substantially justified and that there are no special circumstances making the award unjust. Also, the award may be reduced or denied if the applicant unduly and unreasonably delayed the final resolution. Under this statutory structure, we think the obligation arises, for appropriations accounting purposes (31 U.S.C. § 1501(a)), when the agency issues its decision on the fee application. See 1 Comp. Gen. 200 (1921); 38 *id.* 338 (1958); B-174762, January 24, 1972.

It is elementary that an appropriation may be obligated only during its period of availability. Thus, an agency with fiscal year funds would record an obligation in the fiscal year in which it makes the award. If the agency is subject to section 502 or a similar provision, it cannot make a valid obligation for a fee award to an intervenor. Since NRC's 1982 appropriation was a no-year appropriation, the unobligated balance continues to be available for obligation. However, section 502 "runs" with the appropriation also without fiscal year limitation, and thus continues to bar the creation of a valid obligation for the prohibited purpose.

Since an agency obligates its appropriations when it makes an award under the EAJA, the answer to Question 4 is that the NRC could not make an award in a fiscal year in which there was no available source of funds for payment. To do so would violate two statutes—31 U.S.C. § 1301(a) (formerly 31 U.S.C. § 628) and the Antideficiency Act, 31 U.S.C. § 1341 (formerly 31 U.S.C. § 665(a)).

The first statute, 31 U.S.C. § 1301(a), restricts the use of appropriations to their intended purposes. An "intended purpose" need not be specified in the appropriation act. It is sufficient that the appropriation be legally available for the item in question. NRC appropriations subject to section 502 are not legally available for EAJA awards to intervenors. Therefore, a purported obligation for such an award would contravene this statute.

The Antideficiency Act prohibits the making of obligations or expenditures in excess of or in advance of appropriations. The applicable principle was stated in a 1981 decision as follows:

> When an appropriation act specifies that an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed either as being in excess of the amount (zero) available for that purpose or as in

advance of appropriations made for that purpose. In either case the Antideficiency Act is violated. 60 Comp. Gen. 440, 441 (1981).

It would make no difference whether or not the agency actually recorded the obligation pursuant to 31 U.S.C. § 1501(a). *E.g.,* 55 Comp. Gen. 812, 824 (1976).

If the NRC actually made the award, the effect would be the same as making an obligation after the applicable appropriation has been exhausted. The obligation, albeit an invalid one, is against funds available for obligation at the time it is made. Should appropriations—either NRC appropriations or the judgment appropriation—subsequently become available for EAJA awards to intervenors, they would still not be available to satisfy the prior invalid award unless the legislative action which made those funds available expressed such an intent.

(5) If in answering question 4 you conclude that there is no time limitation on when an award can be paid, can the NRC set a time limitation within which an award must be presented for payment, even if funds are not presently available for disbursement?

In view of our answer to Question 4, a response to this question is unnecessary.

Finally, the NRC asks that we address the same questions as they relate to judicial fee awards under 28 U.S.C. § 2412(d) (added by section 204(a) of the EAJA) to intervenors as a result of their participation in NRC regulatory or adjudicatory proceedings. Judicial awards in this context could come about in one of two ways. First, a party might seek judicial review of the underlying decision of an adversary adjudication. Should the party ultimately prevail, 5 U.S.C. § 504(c)(1) requires that fees be awarded only under the authority of 28 U.S.C. § 2412(d)(3), and the award may encompass the administrative portion of the proceedings. Second, a party might seek judicial review of an agency's determination on its fee application. 5 U.S.C. § 504(c)(2).

Basically, what we have said above with respect to administrative awards applies equally to judicial awards. Agency operating appropriations are available to make payments unless otherwise prohibited, for example, by a provision such as section 502. Also, for the same reasons set forth in our answer to Question 3, section 207 of the EAJA bars payment from the judgment appropriation absent some further congressional action. There is one significant difference, however. A judicial award would not be viewed as violating either 31 U.S.C. § 1301(a) or the Antideficiency Act. Thus, the result might be a valid award with no available source of funds for payment, leaving little recourse but to attempt to obtain funds from the Congress.

In sum, NRC appropriations provided under an appropriation act which contains the section 502 prohibition are not available to pay EAJA fee awards to intervenors, except to the extent the proceedings were funded under an appropriation not subject to the prohibi-

tion. By virtue of section 207 of the EAJA, the permanent judgment appropriation is also not available to pay awards, administrative or judicial, newly authorized by that Act. In the event appropriations—either agency funds or the judgment appropriation—are later made available to pay EAJA awards to intervenors, the applicability to prior time periods would depend on the intent of the legislative action establishing that availability.

[B-196794]

States—Federal Aid, Grants, etc.—Interest on Federal Funds—Accountability

Where subgrantee of CETA grant to State of Arkansas earned interest on recovered FICA taxes before the recovery was returned to the Federal Government, the interest is an applicable credit under the grant agreement and grant cost principles. As a result, all interest earned by subgrantee on the recovery is owed to the grantee and by the grantee to the Department of Labor to the extent not offset by allowable grant costs.

States—Federal Aid, Grants, etc.—Interest on Federal Funds—Accountability

Where a subgrantee of State CETA grantee recovers grant funds and earns interest on recoveries, the interest is not held on advance basis and is not exempt from accountability under the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503(a).

Matter of: Department of Labor—Interest on Recovered Grant Funds, September 30, 1983:

This decision is in response to a request from the Assistant Secretary for Administration and Management, Department of Labor (DOL), for our opinion concerning the treatment of interest earned by a subgrantee on grant funds held under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 801 *et seq.*

The DOL requests that we concur with its position that a subgrantee of a CETA grant to a State cannot retain interest earned on grant funds after they were disbursed and subsequently recovered by the subgrantee. For the reasons given below, we concur with the Department's position.

During the period covering fiscal year 1974 through 1977, DOL made CETA grants to the State of Arkansas (grantee) that in turn made subgrants to the Southeast Arkansas Economic Development District, Inc. (subgrantee). A portion of the grant funds was used by the subgrantee to pay Federal Insurance Contributions Act (FICA) taxes (26 U.S.C. §§ 3101 *et seq.*) to the Internal Revenue Service (IRS). *See* 29 C.F.R. § 98.25(e) (1981). Subsequently, the subgrantee obtained a waiver from IRS of the requirement that it pay FICA taxes and in 1978 the subgrantee received a refund of all of the FICA taxes the subgrantee had paid during the 4-year period in question. The FICA taxes the subgrantee paid to the IRS included both the employer and employee share of the taxes.

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Upon receipt of the refund from IRS, the subgrantee invested the money in certificates of deposit. It was not until this situation was revealed through an audit performed by the grantee in September 1980 that the subgrantee returned any of the funds involved to DOL. However, while the subgrantee apparently returned most of the principal to DOL in November 1981, the subgrantee retained accrued interest as well as a portion of the principal that was still owed to the employees the subgrantee had been unable to locate. The latter amount represents the employees' share of FICA taxes that had been withheld from their wages.

The subgrantee cites 59 Comp. Gen. 218 (1980) as authority for its retention of interest on the IRS refund. That decision concluded that non-governmental subgrantees of States were entitled to keep interest earned on grant funds advanced to them by States pending their disbursement for grant purposes under the authority of the Intergovernmental Cooperation Act, 31 U.S.C. § 6503(a). However, as discussed below, the funds at issue here were recoveries of funds previously expended for grant purposes. Hence, they were not advances as that term is defined by relevant implementing regulations, and they should have been applied to grant purposes upon receipt or returned to the Government until needed for grant purposes. More importantly, the recovered funds clearly were not held "pending disbursement" as contemplated by the Intergovernmental Cooperation Act since they were instead invested for a period of years and except for repayments of some employees' shares of the tax refund, neither the refunded amounts nor the investment interest were ever applied to grant purposes.

The Grant Agreement Forms Basis for Treatment of Interest

When a grantee accepts grant funds, it enters into a contractual agreement. 50 Comp. Gen. 470, 472 (1970). This agreement usually is comprised of the grant application, standard Government award documents, special conditions placed on the award, grant manuals provided by the awarding agency, regulations and legislation. Among the fundamental understandings embodied in a grant agreement which flow from the authorizing statute are that grant funds are to be expended only for the purposes for which they were awarded and are not intended to be used for the profit of the grantee unless expressly agreed to or authorized. *See* 42 Comp. Gen. 289 (1962). Accordingly, these funds may not be used for the purpose of earning income where to do so would be inconsistent with the purposes of the grant. Indeed, agencies have no authority to agree to such an arrangement in the absence of some affirmative legislative action permitting them to do so. B-192459, July 1, 1980.

Where, as here, grant funds are invested and earn interest, the treatment of this interest must fall under one of the rules regarding the treatment of grant-related receipts. The regulations recognize three basic categories of receipts: (1) interest earned on grant

funds held in advance of immediate cash needs; (2) grant-related income derived from the grantee carrying out grant purposes; and (3) applicable credits which are those debits and credits to the grant cost items that are incidental to the operation of the grant program but are not the natural outcome of accomplishing grant purposes.

"Applicable credits" are defined as "those receipts or reductions of expenditure-type transactions which offset or reduce expense items allocable to grants as direct or indirect costs." OMB Circular A-87, Attachment A, paragraph C 3 (formerly Federal Management Circular (FMC) 74-4)) incorporated by DOL in 41 C.F.R. § 29-70.103(a) (1982). The circular gives the following examples of "applicable credits" that involve receipts: rebates, recoveries or indemnities on losses; sales of publications, equipment scrap; and income from personal or incidental services. This description of applicable credits has remained consistent in each of the circular's versions from Bureau of the Budget Circular No. A-87 (1968), Attachment A paragraph C 3, through FMC 74-4 (1974), Attachment A, paragraph C 3 to the current OMB Circular A-87, Attachment A, paragraph C 3.

It seems apparent from a review of the three categories of receipts that may come to a grantee or subgrantee that the interest earned in this instance must be classified as an applicable credit. As discussed below, the interest earned on recoveries is not interest earned on an advance of grant funds. Nor does it meet the basic definition of grant income.

First, the refunded amounts themselves clearly are credits because they are "recoveries" under the applicable definition of "credits" and it seems therefore any interest earned on such credits should also be treated as credits. Further, under Treasury Circular 1075 and the Intergovernmental Cooperation Act, as embodied in DOL regulations, grantees are not to hold grant funds in excess of their immediate needs. 29 C.F.R. § 98.2 (1978). By holding recoveries that should either have been re-disbursed for grant purposes or returned to the Government, the subgrantee violated this clear requirement.

As Applicable Credits the Interest Should Have been Applied to Allowable Costs

Under the cost principles applicable to the State under this grant, OMB Circular A-87 (formerly FMC 74-4) Attachment A, paragraph C 1 g, allowable costs are "net of applicable credits." 41 C.F.R. § 29-70.103 (1982). Accordingly, where interest is earned on recoveries of grant funds, this interest must be treated as added to the total amount of grant funds in the grantee's hands. To the extent that the total of grant funds exceeds allowable cost items of the grantee, these funds are returnable to the Federal Government.

The subgrantee, a non-profit organization, was subject, under regulations, in effect when the taxes were recovered, to cost principles applicable to commercial organizations. 29 C.F.R. § 98.12(a) (1977). Under these standards, the subgrantee was required to treat credits as follows:

> The applicable portion of any income, rebate, allowance, and other credit relating to any allowable cost, received by or accruing to the contractor, shall be credited to the Government either as a cost reduction or by cash refund, as appropriate. * * * 41 C.F.R. § 1-15.201-5 (1977).

Based on the foregoing analysis, all the interest earned in this case would appear to be "applicable credits." We can see no basis for making distinctions based on whether interest was earned on funds held "pending disbursement" generally for grant purposes or whether the interest was earned on the employee's share of the tax refund held while attempting to pay employees their share of the recoveries. All of the interest is to be credited to the grant and must be included in arriving at the net allowable costs for the project. Any excess in grant funds over allowable costs is refundable to DOL at the earliest practicable time.

Employees' Share of Recovered Taxes That Has Not Yet Been Paid to Them Should Be Returned to the Federal Government

Cost regulations are also the basis for answering who should hold the employee share of the IRS refund that has not been returned to the employees. Clearly there is an obligation under this grant to pay these employees for the portion of the refunded taxes that they contributed, but the grantee is entitled to keep only those funds that represent actual costs to him. At this late date, whether these funds will ever be paid must be seriously doubted. Accordingly, they do not appear allowable under grant closeout procedures and this amount should be disallowed as a grantee allowable cost pending submission by an ex-grant funded employee of a request for payment. *See* 29 C.F.R. § 98.17 (1977); under 1982 DOL regulations, closeout procedures are reserved for 41 C.F.R. § 29-70.212. At this time we do not believe that amounts representing employees' share of the refunded amounts are encumbered sufficiently to permit retention as an allowed cost. Adjustments among DOL, the grantee and the subgrantee can be made at a later time, if individuals' claims are submitted, since their payment would represent costs incurred out of grant funds that were available for this purpose at the time the obligation was made.

Section 203 of the Intergovernmental Cooperation Act Does Not Apply to Interest Earned on Recoverd Grant Funds

On several occasions, going back as far as the first volume of Comptroller General decisions, we have considered situations where grantees have earned interest on advances of grant funds. *See* 1 Comp. Gen. 652 (1922). These cases established the rule that where grantees earn interest on advances of grant funds held pend-

ing disbursement they hold that interest in trust for the Government and must pay it over to the Government. *See, e.g.,* 42 Comp. Gen. 289 (1962). Section 203 of the Intergovernmental Cooperation Act of 1968, 31 U.S.C. § 6503(a) (formerly 42 U.S.C. § 4213), made an express exception to this rule for States. Under this Act, States cannot be required to account to the Federal Government for interest earned on grant funds held pending their disbursement. *Id.* We have said that interest earned by subgrantees on advances from State grantees held pending disbursement are also excepted by operations of this Act. 59 Comp. Gen. 218 (1980). The subgrantee argues that our ruling in the last cited case controls the question presented here by DOL because the amounts refunded by IRS were being held "pending disbursement" and that, accordingly, the subgrantee should be allowed to retain the interest.

The Intergovernmental Cooperation Act of 1968, as codified in 1982, provides as follows:

(a) Consistent with program purposes and regulations of the Secretary of the Treasury, the head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between transfer of the money from the Treasury and the disbursement by a State, whether disbursement occurs before or after the transfer. A State is not accountable for interest earned on grant money pending its disbursement for program purposes. 31 U.S.C. § 6503(a).

The last sentence of this provision which provides the basis for the interest exemption for States and their subgrantees from our general rule does not mention the "advance" of funds. However, it is clear from the sentence that precedes it, which speaks about minimizing the time between the transfer and disbursement by a grantee, that the provision applies to advances of funds to States. This conclusion is expressly described in the legislative history of this section.

This section establishes a procedure *to discourage the advancement of Federal funds for longer periods of time than necessary.* The Department of the Treasury has already moved administratively to achieve this objective in its Departmental Circular No. 1075, issued May 28, 1964. Under this circular, a letter of credit procedure has been established which maintains funds in the Treasury until needed by recipients. *Advances* are limited to the minimum allowances that are needed and are timed to coincide with actual cost and program requirements. This section is designed to place this administrative practice on a legislative basis and to extend it to cover disbursements which occur both prior and subsequent to the transfer of funds. *It is further intended that States will not draw grant funds in advance of program needs.*

Decisions of the Comptroller General of the United States have in the past required that recipients of Federal grants return to the Treasury any interest earned on such grants prior to their use, unless Congress has specifically precluded such a requirement. The new technique, such as the letter of credit and sight draft procedures now used by the Treasury, should minimize *the amount of grants advanced,* and thus it should not be necessary to continue to hold States accountable for interest or other income earned prior to disbursement. S. Rept. No. 1456, 90th Cong. 15. [Italic supplied.]

Moreover, it is unlikely that Congress, in creating an exception from the general rule on interest established by Comptroller General decisions, would have created an exemption that would go

beyond the scope of that rule. The legislative history, as quoted above, confirms the limited problems addressed by section 203.

This interpretation of our cases and the Intergovernmental Cooperation Act has formed the basis for governmental policy for many years. OMB Circular A-102 provides at Attachment E, paragraph 2 as follows:

> *Interest earned on advances* of Federal funds shall be remitted to the Federal agency except for *interest earned* on advances to States or instrumentalities of a State as provided by the Intergovernmental Cooperation Act of 1968 (Public Law 90-577) * * *. [Italic supplied.]

This provision has been in the circular in substantially the same form since 1972. DOL has adopted this policy by regulation. *See, e.g.,* 29 C.F.R. § 98.19 (1974) and 41 C.F.R. § 29-70.205-2 (1982). As indicated, we read the Intergovernmental Cooperation Act to be directed to a specific situation concerning the cash flow management problem associated with "advances." Situations, such as that presented by this subgrantee, where disbursements are later recovered, neither meet the wording of the Intergovernmental Cooperation Act, nor are they the kind of situations it was designed to address. Accordingly, the exemption for interest earned on advances to States contained in the Intergovernmental Cooperation Act does not apply to the recoveries from IRS in this case. Our cases interpreting section 203 of the Intergovernmental Cooperation Act, as extending to subgrantees of States, are therefore not on point and do not govern the result of this case.

CETA Section 112(c)

Finally, DOL has specifically asked in the context of this case whether section 112(c) of CETA, formerly set forth in 29 U.S.C. § 822(c), would provide a basis for saying that the subgrantee cannot be said to have always held the recovered withholding taxes pending disbursements since the time within which the grantee could re-spend the recoveries had apparently expired under section 112(c) while interest was being earned. There is no need to address this issue since whether the subgrantee was holding the funds "pending disbursement" is not a material question under this decision as to whether the interest earned by the subgrantee should be paid over to the Federal Government.

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Unobligated balance of fiscal year 1982 Salaries and Expenses appropriation for the United States Information Agency remains available for obligation to fulfill any order of the Foreign Service Labor Relations Board arising out of an unfair labor practice proceeding instituted in September of 1982. Under 31 U.S.C. 1502(b), provisions of

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Question presented is entitlement of Federal judges to 4 percent comparability increase under sec. 129 of Pub. L. 97-377, Dec. 21, 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. We conclude that the language of sec. 129(b) of Pub. L. 97-377, combined with specific intent evidenced in the legislative history, constitutes the specific congressional authorization for a pay increase for Federal judges 358
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Employee's attorney claims attorney fees in case where GAO held Army committed an unjustified and unwarranted personnel action following the denial of an agency-filed application for disability retirement. *David G. Reyes,* B-206237, August 16, 1982. Claim for reasonable attorney fees under the Back Pay Act, 5 U.S.C. 5596, as amended, is allowed since General Accounting Office, as an "appropriate authority" under the Back Pay Act, finds fees to be warranted in the interest of justice. See 5 C.F.R. 550.806 464

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Claim for reasonable attorney fees under the Back Pay Act requested payment for 29 hours at $100 per hour. Following criteria established by Merit Systems Protection Board, the hourly rate is reduced to $75 to be consistent with rates charged by other attorneys in the locality 464

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Appropriation availability

Section 502 of Nuclear Regulatory Commission fiscal year 1982 appropriation act, which prohibits use of funds to "pay the expenses of, or otherwise compensate" intervenors, prohibits NRC from using 1982 funds to pay Equal Access to Justice Act awards to intervenors, to the extent the underlying proceedings were funded under the 1982 appropriation act. However, 1982 appropriation is available to pay award for fees and expenses incurred incident to that portion of a proceeding funded by a prior year's appropriation not subject to section 502 692

Under section 203 of Equal Access to Justice Act (5 U.S.C. 504) which authorizes agencies to award attorney fees and expenses to prevailing party upon final resolution of adversary adjudication, the obligation for purposes of 31 U.S.C. 1501(a) arises when the agency makes the award, that is, when the adjudicative officer renders his decision in response to the prevailing party's fee application 692

Recovery of fees, etc. incurred in pursuing bid protest

Not authorized by Act

Adversary adjudication requirement

Recovery under the Equal Access to Justice Act of attorney's fees and costs incurred in pursuing a bid protest at General Accounting Office (GAO) is not allowed because GAO is not subject to the Administrative Procedures Act (APA) and in order to recover under Equal Access to Justice Act claimant must have prevailed in an adversary adjudication under the APA 86

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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 delinquencies may arguably have been agency's fault 213
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Responsibility *v.* bid responsiveness
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Agency's rejection of low bid as nonresponsive, because individual sureties submitted on a bid bond pledged the same assets, was improper where affidavit submitted disclosed a net worth which was more than adequate to cover the requirement that each surety have a net worth at least equal to the penal amount of the bond and where bid bond was legally sufficient to establish the joint and several liability of the sureties. Furthermore, Defense Acquisition Regulation 10.201.2 does not require that the two sureties have two separate pools of assets 615

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Union agreements, labor strife avoidance, etc.

Requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions neither unduly restricts competition nor conflicts with Federal norm so long as prime contractor permits nonunion firms to compete for contracts and affords them opportunity to seek prehire agreements under the National Labor Relations Act. B-204037, Dec. 14, 1981, is amplified..... 428

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A Standard Form 33 solicitation provision which provides that a 60-day bid acceptance period will apply unless the bidder specifies a different number of days should have been cross-referenced with another solicitation provision which provides that bids with acceptance periods of fewer than 45 days would be considered nonresponsive. The failure to cross-refer was not in this case grossly misleading and, therefore, the cancellation of the solicitation is not required..... 31

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An agency's cancellation of a solicitation after bid opening is not unreasonable where the estimated quantities in the solicitation for the major portion of work are based on quarterly reports of the incumbent contractor, one of which an audit has called into question, and it reasonably appeared that the incumbent contractor could have had an unfair competitive advantage..... 65

Late 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..... 196

Construction

Slash (/) virgule

Bid stating that country of manufacture is "USA/England" was correctly evaluated as offering foreign end product for purposes of applying Buy American Act because the bid can reasonably be construed to permit the bidder to furnish either a domestic or a foreign product in the event of award..... 154

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Interpretation. (*See* BIDS, Construction)
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Invitation for bids (IFB) which specified class "A" security guards but contained Service Contract Act Wage Determination for class I and class II security guards was ambiguous and should have been amended. However, where the record indicates that no bidders were prejudiced by the ambiguity and the Government will receive the desired services, no "cogent and compelling reason" exists for cancellation of the IFB and resolicitation 354
Service Contract Act provisions
Our Office will consider a protest alleging terms of a solicitation to be defective although those terms concern the Service Contract Act, the enforcement of which is under the jurisdiction of the Department of Labor 354
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When union contract would require offeror to pay wages in excess of rates determined under Davis-Bacon Act, and acceptance of bid which failed to acknowledge amendment containing wage determination clearly has no prejudicial effect on competition, offeror may be permitted to cure defect by agreeing to amendment after bid opening 111

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Agency properly canceled solicitation after bid opening where bidders might have offered unacceptable foreign specialty metal products relying on a clause in the solicitation which no longer accurately reflected the agency's interpretation of applicable law, because the solicitation, as written, failed to reflect the Government's needs. 49 Comp. Gen. 606 is distinguished 256
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Faulty. (*See* **BIDS, Estimates of Government, Faulty, Cancellation of invitation)**
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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 196

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Protest that agency solicitation for carousel-type automated storage and retrieval system unduly restricts competition is without merit where record shows that agency technical personnel had an opportunity to evaluate the relevant characteristics of the available systems and reasonably determined that the carousel-type system was the only system that could meet its minimum needs and the protester has not shown that the agency's determination was unreasonable 503
Justification
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Mishandling determination
Improper Government action
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Where carrier for its own convenience gives an unmarked package containing protester's bid to an agency employee rather than delivering it to the proper office, subsequent misrouting of bid by another agency employee was not the paramount reason for the late arrival of the bid at the contracting office and bid was properly rejected 148

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The closer an asserted intended bid is to the next low bid, the more difficult it is to clearly establish that the asserted bid is the one actually intended. Where correction would bring the bid within one-tenth of 1 percent of the next low bid, and the intended bid can only be established by resort to an affidavit and an envelope on which the final bid was allegedly calculated just prior to bid opening, the agency's decision not to permit correction is reasonable 284
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Preparation
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Request for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire. 45 comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases modified in part 113
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Requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions neither unduly re-

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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..... 196
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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..... 196
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BONDS
Bid
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More than one
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Agency's rejection of low bid as nonresponsive, because individual sureties submitted on a bid bond pledged the same assets, was improper where affidavit submitted disclosed a net worth which was more than adequate to cover the requirement that each surety have a net worth at least equal to the penal amount of the bond and where bid bond was legally sufficient to establish the joint and several liability of the sureties. Furthermore, Defense Acquisition Regulation 10.201.2 does not require that the two sureties have two separate pools of assets..... 615

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Pub. L. 95-585 amendment effect
Construction contracts under $25,000
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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 $25,000 210
Performance
Surety
Entitled to recover without set-off
Recovery not affected by mistaken overpayment of contractor
Under surety law surety has election to pay Government's excess cost of completing contract or undertaking to finish the job himself. Under latter election, surety, upon successful completion, is entitled to his costs, up to the unexpended balance of the contract. In considering amount of unexpended balance available to pay performance bond surety his costs for completion of a defaulted National Institutes of Health contract, Government must consider contract balance to include amount of the Government's previous mistaken overpayment to the contractor 498

BUY AMERICAN ACT
Bids
Evaluation
Domestic product proposed
Responsibility determination
Not required
Protest that Buy American Act evaluation should not have been conducted because sole domestic bid, which was not low, was, allegedly, bogus is rejected. Bogus charge relates to allegation concerning domestic bidder's alleged nonresponsibility. But Buy American regulatory scheme does not require responsibility determination of domestic bidder in this situation. Moreover, General Accounting Office does not consider that a responsibility determination need be made absent collusion or other extraordinary circumstances not present in this procurement. Finally, domestic bid contained no indication that it was other than domestic 345
Foreign country classification
Not prejudicial to protester
Protester was not prejudiced by classfication of foreign countries involved in Buy American evaluation of bids submitted for requirement of hexachlorethane 345
Inapplicability of Buy American Act evaluation factor
Quantities on which only foreign bids submitted
Sole domestic bidder submitted bid for quantity which was less than maximum specified in Invitation For Bids (IFB). Partial bid was authorized by IFB. Contracting officer applied Buy American Act evaluation factor against nondomestic bidder as to maximum quantity which nondomestic bidder bid on. Application of evaluation factor as to quantities on which domestic bidder submitted partial bid was

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Bids—Continued
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proper. Application of evaluation factor as to quantities on which only foreign bids were submitted was improper. Partial termination of contract is recommended 345
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Domestic or foreign product
Country of manufacture
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Bid stating that country of manufacture is "USA/England" was correctly evaluated as offering foreign end product for purposes of applying Buy American Act because the bid can reasonably be construed to permit the bidder to furnish either a domestic or a foreign product in the event of award 154

CERTIFYING OFFICERS
Submission 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. B-189622, Mar. 24, 1978, is distinguished 168

CHECKS
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Disbursing officers' responsibility. (*See* DISBURSING OFFICERS)
Duplicate. (*See* CHECKS, Substitute)
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Relief to Treasurer of U.S. (*See* TREASURY DEPARTMENT, Treasurer of United States, Relief)
Payees
Deceased
Heirs' claim
Fact of possession
Insufficient to support payment
Claimants assert entitlement to proceeds of 13 Treasury checks issued in 1936 and 1937. Original payee died in 1954. Payee had endorsed one check incident to unsuccessful attempt to negotiate it in 1939, but other 12 were unendorsed. Checks were found among personal effects of payee's nephew, who was not a legatee under payee's will and who died in 1979. Claimants are heirs of nephew. Mere fact of possession does not establish *inter vivos* gift or other basis of entitlement, and record contains no evidence of delivery of checks by

CHECKS—Continued Page
Payees—Continued
Deceased—Continued
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payee to nephew. Therefore, General Accounting Office finds no basis to allow claim, under either Uniform Commercial Code or relevant state law 121
Personal
Bid desposits. (*See* SALES, Bids, Deposits)
Substitute
Replacement of lost or stolen checks
Treasurer's responsibility
Loss in duplicate check case (payee alleges non-receipt of original check, Treasury issues replacement, payee negotiates both checks) occurs when second check is paid. In general, General Accounting Office (GAO) thinks 31 U.S.C. 156 (now sec. 3333) is more appropriate than 31 U.S.C. 82a-2 (now secs. 3527 (c) and (d)) to deal with duplicate check losses. However, in view of conclusions and recommendations in 1981 report to Congress (AFMD-81-68), GAO thinks problem warrants congressional attention. Therefore, to give Congress and Treasury adequate time to develop solutions, GAO will maintain status quo for reasonable time and will handle cases under either statute as they are submitted 91

CIVIL RIGHTS ACT
Title VII
Discrimination complaints
Informal agency settlement
Without discrimination finding
Backpay
Agencies have the general authority to informally settle a discrimination complaint and to award backpay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination under EEOC regulations and case law. Title VII of the Civil Rights Act of 1964, as amended, and EEOC regulations issued thereunder provide authority for agencies to award backpay to employees in discrimination cases, independent of the Back Pay Act, 5 U.S.C. 5596. Thus, backpay is authorized under Title VII without a finding of an "unjustified or unwarranted personnel action" and without a corresponding personnel action 239
Cash award limitations
Informal settlements without a specific finding of discrimination are authorized by Title VII of the Civil Rights Act of 1964, as amended. In such informal settlements Federal agencies may authorize backpay awards, attorney fees, or costs without a corresponding personnel action. However, agencies are not authorized to make awards not related to backpay or make awards that exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made. An award may not provide for compensatory or punitive damages as they are not provided under Title VII 239

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CIVIL SERVICE REFORM ACT OF 1978

Attorney fees. (*See* **ATTORNEYS, Fees**)

Grade retention *v.* pay retention

Where a General Schedule employee who was demoted is repromoted to his former position during a 2-year period of grade retention under 5 U.S.C. 5362, the schedule for his periodic step increases established before demotion and grade retention remains in effect. *Grade* retention under 5 U.S.C. 5362 is to be distinguished from *pay* retention under sec. 5363. Repromotion during a period of grade retention is not an "equivalent increase" under 5 U.S.C. 5335(a) and 5 C.F.R. 531.403. Prior decisions arising before Civil Service Reform Act of 1978 are not applicable. This decision reversed on new information submitted, by 63 Comp. Gen. ——— (B-209414, Dec. 7, 1983) ... 151

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Contracts

Payments. (*See* **CONTRACTS, Payments, Assignment**)

Set-off. (*See* **SET-OFF, Contract payments, Assignments**)

Attorneys' fees. (*See* **ATTORNEYS, Fees**)

By or against Government

Record retention until settlement. (*See* **RECORDS, Retention**)

Federal Claims Collection Act of 1966. (*See* **FEDERAL CLAIMS COLLECTION ACT OF 1966**)

Reporting to Congress

Meritorious Claims Act

Reporting not warranted

The Secretary of the Army denied a deceased civilian employee's representative's claim under 10 U.S.C. 2733 for wrongful death damages allegedly caused by malpractice of Army medical officials. As to the Comptroller General reporting the matter to Congress as a meritorious claim under 31 U.S.C. 3702(d) (formerly 31 U.S.C. 236), that provision is construed to apply only to claims which fall within General Accounting Office's (GAO) settlement authority. Since, under 10 U.S.C. 2733 and 2735, the Army's settlement of a claim for damages is final and conclusive, GAO has no authority in the matter and the claim is inappropriate for reporting to Congress under the Act 280

Statutes of limitation. (*See* **STATUTES OF LIMITATION, Claims**)

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Contract Disputes Act effect. (*See* **CONTRACTS, Contract Disputes Act of 1978, Inapplicability, Matters covered by other statutes, Transportation Act**)

CLOTHING AND PERSONAL FURNISHINGS

Special clothing and equipment

Air purifiers (ecologizer)

Purchase of air purifiers that would clean the air of tobacco smoke in Department of Interior public reading room does not violate rule against purchasing equipment for personal benefit of individual employees, since all employees and members of public who use the room would benefit. 61 Comp. Gen. 634 is distinguished 653

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COLLECTIONS
Debt. (*See* DEBT COLLECTIONS)

COMMERCE DEPARTMENT
Economic Development Administration
Loan guarantees
Public Works and Economic Development Act
Defaulted loans
Loan collection process
The Economic Development Administration (EDA) has the authority to sell defaulted loans to borrowers for less than the unpaid indebtedness. EDA's authority under 42 U.S.C. 3211(4) and 19 U.S.C. 2347(b)(2) to compromise loans allows it to accept from the borrower less than the outstanding indebtedness in complete satisfaction of EDA's claim, if EDA determines it is in the Government's interest to do so because of some doubt as to the borrower's liability or the collectibility of the full amount of the loan. However, it is not required to do so if it determines that allowing borrowers to bid on their own obligations would interfere with the integrity of the loan collection process or for other valid reasons 489

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Backpay
Removals, suspensions, etc. (*See* COMPENSATION, Removals, suspensions, etc., Backpay)
Retroactive promotions
Computation
A grade GS–12 employee who was discriminatorily denied a promotion to grade GS–13 was awarded a retroactive promotion with back pay under 42 U.S.C. 2000e–16(b). Under regulations implementing sec. 2000e–16(b), set forth in 29 C.F.R. 1613.271(b)(1), back pay must be computed in the same manner as if awarded pursuant to the Back Pay Act, as amended, 5 U.S.C. 5596, and its implementing regulations set forth in 5 C.F.R. 550.805. The standards for computing back pay must be applied in light of the make-whole purposes of 42 U.S.C. 2000e–16(b) 343

A grade GS–12 employee who was discriminatorily denied a promotion to grade GS–13 was awarded a retroactive promotion with back pay under 42 U.S.C. 2000e–16(b). A cash award was granted to the employee under the Employee Incentive Awards Act during the period of the discriminatory personnel action. We hold that the award should not be offset against back pay since such an offset would contravene the make-whole purposes of 42 U.S.C. 2000e–16(b). Moreover, once the cash award was duly granted in accordance with the awards statute and regulations, the employee acquired a vested right to the amount awarded 343

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Implementation

General Accounting Office jurisdiction

Union's request for a determination as to the amount of overtime due employees as a result of an arbitration award, as modified by the Federal Labor Relations Authority, is more appropriately resolved under the procedures authorized by 5 U.S.C. Chapter 71. The agency has objected to submission of the matter to General Accounting Office (GAO) and there are a number of factual issues in dispute. Accordingly, GAO declines to assert jurisdiction over this matter 274

Double

Severance pay

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. 5533(a) 435

Downgrading

Saved compensation

Entitlement

An employee seeks a Comptroller General decision on his entitlement to salary retention. The General Accounting Office (GAO) adheres to the doctrine of *res judicata* to the effect that the valid judgment of a court on a matter is a bar to a subsequent action on that same matter before the GAO. 47 Comp. Gen. 573. Since in *William C. Ragland* v. *Internal Revenue Service,* Appeal No. 55–81 (C.A.F.C. November 1, 1982), it was previously decided that the employee was not entitled to saved pay benefits, the GAO will not consider his claim for salary retention 399

Holidays

Leave without pay status

Before and after holiday

Gradual Retirement Plan participation

A regularly scheduled full-time employee participated in one of his agency's Gradual Retirement Plans, which permitted him to work 3 days a week and take leave without pay (LWOP) on the other 2 days (Wednesdays and Fridays). In November 1982, there were two Thursday holidays for which he claims pay entitlement on basis that only occurrence of the holiday prevented him from working. Where an employee has and must maintain a minimum schedule, he may be paid for a workday designated as a holiday, even though bounded by scheduled LWOP days. 56 Comp. Gen. 393 and B–206655, May 25, 1982, are distinguished 622

Hours of work

Fair Labor Standards Act

Overtime computation. (*See* **COMPENSATION, Overtime, Fair Labor Standards Act, Hours of work requirement**)

COMPENSATION—Continued Page
Judges
Federal. (*See* COURTS, Judges, Compensation)
Overpayments
Waiver. (*See* DEBT COLLECTIONS, Waiver)
Overtime
Backpay. (*See* COMPENSATION, Removals, suspensions, etc., Backpay, Overtime, etc. inclusion)
Early reporting and delayed departure
Lunch period, etc. setoff
Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under Title 5 of the United States Code. Although officers are restricted to Library premises and subject to call during lunch breaks, they are relieved from their posts of duty. Moreover, the officers have not demonstrated that breaks have been substantially reduced by responding to calls. *Baylor* v. *United States*, 198 Ct. Cl. 331 (1972) 447
Fair Labor Standards Act
Early reporting and/or delayed departure
Lunch period, etc. setoff
Bona fide break requirement
The Office of Personnel Management (OPM) has found that certain air traffic control specialists who worked 8-hour shifts were not afforded lunch breaks. No lunch break was established and because of staffing shortages lunch breaks were either not taken or employees were frequently interrupted while eating by being called back to duty so that no *bona fide* lunch break existed. This Office accepts OPM's findings of fact unless clearly erroneous. Therefore, since the employees worked a 15-minute pre-shift briefing they are entitled to overtime compensation under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, for hours worked in excess of 40 in a week as no offset for lunch breaks may be made 58
Lunch breaks provided officers of Library of Congress Special Police Force may be offset against preshift and postshift work which allegedly would be compensable under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* The Library of Congress, authorized to administer FLSA with respect to its own employees, has found that the lunch breaks are *bona fide*—although officers are required to remain on duty and subject to call, they are relieved from their posts during lunch breaks and the breaks have been interrupted infrequently. Since there is no evidence that these findings are clearly erroneous, this Office will accept the Library's determination that the breaks are *bona fide* 447
Effect
Firefighters. (*See* COMPENSATION, Overtime, Firefighting, 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

COMPENSATION—Continued Page
Overtime—Continued
Fair Labor Standards Act—Continued
Hours of work requirement—Continued
Paid absences—Continued
Not hours of work—Continued
absences are not considered "hours worked" in determining whether employee has worked more than 40 hours in a workweek 187
Recordkeeping requirement
Noncompliance effect
Where an agency destroys T&A reports after 3 years, the agency may not then deny claims of more than 3 years on the basis of absence of official records. Claims are subject to a 6-year statute of limitations, and pertinent payroll information may be available on other records which are retained 56 years. Furthermore, the Fair Labor Standards Act (FLSA) requires that the employer keep accurate records, and, in the absence of such records, the employer will be liable if the employee meets his burden of proof. The Office of Personnel Management may wish to reconsider and impose a specific FLSA recordkeeping requirement on Federal agencies 42
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 187
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 187
"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 em-

COMPENSATION—Continued Page
Overtime—Continued
Fair Labor Standards Act—Continued
"Suffered or permitted" overtime—Continued
Agency directive against overtime—Continued
Enforcement requirement—Continued
ployee to continue working additional hours after employee had received, but had failed to comply with, agency's directive 187
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 216
Meal time
Under 4 C.F.R. 22.8 (1983) General Accounting Office (GAO) will not take jurisdiction over a labor-management matter which is "unduly speculative or otherwise not appropriate for decision." Since this case is based on factual issues which are irreconcilably in dispute, it would be more appropriately resolved through the grievance procedures set forth in the parties' negotiated labor-management agreement, or through negotiation. Therefore, under 4 C.F.R. 22.8, GAO will exercise its discretion to decline jurisdiction in this matter. 537
Panama Canal employment system
Retroactive increases
Authority to implement
The Assistant Secretary of the Army (Civil Works) questions whether he is authorized by section 1225(b)(2) of the Panama Canal Act of 1979 to retroactively implement an increase in the wages of employees of Federal agencies participating in the Panama Canal Employment System. We hold that the wage increase may not be effected retroactively because section 1225(b)(2) of the Panama Canal Act, authorizing annual wage increases, does not specifically provide for the retroactive implementation of such increases. Absent specific statutory authority, pay increases resulting from the exercise of discretionary administrative authority may be implemented on only a prospective basis 605
Periodic step-increases
Waiting period
Repromotion
During period of grade retention
Civil Service Reform Act of 1978
Where a General Schedule employee who was demoted is repromoted to his former position during a 2-year period of grade retention under 5 U.S.C. 5362, the schedule for his periodic step increases established before demotion and grade retention remains in effect. *Grade* retention under 5 U.S.C. 5362 is to be distinguished from *pay*

COMPENSATION—Continued Page
Periodic step-increases—Continued
Waiting period—Continued
Repromotion—Continued
During period of grade retention—Continued
Civil Service Reform Act of 1978—Continued
retention under sec. 5363. Repromotion during a period of grade retention is not an "equivalent increase" under 5 U.S.C. 5335(a) and 5 C.F.R. 531.403. Prior decisions arising before Civil Service Reform Act of 1978 are not applicable. This decision reversed on new information furnished, by 63 Comp. Gen. ——— (B-209414, Dec. 7, 1983).... 151
Premium pay
Federal Aviation Administration employees. (*See* FEDERAL AVIATION ADMINISTRATION)
Removals, suspensions, etc.
Backpay
Entitlement
Alternative employment offered
Effect of refusal to accept offer
Agency denied backpay for a portion of employee's involuntary separation since he had refused an offer of temporary employment during his appeal to the Merit Systems Protection Board, and also because he did not show he was ready, willing, and able to work during that period. Employee, however, was not obligated to accept alternate employment while administrative appeals were pending. Further, no evidence shows that employee's medical condition during that period differed from his medical condition during the period for which he was awarded backpay. Accordingly, employee's claim for additional backpay is granted, with appropriate adjustments in annual and sick leave.... 370
Overtime, etc. inclusion
Two employees were awarded backpay pursuant to a Dec. 10, 1973 ruling by the Board of Appeals and Review of the Civil Service Commission that they had involuntarily resigned from their positions in 1972. The employees' claims that overtime earnings were improperly deducted from their backpay awards were received in this Office on June 16 and July 14, 1980. The claims may not be allowed since they accrued on Dec. 10, 1973, the date of the Board's determination, and 31 U.S.C. 71a (1976) (now sec. 3702) bars consideration of claims received in this Office more than 6 years after the date the claim first accrues. 61 Comp. Gen. 57 is amplified.... 275
Computation method
Agency determination
Employee claims that he is entitled to additional overtime pay as part of his backpay award based on overtime hours worked by other employees during period of his separation. Agency based overtime payment on amount of overtime worked by the employee during preceding year. Based on the facts presented, this Office cannot say that the formula used by the agency in computing his entitlement to overtime is incorrect. Employee's claim for additional overtime in this respect is denied.... 370
Saved
Downgrading actions. (*See* COMPENSATION, Downgrading, Saved compensation)

COMPENSATION—Continued Page

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

Severance pay

Eligibility

Actual separation requirement

Certain HUD employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Since individuals must be be actually separated from United States Government service to receive severance pay, those employees were not entitled to severance pay until they were actually separated after the lifting of the injunction. They are entitled to severance pay beginning on the date of actual separation, with years of service and pay rates based on the originally intended date of the RIF, assuming that the retroactivity of the RIF is upheld by the Merit Systems Protection Board 435

Agency determination

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. 5533(a) 435

Involuntary separation

Religious reasons

A National Guard member was denied reenlistment as a result of his refusal to attend training drills on Saturdays which required his removal as a civilian National Guard technician. He was denied severance pay on the ground of delinquency in refusing to work on Saturdays. We hold that he is entitled to severance pay under 5 U.S.C. 5595 because his refusal to attend Saturday drills based on his religious beliefs was not delinquency within the meaning of the statute. See *Sherbert* v. *Verner,* 374 U.S. 398 (1963) 625

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

COMPENSATION—Continued Page
Severance pay—Continued
Eligibility—Continued
Involuntary separation requirement—Continued
Resignation incident to RIF—Continued
Cancellation of RIF prior to effective date of resignation—Continued
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)..... 171
Within-grade increases. (*See* COMPENSATION, Periodic step-increases)

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

CONFLICT OF INTEREST STATUTES
Officers and employees. (*See* OFFICERS AND EMPLOYEES, Contracting with Government, Former employees, Contracts with other than former employing agency)

CONTRACTING OFFICERS
Responsibility
Small business size status determination
Error investigation duty. (*See* CONTRACTS, Small business concerns, Awards, Self-certification, Indication of error, Contracting officer's duty to investigate, etc.)

CONTRACTORS
Government civilian and military personnel
Prohibition
Defense Acquisition Regulation restrictions
Where contracting officer was unaware the awardee was employed by another Government agency on date of award, there was no violation of regulation against knowingly contracting with Government employee. Moreover, agency considered allegation when raised after award and determined that termination of contract for convenience of Government was not warranted since employment was terminated. In addition, General Accounting Office (GAO) finds no evidence in the record of any favoritism towards awardee. In these circumstances, GAO concludes that there is no reason to disturb award..... 230
Incumbent
Competitive advantage
Unfairness possibility
An agency's cancellation of a solicitation after bid opening is not unreasonable where the estimated quantities in the solicitation for the major portion of work are based on quarterly reports of the incumbent contractor, one of which an audit has called into question and it reasonably appeared that the incumbent contractor could have had an unfair competitive advantage 65

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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 164

Determination

Review by GAO

Affirmative finding accepted

Complaint that agency improperly found offeror to be responsible without first conducting preaward survey is not for consideration since preaward survey is not legal prerequisite to affirmative determination of responsibility and such determinations are not reviewed by GAO except in situations not applicable to this case 474

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 delinquencies may arguably have been agency's fault 213

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 213

Small business concerns. (*See* **CONTRACTS, Small business concerns, Awards, Responsibility determination**)

Subcontractors. (*See* **CONTRACTS, Subcontractors**)

CONTRACTS

Administration

Administrative responsibility

Modification of contract

Within scope of contract requirement

While contract modifications generally are the responsibility of the procuring agency in administering the contract, General Accounting Office will consider a protest that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes. A modification does not exceed the contract's scope, however, as long as the modified contract is substantially the same as the contract that was completed 22

Advertised procurements. (*See* **BIDS**)

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Annual contributions contract-funded procurements
Complaints
Timeliness
"Reasonable time" standard

Complaint against action of grantee filed with General Accounting Office 16 working days after an adverse agency decision will be considered since complaint was filed within a "reasonable" time 138

Indian low-income housing
Preference to Indian firms
Bid nonresponsive
Nonresponsibility basis

Indian Housing Authority (IHA) had a reasonable basis for rejecting bid submitted by firm that by bid opening had not demonstrated to IHA's satisfaction through a required "prequalification statement" that it was a qualified Indian-owned organization or Indian-owned enterprise 138

Architect, engineering, etc. services
Procurement practices
Brooks Bill applicability
Procurement not restricted to A-E firms
Administrative determination

General Accounting Office will not question a contracting agency's determination to secure services through competitive bidding procedures rather than through the procedures prescribed in the Brooks Act for the selection of architectural or engineering firms unless the protester demonstrates that the agency clearly intended to circumvent the Act 297

Awards
Abeyance
Resolution of protest

There is no requirement that an agency make an award while a protest is pending before General Accounting Office even though delay in awarding the contract results in an urgent situation requiring that the solicitation be canceled and a portion of the requirement resolicited 637

Small business concerns. (*See* **CONTRACTS, Small business concerns, Awards**)

Withholding pending protest. (*See* **CONTRACTS, Awards, Abeyance**)

Bonds. (*See* **BONDS**)

Brooks Bill applicability. (*See* **CONTRACTS, Architect, engineering, etc. services**)

Buy American Act. (*See* **BUY AMERICAN ACT**)

Canadian Commercial Corporation. (*See* **FOREIGN GOVERNMENTS, Contracts with United States, Canadian Commercial Corporation**)

Claims brought before award
Claims Court jurisdiction
Federal Courts Improvement Act

An agency's cancellation of a solicitation after bid opening is not unreasonable where the estimated quantities in the solicitation for the major portion of work are based on quarterly reports of the in-

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cumbent contractor, one of which an audit has called into question, and it reasonably appeared that the incumbent contractor could have had an unfair competitive advantage 65
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 203
Subcontractor claims
Under the Contract Disputes Act of 1978, contracting officer does not have authority to settle claims of subcontractors who were not parties to prime contract, even when such firms agree to accept *pro rata* settlement from remaining contract funds. Rather, such funds should not be paid until a trustee in bankruptcy and/or court of competent jurisdiction settles accounts among all potential claimants and prime contractor 633
Contracting with Government employees. (*See* OFFICERS AND EMPLOYEES, Contracting with Government)
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 219
Price reduction *v.* reperformance
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. Although 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 219
Reduction of amount
Reasonableness
Agency did not act unreasonably in substantially reducing the amount of liquidated damages that could be imposed where the agency could conclude that the original provision was unnecessary

CONTRACTS—Continued Page
Damages—Continued
Liquidated—Continued
Reduction of amount—Continued
Reasonableness—Continued
and, because it could have resulted in a potential risk exposure of 3.5 times the contract price, may have been unenforceable 645
Default
Excess costs
Collection
Disposition
Funding replacement contract
Excess costs of reprocurement recovered from a breaching contractor by the Bureau of Prisons may be used to fund a replacement contract. It is illogical to hold a contractor legally responsible for excess reprocurement costs and then not permit the recovery of those costs to be used for the purpose for which they were recovered. As long as the Bureau receives only the goods and services for which it bargained under the original contract, there is no illegal augmentation of the Bureau's appropriation. Therefore these funds need not be deposited into the Treasury as miscellaneous receipts. Comptroller General decisions to the contrary are modified 678
Reprocurement
Defaulted contractor
Not entitled to award
Full price already paid under defaulted contract
Where a defaulted contractor has been paid the full contract price under the defaulted contract, it is not entitled to award of the repurchase contract because it is not permitted to be paid more than the original contract price. Award of the repurchase contract would be tantamount to modification of the original contract without consideration flowing to the Government 469
Federal Supply Schedule
Awards
Propriety
A determination to set aside for small businesses Federal Supply Services (FSS) multiple award contracts for a category of broadly described instruments, solely on the basis that an adequate number of small businesses will submit offers, is improper where the evidence available to the contracting officer at the time the determination is made suggests that only one small business firm can supply a portion of the models and that firm has received the large majority in dollar terms of FSS sales of those particular instruments under a previous FSS set-aside 271
Multiple suppliers
Agency issuance of a request for quotations
Evaluation priority
GAO finds no legal requirement that procuring agency, after the date an order was ready to be placed under a request for quotations for Federal Supply Schedule (FSS) items, consider fact that low quoter rejected for offering nonschedule items had modified its FSS contract to include rejected items on schedule 515

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In-house performance *v.* contracting out
Cost comparison
Cancellation of solicitation
Specification changes
Anticipated prior to award
Agency may not avoid canceling solicitation where it is aware before award of need for specification changes by use of Changes and Government-Furnished Property clauses which provide for an equitable adjustment for property not delivered by the Government 129
Minimun needs overstated
Cancellation of invitation after bid opening is proper where Government determines, albeit after allegedly inappropriate consideration of OMB Circular A-76 appeal, that solicitation's statement of work overstates actual minimum needs and that Government is no longer able to furnish a significant amount of the Government Furnished Equipment identified in the solicitation 129
Labor stipulations
Davis-Bacon Act
Minimum wage determinations
Union agreement effect
Failure to acknowledge modifying amendment
When union contract would require offeror to pay wages in excess of rates determined under Davis-Bacon Act, and acceptance of bid which failed to acknowledge amendment containing wage determination clearly has no prejudicial effect on competition, offeror may be permitted to cure defect by agreeing to amendment after bid opening 111
Service Contract Act of 1965
Minimum wage, etc. determinations
Prospective wage rate increases
Ceiling provision
GAO has no objection to ceiling provision in escalation clause providing for prices to be adjusted at the beginning of each option period to reflect changes in the Service Contract Act determinations since use of such a provision appears to be a reasonable exercise of contracting officer's authority 542
Liquidated damages. (*See* CONTRACTS, Damages, Liquidated)
Modification
Beyond scope of contract
Subject to GAO review
While contract modifications generally are the responsibility of the procuring agency in administering the contract, General Accounting Office will consider a protest that a modification went beyond the contractor's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes. A modification does not exceed the contract's scope, however, as long as the modified contract is substantially the same as the contract that was competed 22

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Scope of contract requirement
Obligation of parties unchanged
Advanced technology approaches
Price unchanged
An agency's acceptance of a firm's post-award offer to change the way it will perform to meet its obligation—furnish a system that would meet various performance specifications—is not outside the contract's scope, even if that change reflects a more advanced or sophisticated approach, where there is no change in the nature of the obligation of either party to the contract 22
Negotiation
Awards
Price determinative factor
Where request for proposals lists the relative weights of the major evaluation criteria, but not the precise weights, there is no requirement that award be made to the offeror whose proposal receives the highest numerical ranking, or that selection officials adhere to the precise weights recommended to them by their advisers. Where selection officials, after evaluating proposals on a basis clearly consistent with the solicitation's scheme, reasonably regard proposals as essentially equal technically, cost or price may be the determinative selection factor, absent justification for an award to a more costly offeror.. 577
Best and final offer. (*See* CONTRACTS, Negotiation, Offers or proposals, Best and final)
Competition
Restrictions
Undue restriction established
Provision in solicitation issued by Department of Health and Human Services which gives preference to Indian organizations or Indian-owned economic organizations by requiring negotiation and award solely with Indian organizations if one or more is within competitive range is improper, since there is no legal basis for such a preference 353
Estimates of Government
Not mandatory
Indefinite, future needs
Life-cycle costing
Where agency specifies additional feature of a system to assure their availability in the future and requires offerors to state prices for those additional features, but agency has no known requirement for those features at the time of procurement, the solicitation need not contain estimates of the usage of those features and they need not be included in the overall price evaluation 124
Evaluation factors. (*See* CONTRACTS, Negotiation, Offers or proposals, Evaluation)
Offers or proposals
Best and final
Additional rounds
Auction technique not indicated
Agency's requests for three best and final offers did not automatically establish an auction situation since the multiple best and final

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Offers or proposals—Continued
Best and final—Continued
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Auction technique not indicated—Continued
offers were required by the receipt of contingent offers and the agency's determination that several solicitation requirements, which were inhibiting the competition, were not essential to its minimum needs... 645
Technical changes, etc. not precluded
Request for best and final offers stating that no technical revisions are desired cannot reasonably be interpreted as precluding technical revisions that might make a proposal more competitive. Absent express contrary instructions, offerors should know that changes to their technical proposals are permitted in best and final offers..... 577
Evaluation
Competitive range exclusion
Reasonableness
GAO will not question any agency's technical evaluation or determination whether a proposal is in the competitive range unless shown to lack a reasonable basis or to violate procurement statutes and regulations. The protester's mere disagreement with the agency's judgment does not meet its burden of showing the agency's technical evaluation and competitive range determination were unreasonable..... 577
Cost realism analysis
Adequacy
Contracting agency's analysis of proposals for cost realism involves the exercise of informed judgment, and GAO therefore will not disturb a cost realism determination unless it is shown to lack a reasonable basis. Where the contracting agency independently reviewed the cost realism of offers against a Defense Contract Audit Agency's report based in part on the actual costs of prior performance, the analysis is not legally objectionable where no specific errors are alleged..... 577
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Where a solicitation reserved to the agency the right to delay delivery without cost for a specified period of time, best and final offer which included a prompt delivery discount was properly evaluated without consideration of the discount since at that time delays in delivery appeared probable..... 645
Evaluators
Consideration of personal statements
Agency correctly found that the personal statements of evaluators concerning a firm should not be considered in evaluating that firm's experience..... 506
Technical evaluation panel. (*See* CONTRACTS, Negotiation, Technical evaluation panel)
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General Accounting Office will not disturb an agency's technical evaluation unless that evaluation is arbitrary, unreasonable, or in violation of law. In evaluating a firm's experience under an evalua-

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tion criteria, an agency may consider the experience of the firm's personnel and the firm's experience prior to its incorporation 506
Factors not in solicitation
Oral disclosure during negotiations
When offeror is orally informed of an agency's requirement during negotiation, notwithstanding its absence in solicitation, offeror is on notice of the requirement and General Accounting Office will deny protest based on failure to state it in the solicitation 50
Improper
Based on significant misstatements in proposal
Allegation that a competitor's proposal contains false representations in violation of 18 U.S.C. 1001, a criminal statute, raises a matter outside GAO's bid protest function. Nevertheless, if a protester establishes that an offeror made misrepresentations in its offer that materially affected the evaluation, corrective action would be appropriate 577
Life-cycle costing
Indefinite, future needs
Where agency specifies additional features of a system to assure their availability in the future and requires offerors to state prices for those additional features, but agency has no known requirement for those features at the time of procurement, the solicitation need not contain estimate of the usage of those features and they need not be included in the overall price evaluation 124
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Comparison of proposals not required
Since agency was not required to conduct technical evaluation by comparing the proposals it received, offeror's claim that it had greater experience than two other offerors and, therefore, should have received a higher evaluation score is without merit 506
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General Accounting Office will not disturb an agency's technical evaluation unless that evaluation is arbitrary, unreasonable, or in violation of law. In evaluating a firm's experience under an evaluation criteria, an agency may consider the experience of the firm's personnel and the firm's experience prior to its incorporation 506
Technically equal proposals
Price determinative factor
Where request for proposals lists the relative weights of the major evaluation criteria, but not the precise weights, there is no requirement that award be made to the offeror whose proposal receives the highest numerial ranking, or that selection officials adhere to the precise weights recommended to them by their advisers. Where selection officials, after evaluating proposals on a basis clearly consistent with the solicitation's scheme, reasonably regard proposals as essentially equal technically, cost or price may be the determinative selection factor, absent justification for an award to a more costly offeror.. 577

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Requests for proposals
Amendment
Propriety
Agency did not act unreasonably in substantially reducing the amount of liquidated damages that could be imposed where the agency could conclude that the original provision was unnecessary and, because it could have resulted in a potential risk exposure of 3.5 times the contract price, may have been unenforceable 645
Cancellation
Reasonable basis
Substantial change in specifications
A contracting officer in negotiated procurement need only establish a reasonable basis for cancellation of a solicitation after receipt of proposals; protest that such cancellation was improper is denied since record indicates increase in scope of work of about 46 percent was required 100
Resolicitation not conducted
Arms Export Control Act applicability
Protest that agency's failure to resolicit requirement after cancellation of initial solicitation is denied since procurement was conducted under Arms Export Control Act, 22 U.S.C. 2751 *et seq.*, and foreign government on whose behalf procurement was conducted requested award be made to a specific source 100
Evaluation criteria
Subcriteria
Encompassed within major criteria
Agency's evaluation of technical proposals for the offeror's "Approach/Understanding of Tasks" was reasonable even though the subfactor was not expressly listed in the solicitation. While an agency must identify every major evaluation factor, it need not specify the various aspects of the major criteria, provided the aspects are reasonably related to, or are encompassed by, the stated criteria, which the record clearly shows is the case here 577
Restrictive of competition
Provision in solicitation issued by Department of Health and Human Services which gives preference to Indian organizations or Indian-owned economic organizations by requiring negotiation and award solely with Indian organizations if one or more is within competitive range is improper, since there is no legal basis for such a preference 353
Specifications
Restrictive
Agency determination to use less restrictive specifications
Protest urging that performance type specifications be revised to require certain elements of protester's equipment configuration is in effect an allegation that a more restrictive specification should be

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Requests for proposals—Continued
Specifications—Continued
Restrictive—Continued
Agency determination to use less restrictive specifications—Continued
used. Agency determination that performance type specification is adequate and that conforming equipment will meet Government's needs will not be questioned 124
Specificity
Sufficiency
Procuring agency generally must give offerors sufficient details in request for proposals to enable them to compete intelligently and on relatively equal basis. Where the solicitation sets out estimates as to the extent of the number of services required for evaluation purposes, establishes a minimum ordering requirement, and identifies the types and levels of services required, the solicitation is sufficient for the preparation of proposals 124
Sole-source basis
Foreign procurement
Arms Export Control Act applicability. (*See* FOREIGN GOVERNMENTS, Defense articles and services, Arms Export Control Act)
Technical evaluation panel
Evaluation propriety
The fact that proposals were reevaluated by one person who was not on the original panel is not improper 506
Two-step procurement. (*See* CONTRACTS, Two-step procurement)
Offer and acceptance
Acceptance
What constitutes acceptance
Space leasing
Inspection, etc. not acceptance
Inspection of offered space and/or request for alternate offer does not constitute an acceptance or implied lease by the Government. Acceptance of an offer must be clear and unconditioned 50
Payments
Assignment
Assignee's right to payment
First *v.* second assignee
First assignee's (computer leasing company/financing institution) claim for sums paid to second assignee (also computer leasing company/financing institution) under modification of the same contract is denied because (1) the first assignee has only a qualified interest in the assigned payment, commensurate with the amount of equipment which it financed, and (2) it appears that the first assignee has received all payments it is entitled to for the equipment which it financed. Therefore, first assignee has no basis for its claim 368

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Set-off
"No set-off" clause
Under the Assignment of Claims Act, now codified at 31 U.S.C. 3727, a lender is not protected against set-off by the presence of a no-set-off clause in the assigned contract unless the assignment was made to secure the assignee's loan to the assignor and only if the proceeds of the loan were used or were available for use by the assignor in performing the contract that was assigned. To the extent that our holdings in 49 Comp. Gen. 44 (1967), 36 Comp. Gen. 19 (1956), and other cases cited herein are not consistent with this decision they will no longer be followed. 60 Comp. Gen. 510 (1981) is clarified 683
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When a contract containing a no-set-off clause is validly assigned under the Assignment of Claims Act, now codified at 31 U.S.C. 3727, to an eligible assignee who substantially complies with the statutory filing and notice requirements, the Internal Revenue Service cannot set off the contractor's tax debt against the contract proceeds due to the assignee, even if the tax debt was fully mature prior to the date on which the contracting agency had received notice of the assignment. B-158451, Mar. 3, 1966, and B-195460, Oct. 18, 1979, are modified accordingly. 60 Comp. Gen. 510 (1981) is clarified 683
Progress
Request
What constitutes
Canadian bids
Request for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire. 45 Comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases modified in part 113
Quantum meruit/valebant basis. (*See* PAYMENTS, Quantum meruit/valebant basis)
Set-off. (*See* SET-OFF, Contract payments)
Surety of defaulted contractor
"Unexpended contract balance"
Calculation of balance
Mistaken overpayment to contractor included
Under surety law surety has election to pay Government's excess cost of completing contract or undertaking to finish the job himself. Under latter election, surety, upon successful completion, is entitled to his costs, up to the unexpended balance of the contract. In considering amount of unexpended balance available to pay performance bond surety his costs for completion of a defaulted National Institutes of Health Contract, Government must consider contract balance to include amount of the Government's previous mistaken overpayment to the contractor 498

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Performance

Defects

Liability

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 219

Reperformance entitlement

Reduced value determination

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. Although 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 219

Privity

Subcontractors

Default of prime contractor

Government liability

Subcontractors and suppliers, claiming amounts due for labor and materials furnished to defaulted prime contractor, may not bring a claim directly against the Government when, under any common law theory, they lack privity of contract with the Government 633

Protests

Academic questions. (*See* **CONTRACTS, Protests, Moot, academic, etc. questions**)

Allegations

Unsubstantiated

Protest that Buy American Act evaluation should not have been conducted because sole domestic bid, which was not low, was, allegedly, bogus is rejected. Bogus charge relates to allegation concerning domestic bidder's alleged nonresponsibility. But Buy American regulatory scheme does not require responsibility determination of domestic bidder in this situation. Moreover, General Accounting Office does not consider that a responsibility determination need be made absent collusion or other extraordinary circumstances not present in this procurement. Finally, domestic bid contained no indication that it was other than domestic 345

Authority to consider

Disputes between private parties. (*See* **GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Disputes, Between private parties**)

Federal Reserve System

Member bank contracts

General Accounting Office (GAO) will not decide protest against contract award by Federal Reserve Bank, despite GAO audit authority, because GAO account settlement authority (the basis of GAO bid

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Authority to consider—Continued
Federal Reserve System—Continued
Member bank contracts—Continued
protest jurisdiction) does not extend to Federal Reserve System banks 40
Service Contract Act matters. (*See* BIDS, Invitation for bids, Ambiguous, Service Contract Act provisions)
United States-Saudi Arabia Joint Commission on Economic Cooperation procurements
The GAO is not authorized to settle and adjust the dollar account used to hold Saudi Arabian monies covering Joint Commission project costs, and thus, will not entertain bid protests of Joint Commission procurements where, as in all Joint Commission projects except one, no United States funds are involved at any stage of the procurement. The holding in *Mandex, Inc.*, B-204415, Oct. 13, 1981 is affirmed. Foreign Military Sales procurements are distinguished 410
Award withheld pending GAO decision
Urgency of procurement
There is no requirement that an agency make an award while a protest is pending before General Accounting Office even though delay in awarding the contract results in an urgent situation requiring that the solicitation be canceled and a portion of the requirement resolicited 637
Contracting officer's affirmative responsibility determination. (*See* CONTRACTORS, Responsibility, Determination)
General Accounting Office authority
Disputes between private parties. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Disputes, Between private parties)
General Accounting Office function
Independent investigation and conclusions
Speculative allegations
It is not part of General Accounting Office's bid protest function to conduct investigations to determine whether protester's speculative allegations are valid 75
General Accounting Office procedures
Timeliness of protest
Date basis of protest made known to protester
Two grounds of protest against application of Buy American Act evaluation factor are timely when filed within 10 working days of when the protester learns of basis of protest. Final ground of protest is untimely filed but will be considered under significant issue exception to Bid Protest Procedures 345
Significant issue exception
For application
General Accounting Office will consider protest challenging requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions since significant issue is involved. B-204037, Dec. 14, 1981, is amplified 428

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Protests—Continued
General Accounting Office procedures—Continued
Timeliness of protest—Continued
Solicitation improprieties
Apparent prior to bid opening/closing date for proposals
Protest filed well after bid opening, objecting to the agency's failure to postpone bid opening to allow protester to assess the impact of an amendment to the solicitation, is untimely 542
Not apparent prior to closing date for receipt of quotations
Amended protest which was filed the day after the protester modified its Federal Supply Schedule contract to include partitions required by the agency under its request for quotations is timely because basis for protest—that agency was required to place an order under the modified contract—did not arise until the modification 515
Interested party requirement
Small business set-asides
Protester rejected as other than small business under 100-percent small business set-aside procurement contending it was improperly rejected is interested party under General Accounting Office Bid Protest Procedures because if protest is sustained the protester would be eligible for award 458
Moot, academic, etc. questions
Award made to protester
Where protest is against a contract award which has been terminated and the contract has been reawarded to protester, it is academic and will not be considered on the merits. Also, protest against initial proposal evaluation is academic where agency reevaluated the proposal and awarded protester the maximum possible score 506
Proprietary data
Use by competitor
No disclosure by contracting agency. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Disputes, Between private parties)
Subcontractor protests
Protest against award of subcontract on behalf of Government by Department of Energy prime contractor is appropriate for General Accounting Office review under standards of *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Nonunion protester, whose bid prime contractor did not open, is interested party, in particular circumstances, for purposes of protesting requirement for subcontractors to have union agreement notwithstanding that protester withdrew its bid. B-204037, Dec. 14, 1981, is amplified 428
Timeliness
General Accounting Office procedures. (*See* CONTRACTS, Protests, General Accounting Office procedures, Timeliness of protest)
Quantum meruit/valebant
Payment basis. (*See* PAYMENTS, Quantum meruit/valebant basis)
Requests for proposals
Negotiated procurement. (*See* CONTRACTS, Negotiation, Requests for proposals)

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Research and development

Small Business Innovation Development Act Appropriation availability. (*See* APPROPRIATIONS, Availability, Contracts, Research and development, Small Business Innovation Development Act)

Responsibility of contractors

Determination. (*See* CONTRACTORS, Responsibility, Determination)

Sales. (*See* SALES)

Service Contract Act. (*See* CONTRACTS, Labor stipulations, Service Contract Act of 1965)

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 164

Nonresponsibility determination

Certificate of Competency denial on recent procurement—resubmission to SBA not required

Under limited circumstances, a recent denial by the Small Business Administration (SBA) for a certificate of competency may be used by a contracting officer as SBA confirmation of another finding of nonresponsibility 469

Nonresponsibility finding

Referral to SBA for COC mandatory without exception

Contracting officer's determination of nonresponsibility, based on finding that small business concern otherwise in line for award does not have acceptable quality assurance system to perform required work, must be referred to Small Business Administration (SBA), albeit on an expedited basis, for consideration under certificate of competency (COC) program, since applicable law and regulations no longer allow exception to this requirement based on urgency. However, General Accounting Office recommends that Executive branch consider developing expedited COC procedure to permit prompt consideration of COC referrals by SBA when critically urgent procurements are involved 134

Small purchases. (*See* PURCHASES, Small, Small business concerns, Certificate of Competency procedures under SBA, Applicability)

Review by GAO

Procurement under 8(a) program

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 205

CONTRACTS—Continued Page
Small business concerns—Continued
Awards—Continued
Review by GAO—Continued
Procurement under 8(a) program—Continued
Fraud or bad faith alleged
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 205
Self-certification
Indication of error
Contracting officer's duty to investigate, etc.
While contracting officer and Small Business Administration considered timely size protest contained insufficient detail, contracting officer should have pursued matter on his own initiative under Defense Acquisition Regulation 1-703(b)(2) where data submitted by proposed awardee in bid indicated $5 million size standard may be exceeded 300
Set-asides
Administrative determination
Reasonable expectation of competition
A determination to set aside for small businesses Federal Supply Service (FSS) multiple award contracts for a category of broadly described instruments, solely on the basis that an adequate number of small businesses will submit offers, is improper where the evidence available to the contracting officer at the time the determination is made suggests that only one small business firm can supply a portion of the models and that firm has received the large majority in dollar terms of FSS sales of those particular instruments under a previous FSS set-aside 271
Qualifications of small businesses
Business entity organized for profit requirement
To qualify as a small business concern a concern must be a business entity organized for profit. The contracting officer acted reasonably in rejecting bid in which bidder represents that it is a nonprofit organization, thus indicating that bidder is other than a small business concern and ineligible for award under a small business set-aside 458
Research and development
Appropriation availability. (*See* APPROPRIATIONS, Availability, Contracts, Research and development, Small Business Innovation Development Act)
Withdrawal
Best interest of Government
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 deter-

CONTRACTS—Continued Page
Small business concerns—Continued
Awards—Continued
Set-asides—Continued
Withdrawal—Continued
Best interest of Government—Continued
mination 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 205
Size status
Time to question
The contracting officer has the right to question a bidder's status as a small business at any time during the award process 637
Small purchases. (*See* PURCHASES, Small)
Specifications
Advertised procurements. (*See* BIDS, Invitation for bids, Specifications)
Changes, revisions, etc.
After award. (*See* CONTRACTS, Modification)
Negotiated procurements. (*See* CONTRACTS, Negotiation, Requests for proposals, Specifications)
Subcontractors
Disputes with prime contractor
Government's obligation
Under the Contract Disputes Act of 1978, contracting officer does not have authority to settle claims of subcontractors who were not parties to prime contract, even when such firms agree to accept *pro rata* settlement from remaining contract funds. Rather, such funds should not be paid until a trustee in bankruptcy and/or court of competent jurisdiction settles accounts among all potential claimants and prime contractor 633
Privity. (*See* CONTRACTS, Privity, Subcontractors)
Subcontracts
Privity between subcontractor and United States. (*See* CONTRACTS, Privity, Subcontractors)
Termination of prime contract
Subcontractors and suppliers, claiming amounts due for labor and materials furnished to defaulted prime contractor, may not bring a claim directly against the Government when, under any common law theory, they lack privity of contract with the Government 633
Termination
Convenience of Government
Erroneous evaluation, etc.
Agency properly terminated contract with protester where reevaluation of proposals showed that under the stated criteria, another firm received the highest score 506
Two-step procurement
Step two
Nonresponsive bid
Deviation apparent in step one
A contracting officer has no authority to award a contract to other than the lowest responsive, responsible offeror. Therefore, the accept-

CONTRACTS—Continued Page
Two-step procurement—Continued
Step two—Continued
Nonresponsive bid—Continued
Deviation apparent in step one—Continued
ance of a firm's technical proposal under step one of a two-step proposal does not bind the Government to accept that firm's step two bid if the bid is nonresponsive, even though the deviation from the terms of the solicitation was contained in the step-one technical proposal 31
Terms and conditions
Acceptance time limitation
Shorter period offered
Compliance with a mandatory minimum bid acceptance period established in an invitation for bids is a material requirement because a bidder offering a shorter acceptance period has an unfair advantage since it is not exposed to marketplace risks and fluctuations for as long as its competitors are. Therefore, a bid which takes exception to the requirement by offering a shorter acceptance period is nonresponsive and cannot be corrected 31
Defective invitation
Cross-referencing necessity
A Standard Form 33 solicitation provision which provides that a 60-day bid acceptance period will apply unless the bidder specifies a different number of days should have been cross-referenced with another solicitation provision which provides that bids with acceptance periods of fewer than 45 days would be considered nonresponsive. The failure to cross-refer was not in this case grossly misleading and, therefore, the cancellation of the solicitation is not required 31

CORPORATIONS
Legal Services Corporation
Advocacy or opposition of ballot measures
During a January 1981 training session at the LSC Denver Region, Alan Rader, a staff attorney with the Western Center on Law and Poverty in Los Angeles, an LSC grantee, gave a presentation on how he had organized a campaign with LSC funds to defeat a 1980 California tax reduction ballot measure entitled "Proposition 9." He hired campaign coordinators and organized broad-based coalitions with community groups and agencies. This activity constitutes a violation of 42 U.S.C. 2996e(d)(4) which prohibits the Corporation and its grantees from using corporate funds to advocate or oppose ballot measures 654
Coalition and network building
The LSC held a training session in its Denver Region in January 1981. Representatives of grantees in the 5-state region attended. Corporate officials and grantee staff attorneys presented lectures and workshops on how grantees could build coalitions with community groups and agencies to form a grass roots organization to lobby Congress for legal services and other social benefit programs. Grantee representatives described coalition building projects that were underway. This activity constitutes a violation of 42 U.S.C. 2996f(b)(7)

CORPORATIONS—Continued Page
Legal Services Corporation—Continued
Coalition and network building—Continued
which prohibits grantees from using corporate funds to build organizations such as coalitions and networks 654
Conducting training programs
Advocacy of public policies
During January 1981, the Denver Regional Office of the Legal Services Corporation (LSC) held a training session for grantee personnel of the region. The training session speakers included Corporation headquarters officials and officials from grantees, who presented material on the LSC Survival Plan. These officials advocated the public policy of resisting the threatened Reagan Administration cuts in the legal services and other social benefits programs. These same speakers encouraged those in attendance to engage in political activities of building coalitions in order to mount a grass roots campaign to lobby Congress to vote against measures to curtail these programs. This activity constituted a violation of 42 U.S.C. 2996f(b)(6) which prohibits the use of corporate funds by grantees to conduct training programs that advocate public policies or encourage political activities 654
Enforcement responsibilities
Compliance of recipients with LSC Act
The LSC and certain grantees conducted a training session in the LSC Denver Region in January 1981 during which grantee officials violated certain restrictions on training and coalition building activities contained in 42 U.S.C. 2996f(b) (6) and (7). The Corporation failed to carry out its enforcement responsibilities under 42 U.S.C. 2996e(b)(1) to insure the compliance of recipients and their employees with the provisions of the Legal Services Corporation Act of 1974, and assumed a contrary role of encouraging grantees to violate the aforementioned provisions 654

COURTS
Judges
Compensation
Increases
Comparability pay adjustment
Precluded under Pub. L. 97-92
Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in Oct. 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since sec. 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on Oct. 1, 1982, in the absence of specific congressional authorization 54
Specific Congressional authorization requirement
Question presented is entitlement of Federal judges to 4 percent comparability increase under sec. 129 of Pub. L. 97-377, Dec. 21, 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. We conclude that the language of sec. 129(b) of Pub. L. 97-377, combined with spe-

COURTS—Continued Page
Judges—Continued
Compensation—Continued
Increases—Continued
Comparability pay adjustment—Continued
Specific Congressional authorization requirement—Continued
cific intent evidenced in the legislative history, constitutes the specific congressional authorization for a pay increase for Federal judges.... 358
Judgments, decrees, etc.
Interest
Delayed payment of judgment
Not due to unsuccessful Government appeal
Court of Claims judgment
Interest is allowable on Court of Claims judgment under 28 U.S.C. 2516(b) only in cases of unsuccessful appeal by the Government. Delay resulting from consideration of whether to seek further review, or from filing of post-judgment motions, does not create entitlement to interest. Therefore, Plaintiffs are not entitled to interest on Court of Claims judgment where Department of Justice did not certify judgment to General Accounting Office for payment until after Court had denied Government's motion to vacate. 59 Comp. Gen. 259 and 58 *id.* 67 are explained..... 4
Payment
Permanent indefinite appropriation availability
Compromise settlement
Payment otherwise provided for
Secretary of Housing and Urban Development (HUD) provided building mortgage insurance on two projects under authority of sec. 236 of the National Housing Act, 12 U.S.C. 1715z-1. In one case, the Secretary agreed to make payments to plaintiff construction contractor in settlement of lawsuit after court had ruled that the contractor had cause of action against the Secretary on the theory of *quantum meruit.* In the second case, similar payment was directed by court judgment. The permanent indefinite appropriation established by 31 U.S.C. 724a is not available in either case. The permanent appropriation may be used to pay a judgment or compromise settlement only if no other funds are available for that purpose. The Special Risk Insurance Fund, a revolving fund created by 12 U.S.C. 1715z-3(b), is available for the payments to contractors for completion of projects for which HUD has provided mortgage insurance under sec. 236..... 12
Effect of Equal Access to Justice Act
Section 207 of Equal Access to Justice Act (EAJA) (5 U.S.C. 504 note) prohibits use of permanent judgment appropriation established by 31 U.S.C. 1304 as alternative source of funds for payment of awards newly authorized by EAJA unless and until Congress makes a specific appropriation for that purpose..... 692
Payment otherwise provided for
U.S. Marshals Service seizure costs
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

COURTS—Continued Page
Judgments, decrees, etc.—Continued
Payment—Continued
Permanent indefinite appropriation availability—Continued
Payment otherwise provided for—Continued
U.S. Marshals Service seizure costs—Continued
once it seizes the property pursuant to the execution of a warrant *in rem* 177
Res judicata
Subsequent claims
An employee seeks a Comptroller General decision on his entitlement to salary retention. The General Accounting Office (GAO) adheres to the doctrine of *res judicata* to the effect that the valid judgment of a court on a matter is a bar to a subsequent action on that same matter before the GAO. 47 Comp. Gen. 573. Since in *William C. Ragland* v. *Internal Revenue Service,* Appeal No. 55-81 (C.A.F.C. November 1, 1982), it was previously decided that the employee was not entitled to saved pay benefits, the GAO will not consider his claim for salary retention 399
Jurors
Fees
Military personnel in State courts
Pay deduction
A military member on active duty receiving full pay and allowances served as a juror in a State court. He received $35 in fees for his jury duty. The member may not keep the fees because he was not in a leave status and he is therefore receiving additional compensation for performing his duties presumably during normal working hours 39
Government employees
Firefighters
Overtime compensation
Fair Labor Standards Act applicability. (*See* COMPENSATION, Overtime, Firefighting, Fair Labor Standards Act, Court leave)
Magistrates
Authority
Withdrawal from court registry funds
Upon consent of all the parties, a magistrate may be specially designated to make final determinations of the district court in all civil matters. 28 U.S.C. 636(c), as amended in 1979. Therefore, in those cases, a magistrate may also be legally authorized to order withdrawal of money from the court registry 404
Witnesses
Leave of absence from regular duty. (*See* LEAVES OF ABSENCE, Court)
CRIMINAL LAW VIOLATIONS
Not for GAO consideration
Allegation that a competitor's proposal contains false representations in violation of 18 U.S.C. 1001, a criminal statute, raises a matter outside GAO's bid protest function. Nevertheless, if a protester establishes that an offeror made misrepresentations in its offer

CRIMINAL LAW VIOLATIONS—Continued Page
Not for GAO consideration—Continued
that materially affected the evaluation, corrective action would be appropriate 577

CUSTOMS
Services to the public
Reimbursement. (*See* FEES, Services to the public)

DAVIS-BACON ACT (*See* CONTRACTS, Labor stipulations, Davis-Bacon Act)

DEBT COLLECTIONS
Accountable officers
Relief. (*See* ACCOUNTABLE OFFICERS, Relief)
By Government employees requirement
Collection of fees owed the United States is an inherent governmental function which may be performed only by Federal employees. 339
Collection by non-employees
System for protection of Government
Feasibility questionable
General Accounting Office questions the feasibility of developing a system of alternative controls to protect the Government against loss in the event that volunteers collect Government monies 339
Cancellation
The holding in 60 Comp. Gen. 181 regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals. 60 Comp. Gen. 181 is extended 308
Federal Claims Collection Act of 1966. (*See* FEDERAL CLAIMS COLLECTION ACT OF 1966)
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 211
Social Security payments. (*See* SOCIAL SECURITY, Benefits, Overpayments, Debt collection)

DEBT COLLECTIONS—Continued Page
Waiver
Civilian employees
Compensation overpayments
Failure to deduct insurance premiums
Optional life
Employee elected regular and optional life insurance coverage under the Federal Employees' Group Life Insurance Program (FEGLI), but when he transferred in 1969 the new agency stopped deducting his optional insurance premiums due to an administrative error. Since the employee received Leave and Earnings Statements throughout the period in question, which reflected optional premium deductions before his transfer, but not afterward, his failure to examine the statements and to note the error makes him at least partially at fault, thereby precluding waiver under 5 U.S.C. 5584 608

DEFENSE ACQUISITION REGULATION
Advertised procurements
Progress payment clause
Absence
Bid responsiveness
Request for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire. 45 Comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases modified in part 113
Arms Export Control Act
Implementation
Competition not required
Sole-source procurement requested
Protest that provisions in Defense Acquisition Regulation requiring contracting officer to honor request of a foreign government to sole-source procurement are unlawful because they violate requirement for competitive procurement in 10 U.S.C. 2304(a) is without merit because that provision is not applicable to foreign military sales procurements if the foreign government requests a sole-source procurement 100
Consistency with law requirement
Absence of congressional objection
In subsequent appropriation acts
Specialty metals' procurements
Agency interpretation of Department of Defense Appropriation Act restriction against the purchase of articles consisting of foreign specialty metals as reflected in DAR 6-302 is to be accorded deference. General Accounting Office will not object to DAR 6-302 provision that statutory restriction is met if the specialty metal is melted in the United States, notwithstanding protester's contention that statute requires that such articles be manufactured entirely in the United States. DAR provision is based on wording in legislative history and has been in existence for 10 years without congressional objection. 49 Comp. Gen. 606 is distinguished 256

DEFENSE ACQUISITION REGULATION—Continued Page
Contracting with Government employees
Restrictions
Where contracting officer was unaware the awardee was employed by another Government agency on date of award, there was no violation of regulation against knowingly contracting with Government employee. Moreover, agency considered allegation when raised after award and determined that termination of contract for convenience of Government was not warranted since employment was terminated. In addition, General Accounting Office (GAO) finds no evidence in the record of any favoritism towards awardee. In these circumstances, GAO concludes that there is no reason to disturb award 230

DEFENSE DEPARTMENT
Appropriations. (*See* APPROPRIATIONS, Defense Department)

DEFENSE OFFICER PERSONNEL MANAGEMENT ACT
Involuntary separation
Military personnel
Pub. L. 96-513 effect. (*See* DISCHARGES AND DISMISSALS, Military personnel, Involuntary separation, Pub. L. 96-513 effect)

DEPARTMENTS AND ESTABLISHMENTS
Adjudicative proceedings
Public intervenors
Appropriation availability. (*See* APPROPRIATIONS, Availability, Intervenors)
Closing authority. (*See* AGENCY)
Lobbying
Anti-lobbying statutes
During January 1981, the Denver Regional Office of the Legal Services Corporation (LSC) held a training session for grantee personnel of the region. The training session speakers included Corporation headquarters officials and officials from grantees, who presented material on the LSC Survival Plan. These officials advocated the public policy of resisting the threatened Reagan Administration cuts in the legal services and other social benefits programs. These same speakers encouraged those in attendance to engage in political activities of building coalitions in order to mount a grass roots campaign to lobby Congress to vote against measures to curtail these programs. This activity constituted a violation of 42 U.S.C. 2996f(b)(6) which prohibits the use of corporate funds by grantees to conduct training programs that advocate public policies or encourage political activities 654
Services between
Appropriation obligation
Section 601 of the Economy Act, as amended, 31 U.S.C. 686 (now 31 U.S.C. 1535), permits one agency or bureau of the Government to furnish materials, supplies or services for another such agency or bureau on a reimbursable basis. However, since the Presidential Inaugural Committee (PIC) is not a Government agency and DOD used its own appropriations without reimbursement from either the PIC or Joint Congressional Committee on Inaugural Ceremonies in par-

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ticipating in the 1981 Presidential inaugural activities, the authority of the Economy Act was not available 323

DISBURSING OFFICERS
Altered check cashed
Full restitution made
Account in balance
Relief not necessary
When dishonest payee who altered Government check for final pay makes full restitution of all amounts over and above his entitlement which were fraudulently obtained from military disbursing officer, account may be considered in balance. 27 Comp. Gen. 674 is explained and distinguished 614

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 174

DISCRIMINATION
Title VII
Complaints
Informal agency settlement. (*See* CIVIL RIGHTS ACT)
Equal Employment Opportunity
Commission authority. (*See* EQUAL EMPLOYMENT OPPORTUNITY)

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

ENERGY
Department of Energy
Authority and responsibility
Oil price and allocation regulation
Recovered overcharges. (*See* FUNDS, Recovered overcharges)

EQUAL ACCESS TO JUSTICE ACT
Appropriations
Availability
Intervenors. (*See* APPROPRIATIONS, Availability, Intervenors)
Attorneys' fees. (*See* ATTORNEYS, Fees, Equal Access to Justice Act)

EQUAL ACCESS TO JUSTICE ACT—Continued Page
Awards, judgments, etc.
Payment
Permanent judgment appropriation
Section 207 of Equal Access to Justice Act (EAJA) (5 U.S.C. 504 note) prohibits use of permanent judgment appropriation established by 31 U.S.C. 1304 as alternative source of funds for payment of awards newly authorized by EAJA unless and until Congress makes a specific appropriation for that purpose 692

EQUAL EMPLOYMENT OPPORTUNITY
Commission
Authority
Title VII discrimination complaints
Informal agency settlement
Remedial actions
The scope of remedial actions under Title VII is generally for determination by EEOC. However, EEOC's present regulations on informal settlements do not provide sufficient guidance for Federal agencies to carry out their responsibilities under Title VII of the Civil Rights Act of 1964, as amended. We recommend that EEOC review and revise its present regulations to provide such guidance. Until that time agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision 239

EQUIPMENT
Telecommunications systems
Procurement
Procuring agency generally must give offerors sufficient details in request for proposals to enable them to compete intelligently and on relatively equal basis. Where the solicitation sets out estimates as to the extent of the number of services required for evaluation purposes, establishes a minimum ordering requirement, and identifies the types and levels of services required, the solicitation is sufficient for the preparation of proposals 124

FAIR LABOR STANDARDS ACT
Applicability
Employees of United States
Fair Labor Standards amendments, Pub. L. 93-259
Firefighters
Overtime compensation. (*See* COMPENSATION, Overtime, Firefighting, Fair Labor Standards Act)
Enforcement provisions
Office of Personnel Management role. (*See* OFFICE OF PERSONNEL MANAGEMENT, Jurisdiction, Fair Labor Standards Act)
Overtime
Compensation. (*See* COMPENSATION, Overtime, Fair Labor Standards Act)
Recordkeeping requirements. (*See* RECORDS, Recordkeeping requirements, Fair Labor Standards Act)

FARMERS HOME ADMINISTRATION. (*See* AGRICULTURE DEPARTMENT, Farmers Home Administration)

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FEDERAL AVIATION ADMINISTRATION
Employees
Premium pay
Entitlement
Section 145 of Pub. L. 97-377, Dec. 21, 1982, which amends 5 U.S.C. 5546a(a) to provide that certain instructors at the Federal Aviation Academy are entitled to premium pay, is effective from the date of enactment and is not retroactive to Aug. 3, 1981, as were the original provisions of 5 U.S.C. 5546a(a) added by subsec. 151(a) of Pub. L. 97-276. The general rule is that an amendatory statute is applied prospectively only unless a retroactive construction is required by express language or by necessary implication. Neither the express language nor the legislative history supports the view that the amendment made by sec. 145 is retroactively effective 396

FEDERAL BANKING AGENCY AUDIT ACT
Amendments
Audit authority of GAO. (*See* **GENERAL ACCOUNTING OFFICE, Audits, Authority, Federal Reserve System**)

FEDERAL CLAIMS COLLECTION ACT OF 1966
Compromise, waiver, etc. of claims
Authority
Consideration of debtor's financial condition
Under the Federal Claims Collection Standards, 4 C.F.R. Chapter II, when determining whether to compromise claims, or suspend or terminate collection activity, agencies should exercise sound discretion, and may consider, among other factors, the financial condition of the debtor. The fact that the debtor is receiving Government benefits is merely one more factor to be considered when determining whether compromise, suspension, or termination (or some other action) best serves and protects all of the Government's interests 599
Procedure
Standards
Agency implementation
Administrative offset
Whether collection by administrative offset under the Federal Claims Collection Standards, 4 C.F.R. Chapter II, is "feasible" lies within the agency's exercise of sound discretion, on a case-by-case basis. The term is not synonymous with "possible." Agencies should consider not only whether administrative offset can be accomplished, both practically and legally, but also whether it is best suited to further and protect the Government's interests. In certain circumstances, agencies may give due consideration to the debtor's financial condition, and are not required to use offset in every instance in which there is an available source of funds, for example, where those funds are payments under a benefit program designed to avoid or alleviate financial hardship 599
Applicability
Social Security Act
Social Security Administration is not bound by Federal Claims Collection Standards (FCCS) requiring administrative offset "in every instance in which this is feasible," in light of section 8(e) of the Debt

FEDERAL CLAIMS COLLECTION ACT OF 1966—Continued Page
Procedure—Continued
Standards—Continued
Applicability—Continued
Social Security Act—Continued
Collection Act of 1982, 31 U.S.C. 3701(d). The FCCS, 4 C.F.R. Chapter II, to the extent they implement the 1982 legislation, do not govern the use of administrative offset to collect debts arising under the Social Security Act. However, Social Security Administration may continue to use administrative offset to collect such debts when authorized by other statutes or principles of common law, and should look to FCCS for guidance to the extent it has not issued its own offset regulations 599

FEDERAL COURTS IMPROVEMENT ACT OF 1982
Contract claims brought before award
Claims Court jurisdiction. (*See* CONTRACTS, Claims brought before award, Claims Court jurisdiction, Federal Courts Improvement Act)

FEDERAL PRISON INDUSTRIES, INC. (*See* PRISONS AND PRISONERS)

FEDERAL SUPPLY SCHEDULE CONTRACTS. (*See* CONTRACTS, Federal Supply Schedule)

FEES
Attorneys. (*See* ATTORNEYS, Fees)
Jury. (*See* COURTS, Jurors, Fees)
Services to the public
Charges
Cost recovery
When employees of the Customs Service participate as instructors in programs to train travel agents in Customs requirements and procedures so that the travel agents will, in turn, provide this information to travelers, the Customs Service must charge a fee to recover the full cost of the special benefit conferred. Any receipts may be deposited to the credit of the appropriation of the Customs Service pursuant to 19 U.S.C. 1524 262
User fees
Recovery of cost
By Government employees requirement
Collection of fees owed the United States is an inherent governmental function which may be performed only by Federal employees. 339
General Accounting Office questions the feasibility of developing a system of alternative controls to protect the Government against loss in the event that volunteers collect Government monies 339

FLY AMERICA ACT
Travel by noncertificated air carriers. (*See* TRAVEL EXPENSES, Air travel, Fly America Act, Employees' liability)

FOOD
Meals furnished
Reimbursement. (*See* MEALS, Furnishing, General rule)

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FOREIGN GOVERNMENTS

American citizens

Employment

Military retirees

Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of Congress in Art. I. sec. 9, cl. 8 of the Constitution and the approvals required by section 509 of Public Law 95-105 (37 U.S.C. 801 note) in order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government 432

Contracts with United States

Canadian Commercial Corporation

Endorsement of Canadian bid/offer

Canadian Commercial Corporation, a corporation of the Government of Canada, is required to submit an unequivocal endorsement of Canadian producer's bid. 45 Comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases are modified in part 113

Defense articles and services

Arms Export Control Act

Foreign military sales program

Competition requirement inapplicability

Sole-source award requested

Protest that provisions in Defense Acquistion Regulation requireing contracting officer to honor request of a foreign government to sole-source procurement are unlawful because they violate requirement for competitive procurement in 10 U.S.C. 2304(a) is without merit because that provision is not applicable to foreign military sales procurements if the foreign government requests a sole-source procurement 100

Employment of U.S. Government retirees. (*See* **FOREIGN GOVERNMENTS, American citizens, Employment**)

Military assistance

Arms Export Control Act. (*See* **FOREIGN GOVERNMENTS, Defense articles and services, Arms Export Control Act**)

FOREIGN SERVICE

Foreign Service Grievance Board

Decisions

General Accounting Office review. (*See* **GENERAL ACCOUNTING OFFICE, Jurisdiction, Foreign Service Grievance Board decisions**)

FOREST SERVICE

Other than timber sales. (*See* **AGRICULTURE DEPARTMENT, Forest Service**)

FUNDS

Miscellaneous receipts. (*See* **MISCELLANEOUS RECEIPTS**)

FUNDS—Continued Page
Recovered overcharges
Distribution
Department of Energy
In distributing funds under consent orders with alleged violators of petroleum price and allocation regulations, Dept. of Energy must attempt to return funds to those actually injured by overcharges. Where this is not possible, Energy must use mandatory procedure established by 10 C.F.R. 205.280 *et seq.*, which creates mechanisms for injured parties to claim refunds. Distribution of consent order funds by oil companies is not permissible without restitutionary nexus because Energy lacks authority to do indirectly what it cannot do directly. In-kind deposit of oil in Strategic Petroleum Reserve by oil companies is not permissible because it lacks restitutionary nexus and is not otherwise authorized 379
Distribution of consent order funds to states by oil companies or Dept. of Energy is permissible only if states are required to use funds exclusively for energy-related purposes with restitutionary nexus to nature of overcharges, for benefit of class of consumers overcharged, and according to plans approved by Energy. Any funds not able to be distributed by oil companies in appropriate restitutionary manner must revert to Energy for disposition under procedure in 10 C.F.R. 205.280 *et seq.* If no consumers or classes of consumers can be identified by administrative procedure, and no restitutionary nexus for payments to states can be found, only remaining authorized distribution is deposit of funds in miscellaneous receipts account of Treasury. 379

GENERAL ACCOUNTING OFFICE
Adminsitrative Procedure Act
Inapplicability. (*See* ADMINISTRATIVE PROCEDURE ACT, Inapplicability)
Audits
Authority
Fedeal Reserve System
Federal Banking Agency Audit Act
Amendment (1978)
General Accounting Office (GAO) will not decide protest against contract award by Federal Reserve Bank, despite GAO audit authority, because GAO account settlement authority (the basis of GAO bid protest jurisdiction) does not extend to Federal Reserve System banks 40
Foreign Assistance Act activities
Pursuant to the Budget and Accounting Act, 1921, as amended, 31 U.S.C. 712, 716(a) (formerly 31 U.S.C. 53(a)), and the Legislative Reorganizaton Act of 1970, as amended, 31 U.S.C. 716(b) (formerly 31 U.S.C. 115(a)), the General Accounting Office (GAO) is authorized to conduct comprehensive audits of activities under sec. 607(a) of the Foreign Assistance Act, as amended, 22 U.S.C. 2357(a), where Federal agencies directly participate in carrying out international agreements, such as those of the United States-Saudi Arabia Joint Commission on Economic Cooperation. Our audit authority extends to Joint Commission procurements and contacts even through the funding is wholly provided by Saudi Arabia 410

GENERAL ACCOUNTING OFFICE—Continued Page

Claims

Jurisdiction. (*See* **GENERAL ACCOUNTING OFFICE, Jurisdiction, Claims**)

Decisions

Overruled or modified

Prospective application

Transferred member of the Air Force may be reimbursed the cost of transporting the houseboat he uses as his dwelling under 37 U.S.C. 409, which permits the transportation at Government expense of a mobile home dwelling, because it is determined that a boat may qualify as a "mobile home dwelling" under the law. 48 comp. Gen. 147 is overruled and regulations issued to implement that decision need not be applied so as to exclude payment for transporting boats which are used as residences 292

Prospective application

The holding in 60 Comp. Gen. 181 regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals. 60 Comp. Gen. 181 is extended 308

Because so many agencies have relied on apparent acquiescence by the Congress during the appropriations process when funds for passenger vehicles were appropriated without imposing any limits on an agency's discretion to detemine the scope of "official business," and because dicta in GAO's own decisions may have contributed to the impression that use of cars for home-to-work transportation was a matter of agency discretion, GAO does not think it appropriate to seek recovery for past misuse of vehicles (except for those few agencies whose use of vehicles was restricted by specific Congressional enactments). This decision is intended to apply prospectively only. Moreover, GAO will not question such continued use of vehicles to transport heads of non-cabinet agencies and the respective seconds-in-command of both cabinet and non-cabinet agencies until the close of this Congress 438

Jurisdiction

Administrative determinations

The concept of administrative discretion does not permit an agency to refuse to consider all claims submitted to it under the Military Personnel and Civilian Employees' Claims Act, which authorizes agencies to settle claims of Government employees for loss or damage to personal property. While General Accounting Office will not tell another agency precisely how to exercise its discretion, that agency has a duty to actually exercise it, either by the issuance of regulations or by case-by-case adjudications 641

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Claims
Settlement
Authority
The Secretary of the Army denied a deceased civilian employee's representative's claim under 10 U.S.C. 2733 for wrongful death damages allegedly caused by malpractice of Army medical officials. As to the Comptroller General reporting the matter to Congress as a meritorious claim under 31 U.S.C. 3702(d) (formerly 31 U.S.C. 236), that provision is construed to apply only to claims which fall within General Accounting Office's (GAO) settlement authority. Since, under 10 U.S.C. 2733 and 2735, the Army's settlement of a claim for damages is final and conclusive, GAO has no authority in the matter and the claim is inappropriate for reporting to Congress under the Act 280
Commercial activities of Government
Private *v.* Government performance. (*See* **GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, In-house performance *v.* contracting out**)
Contracts
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions. (*See* **CONTRACTORS, Responsibility, Determination, Review by GAO**)
Defaults and terminations
Review of procedures leading to award
General Accounting Office will review a contracting agency's decision to terminate a contract for the convenience of the Government when that decision results from the agency's detemination that the contract award was improper 506
Disputes
Between private parties
Protest that a competitor allegedly used the protester's proprietary data in its proposal presents a dispute between private parties that is not for consideration under General Accounting Office's (GAO) Bid Protest Procedures where the contacting agency did not participate in the alleged disclosure of the data 577
Liquidated damages
Solicitation provisions
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 219
In-house performance *v.* contracting out
Cost comparison
Appeal of agency's analysis
Protest of Army's consideration of appeal of comparative cost analysis and agency's subsequent decision to sustain that appeal and to order new management study under Office of Management and Budget (OMB) Circular A-76 analysis is subject to General Account-

GENERAL ACCOUNTING OFFICE—Continued Page
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Contracts—Continued
In-house performance *v.* contracting out—Continued
Cost comparison—Continued
Appeal of agency's analysis—Continued
ing Office review where solicitation establishes ground rules for the appeal process 129
Modification
While contract modifications generally are the responsibility of the procuring agency in administering the contract, General Accounting Office will consider a protest that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes. A modification does not exceed the contract's scope, however, as long as the modified contract is substantially the same as the contract that was competed 22
Small business matters
Procurement under 8(a) program. (*See* CONTRACTS, Small business concerns, Awards, Review by GAO, Procurement under 8(a) program)
Small purchases. (*See* PURCHASES, Small)
Terminated for convenience of Government. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Defaults and terminations)
Criminal law violations. (*See* CRIMINAL LAW VIOLATIONS)
Discrimination
Complaints under Title VII
Civil Rights Act
Monetary awards
In view of authority granted to EEOC under Title VII of the Civil Rights Act of 1964, as amended, General Accounting Office (GAO) does not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the Government. However, in view of GAO's authority to determine the legality of expenditures of appropriated funds, GAO may determine the legality of awards agreed to by agencies in informal settlements of discrimination cases arising under Title VII 239
Foreign Service Grievance Board decisions
An employee of the Agency for International Development (AID) filed a grievance with the Foreign Service Grievance Board under 22 U.S.C. 1037(a) for credit of unused sick leave earned while he was employed by a United Nations agency. The Board found for the employee. An AID certifying officer thereafter submitted the case to General Accounting Office for review and decision. Under 22 U.S.C. 1037a(13) such decisions of the Board are final, subject only to judicial review in the District Courts of the United States. Therefore, this Office is without jurisdiction to review the Board's decision in this case. 57 Comp. Gen. 299 is distinguished 671

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Labor-management relations
Requests for decisions
Declined
Under 4 C.F.R. 22.8 (1983) General Accounting Office (GAO) will not take jurisdiction over a labor-management matter which is "unduly speculative or otherwise not appropriate for decision." Since this case is based on factual issues which are irreconcilably in dispute, it would be more appropriately resolved through the grievance procedures set forth in the parties' negotiated labor-management agreement, or through negotiation. Therefore, under 4 C.F.R. 22.8 GAO will exercise its discretion to decline jurisdiction in this matter. 537
Union's request for a determination as to the amount of overtime due employees as a result of an arbitration award, as modified by the Federal Labor Relations Authority, is more appropriately resolved under the procedures authorized by 5 U.S.C. Chapter 71. The agency has objected to submission of the matter to General Accounting Office (GAO) and there are a number of factual issues in dispute. Accordingly, GAO declines to assert jurisdiction over this matter 274
Labor stipulations
Service Contract Act of 1965
Invitation for bids terms
Ambiguities. (*See* **BIDS, Invitation for bids, Ambiguous, Service Contract Act provisions**)
Military matters
Dependency
Under 37 U.S.C. 403(h) the Secretary of the service concerned may make dependency and relationship determinations for enlisted members' quarters allowance entitlements and the determinations are final and may not be reviewed by the General Accounting Office. However, that provision does not apply to officers and the Comptroller General renders decision in officers' cases and also in enlisted members' cases when requested by the service. In the interest of uniformity it seems appropriate to forward doubtful cases to the Comptroller General for decision particularly where an officer is married to an enlisted member. 60 Comp. Gen. 399 is modified 666
Relief authority
Treasurer of United States
Duplicate check losses
Loss in duplicate check case (payee alleges non-receipt of original check, Treasury issues replacement, payee negotiates both checks) occurs when second check is paid. In general, General Accounting Office (GAO) thinks 31 U.S.C. 156 (now sec. 3333) is more appropriate than 31 U.S.C. 82a-2 (now secs. 3527(c) and (d)) to deal with duplicate check losses. However, in view of conclusions and recommendations in 1981 report to Congress (AFMD-81-68), GAO thinks problem warrants congressional attention. Therefore, to give Congress and Treasury adequate time to develop solutions, GAO will maintain status quo for reasonable time and will handle cases under either statute as they are submitted 91

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Subcontracts
Protests against award of subcontract on behalf of Government by Department of Energy prime contractor is appropriate for General Accounting Office review under standards of *Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Nonunion protester, whose bid prime contractor did not open, is interested party, in particular circumstances, for purposes of protesting requirement for subcontractors to have union agreement notwithstanding that protester withdrew its bid. B-204037, Dec. 14, 1981, is amplified 428
Procedure
Bid protest cases
Resolution of protests
Not "adversary adjudication"
Claims under Equal Access to Justice Act
Recovery under the Equal Access to Justice Act of attorney's fees and costs incurred in pursuing a bid protest at General Accounting Office (GAO) is not allowed because GAO is not subject to the Administrative Procedures Act (APA) and in order to recover under Equal Access to Justice Act claimant must have prevailed in an adversary adjudication under the APA 86
Recommendations
Contracts
Termination
Partial
Sole domestic bidder submitted bid for quantity which was less than maximum specified in Invitation For Bids (IFB). Partial bid was authorized by IFB. Contracting officer applied Buy American Act evaluation factor against nondomestic bidder as to maximum quantity which nondomestic bidder bid on. Application of evaluation factor as to quantities on which domestic bidder submitted partial bid was proper. Application of evaluation factor as to quantities on which only foreign bids were submitted was improper. Partial termination of contract is recommended 345
Settlements
Authority
Federal Reserve System
Audit *v.* account settlement authority
General Accounting Office (GAO) will not decide protest against contract award by Federal Reserve Bank, despite GAO audit authority, because GAO account settlement authority (the basis of GAO bid protest jurisdiction) does not extend to Federal Reserve System banks 40

GENERAL SERVICES ADMINISTRATION
Authority
Space assignment. (*See* GENERAL SERVICES ADMINISTRATION, Services for other agencies, etc., Space assignment)
Strategic and Critical Stock Piling Act
Proposal by General Services Administration (GSA) to sell, on behalf of contractor, excess Stockpile materials under the Strategic and Critical Stock Piling Act, 50 U.S.C. 98e(c), where title has been

GENERAL SERVICES ADMINISTRATION—Continued Page

Authority—Continued

Strategic and Critical Stock Piling Act—Continued

transferred to the contractors in exchange for other needed Stockpile materials, is legally within the parameters of GSA's existing barter authority. Where a statute confers duties in general terms, all powers and duties incidental and necessary to make such authority effective are included by implication. Congress has encouraged barter transactions and the proposed plan helps accomplish the purposes of the Act. However, since it may have a significant effect on congressional control over the Stockpile transaction, GSA should discuss the proposal with its congressional oversight and appropriations committees before implementation 245

Procurement

Telephone equipment and related services

Installment purchase contract

Financial reporting

Capitalization

For the purpose of financial reporting GSA should capitalize equipment and installation portion of procurement characterized as a lease with an option to purchase (which in this case should be treated as an installment purchase contract), since it is clear that GSA intends to exercise option to take title to equipment at cost of $1 at expiration of 5-year contract term. Also, should GSA cancel contract, title to equipment would immediately vest in GSA and payment would be handled as provided for in the contract. See 2 GAO 12.5(d)... 569

Obligation of funds

Annual costs only

GSA under authority of 40 U.S.C. 481(a)(3) may obligate only the amount necessary to cover its annual costs under lease with an option to purchase contract (which in this case should be treated as an installment purchase contract) against the capital investment apportionment of the Federal Telecommunications Fund 569

Public utility services

Contract between General Services Administration (GSA) and a non-tariffed supplier for procurement of telephone equipment and related installation and maintenance services is one for "Public utility services" within the scope of 40 U.S.C. 481(a)(3) (authorizing GSA to make contracts for public utility services for periods up to 10 years), since it is the nature of the services provided and not the nature of the provider of the services that is determinative for the purpose of the law. Sale of telephone equiment is a utility type service. Installment purchase contracts as well as leases or leases with options to purchase are within the scope of 40 U.S.C. 481(a)(3) 569

Services for other agencies, etc.

Space assignment

Including leasing

Public Buildings Cooperative Use Act

Historic building preference

When applicable statute states that General Services Administration should acquire space in historic buildings when "feasible and prudent" compared with available alternatives, agency has not

GENERAL SERVICES ADMINISTRATION—Continued Page
Services for other agencies, etc.—Continued
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Including leasing—Continued
Public Buildings Cooperative Use Act—Continued
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abused its discretion or violated statute in making award to firm offering non-historic space at substantially lower price 50

GOVERNMENT PRINTING OFFICE
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Small Business Act purposes
Inapplicability of Act
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 164

GRANTS
Comprehensive Employment and Training Act (CETA)
Subgrantees
Interest on grant funds
Where subgrantee of CETA grant to State of Arkansas earned interest on recovered FICA taxes before the recovery was returned to the Federal Government, the interest is an applicable credit under the grant agreement and grant cost principles. As a result, all interest earned by subgrantee on the recovery is owed to the grantee and by the grantee to the Department of Labor to the extent not offset by allowable grant costs 701
Where a subgrantee of State CETA grantee reovers grant funds and earns interest on recoveries, the interest is not held on advance basis and is not exempt from accountability under the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503(a) 701
Federal
To states. (*See* STATES, Federal aid, grants, etc.)

HEALTH AND HUMAN SERVICES DEPARTMENT
Regulations
Procurement practices
Contractual preference to Indian organizations
Legality of preference
Provision in solicitation issued by Department of Health and Human Services which gives preference to Indian organizations or Indian-owned economic organizations by requiring negotiation and award solely with Indian organizations if one or more is within competitive range is improper, since there is no legal basis for such a preference 353

HOLIDAYS
Compensation. (*See* COMPENSATION, Holidays)

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HOUSING AND URBAN DEVELOPMENT
Mortgage insurance programs
Special Risk Insurance Fund
Availability
Judgments and compromise settlements
Secretary of Housing and Urban Development (HUD) provided building mortgage insurance on two projects under authority of sec. 236 of the National Housing Act, 12 U.S.C. 1715z-1. In one case, the Secretary agreed to make payments to plaintiff construction contractor in settlement of lawsuit after court had ruled that the contractor had cause of action against the Secretary on the theory of *quantum meruit.* In the second case, similar payment was directed by court judgment. The permanent indefinite appropriation established by 31 U.S.C. 724a is not available in either case. The permanent appropriation may be used to pay a judgment or compromise settlement only if no other funds are available for that purpose. The Special Risk Insurance Fund, a revolving fund created by 12 U.S.C. 1715z-3(b), is available for the payments to contractors for completion of projects for which HUD has provided mortgage insurance under sec. 236..... 12

HUSBAND AND WIFE
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Quarters allowance. (*See* **QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ))**
Separation agreements
Status
Members with dependents
A properly executed separation agreement generally is legally sufficient as a statement of the parties' marital separation and resulting legal obligations, for the purpose of determining entitlement to a basic Allowance for quarters, even though the agreement was not issued or sanctioned by a court. However, a member's entitlement to basic allowance for quarters based on child support obligations created by a separation agreement should be reassessed following court action since the court is not bound by the agreement in awarding custody..... 315

INDIAN AFFAIRS
Contracting with Government
Preference to Indian concerns
Indian Housing Authority (IHA) had a reasonable basis for rejecting bid submitted by firm that by bid opening had not demonstrated to IHA's satisfaction through a required "prequalification statement" that it was a qualified Indian-owned organization or Indian-owned enterprise..... 138
Health and Human Services Department. (*See* **HEALTH AND HUMAN SERVICES DEPARTMENT, Regulations, Procurement practices, Contractual preference to Indian organizations)**

INDEBTEDNESS
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INSANE AND INCOMPETENT
Military personnel
Dependents
Annuity election for dependents
Survivor Benefit Plan. (*See* PAY, Retired, Survivor Benefit Plan, Mentally incapacitated beneficiaries)
Self-support status
A deceased military officer's daughter, considered eligible for a Survivor Benefit Plan annuity on the basis of mental illness making her incapable of self-support, then recovered from her illness to the extent that she was able to support herself for 6 months through gainful employment. She subsequently suffered a relapse requiring rehospitalization. The annuity may properly be suspended during the 6-month period of employment. It may be reinstated during the following period when she was again incapable of self-support because of the original disabling condition, since the applicable laws governing military survivor annuity plans do not preclude reinstatment in appropriate circumstances. 44 Comp. Gen. 551 is modified in part 302

INSURANCE
Department of Housing and Urban Development
Mortgage insurance projects
Special Risk Insurance Fund. (*See* HOUSING AND URBAN DEVELOPMENT, Mortgage insurance programs, Special Risk Insurance Fund)
Household effects transported. (*See* TRANSPORTATION, Household effects, Insurance)

INTEREST
Dual Benefits Payment Account
Railroad Retirement Board. (*See* RAILROADS, Railroad Retirement Board, Dual Benefits Payment Account, Interest on funds)
Judgments. (*See* COURTS, Judgments, decrees, etc., Interest)
Paid to U.S. (*See* MISCELLANEOUS RECEIPTS, Interest)

INTERNATIONAL ORGANIZATIONS
International Natural Rubber Organization
Excess Membership contributions
Retention and investment
General Accounting Office (GAO) has no legal objection to the retention of excess funds in an account where they will be invested by the INRO for the benefit of individual member governments, as the fund will be in custody of the INRO itself rather than of the United States. However, any earnings or interest from these investments received by the United States must be deposited in the Treasury as miscellaneous receipts 70

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JOINT TRAVEL REGULATIONS
Civilian personnel (Vol. 2)
Actual expenses
High rate areas
Meals, etc. cost reasonableness
Definitive guidelines needed
Volume 2 of Joint Travel Regs. does not specify across-the-board dollar limitation for purpose of determining reasonableness of actual subsistence claims for meals and miscellaneous expenses. In this case, accounting and finance officer considered a meal expense to be excessive and applied a dollar limitation to reimbursement. Absent sufficient justification for the higher dinner cost, that action is upheld. It is noted that provisions of 2 JTR para. C4611 limit meal and miscellaneous expenses reimbursement to 50 percent of high cost area rate in specific situations where lodging costs are not incurred. A similar limitation for application to subsistence expenses claims involving commercial lodging costs could be applied 88

JUDGES. (*See* COURTS, Judges)

LABOR-MANAGEMENT RELATIONS
Federal service
Requests for GAO decisions, etc.
Where a General Schedule employee who was demoted is repromoted to his former position during a 2-year period of grade retention under 5 U.S.C. 5362, the schedule for his periodic step increases established before demotion and grade retention remains in effect. *Grade* retention under 5 U.S.C. 5362 is to be distinguished from *pay* retention under sec. 5363. Repromotion during a period of grade retention is not an "equivalent increase" under 5 U.S.C. 5335(a) and 5 C.F.R. 531.403. Prior decisions arising before Civil Service Reform Act of 1978 are not applicable. This decision reversed on new information submitted, by 63 Comp. Gen. ——— (B-209414, Dec. 7, 1983) ... 151

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 216

Union's request for a determination as to the amount of overtime due employees as a result of an arbitration award, as modified by the Federal Labor Relations Authority, is more appropriately resolved under the procedures authorized by 5 U.S.C. Chapter 71. The agency has objected to submission of the matter to General Accounting Office (GAO) and there are a number of factual issues in dispute. Accordingly, GAO declines to assert jurisdiction over this matter 274

Certain Department of Housing and Urban Development (HUD) employees were terminated by a reduction-in-force (RIF) after the lifting of an injunction issued by the U.S. District Court. During the period of the stay, the employees continued their employment. When the injunction was lifted, HUD made the RIF retroactively effective

LABOR-MANAGEMENT RELATIONS—Continued Page
Federal service—Continued
Requests for GAO decisions, etc.—Continued
to the originally proposed date. Severance pay is not basic pay from a position, and so payment of severance pay is not barred by the dual compensation prohibitions of 5 U.S.C. 5533(a) 435
Under 4 C.F.R. 22.8 (1983) General Accounting Office (GAO) will not take jurisdiction over a labor-management matter which is "unduly speculative or otherwise not appropriate for decision." Since this case is based on factual issues which are irreconcilably in dispute, it would be more appropriately resolved through the grievance procedures set forth in the parties' negotiated labor-management agreement, or through negotiation. Therefore, under 4 C.F.R. 22.8, GAO will exercise its discretion to decline jurisdiction in this matter . 537

LEASES
Mineral
Public lands
Exchange agreements
Public land acquisition
Rattlesnake National Recreation Area and Wilderness Act
Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under sec. 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt 102
Negotiation
Evaluation of offers
Undisclosed factors
Oral disclosure during negotiations
When offeror is orally informed of an agency's requirement during negotiation, notwithstanding its absence in solicitation, offeror is on notice of the requirement and General Accounting Office will deny protest based on failure to state it in the solicitation 50
Historic building preference
Conditions for application
Omitted in solicitation
Cost consideration
Solicitation for lease of office space stating that preference will be given to space in historic buildings is deficient when it does not indicate how preference will be applied. However, protester cannot reasonably assume that preference is absolute and that an offer of historic space will be accepted over offer of non-historic space, regardless of price 50

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LEAVES OF ABSENCE
Administrative leave
Administrative determination
Retroactive application
The Merit Systems Protection Board asks whether administrative leave may be granted retroactively to employees who were ordered not to report for work during a brief partial shutdown of the agency. The employees were placed on half-time, half-pay status in order to forestall a funding gap which would have necessitated a full close-down. In its discretion, the Board has the authority to retroactively grant administrative leave with pay to the affected employees to the extent appropriated funds were available and adequate on the dates of the partial shutdown 1
Merit Systems Protection Board employees. (*See* **MERIT SYSTEMS PROTECTION BOARD)**
Annual
Accrual
Employees "stationed" outside United States
Recruited overseas
Employee of Department of Agriculture's Food and Nutrition Service was recruited from her place of permanent residence in the continental United States for assignment in Puerto Rico. Thus, she is eligible to accrue the 45 days of annual leave authorized by 5 U.S.C. 6304(b)(1) for individuals recruited or transferred from the United States or its territories or possessions for employment outside the area of recruitment or from which transferred 545
Agency policy, which purports to deny 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruited from places of actual residence in continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements 545
"Buying back"
After workers' compensation award
Forfeiture after leave adjustment
Administrative error effect
Employee who used restored 1977 annual leave and regular annual leave in 1978 to recuperate from work-related illness accepted workers' compensation and bought back leave used. Upon reconstruction of the employee's leave records to show the recredit of the leave as of the time it was used, 66 hours of repurchased restored and regular annual leave were subject to forfeiture. Since the employing agency failed to apprise the employee of the possibility of forfeiture, the employee at his election may choose to be placed on annual leave for 1978 to avoid any or all of the forfeiture 253
Change of separation date for purpose of granting
Prohibition
Widow of former employee seeks to cancel employee's resignation on January 9, 1982, and substitute sick and annual leave until em-

LEAVES OF ABSENCE—Continued Page
Annual—Continued
Change of separation date for purpose of granting—Continued
Prohibition—Continued
ployee's death on July 3, 1982. A separation date may not be changed absent administrative error, violation of policy or regulation, or evidence that resignation was not the intent of the parties. There is no evidence of administrative error, violation of policy or regulation, or contrary intent which would warrant a change in the employee's separation date 620
Restored
"Buying back"
After workers' compensation award
Forfeiture after leave adjustment
Employee who used restored 1977 annual leave and regular annual leave in 1978 to recuperate from work-related illness accepted workers' compensation and bought back leave used. Upon reconstruction of the employee's leave record to show the recredit of the leave as of the time it was used, regular annual leave reinstated in excess of the maximum carryover stated in 5 U.S.C. 6304(a) is subject to forfeiture and may not be restored under 5 U.S.C. 6304(d). Previously restored leave recredited to leave year 1978 was subject to forfeiture at the end of leave year 1979 and therefore is not eligible for further restoration 253
Compensatory time
Aggregate salary limitation
Employees whose salaries have reached the statutory limit may earn and use compensatory time for religious observances under 5 U.S.C. 5550a, despite the fact that they are not otherwise entitled to premium pay or compensatory time. In granting the authority for Federal employees to earn and use compensatory time for religious purposes, Congress intended to provide a mechanism whereby all employees could take time off from work in fulfillment of their religious obligations, without being forced to lose pay or use annual leave. Since section 5550a involves mere substitution of hours worked, rather than accrual of premium pay, we conclude that compensatory time off for religious observances is not premium pay under Title 5, United States Code, and, therefore, is not subject to aggregate salary limitations imposed by statute 589
Court
Jury duty
Firefighters
Overtime compensation
Fair Labor Standards Act applicability. (*See* COMPENSATION, Overtime, Firefighting, Fair Labor Standards Act, Court leave)
Witness
Employee-defendant
State or local government-plaintiff
Traffic violation
Employee who is summoned to county court for a traffic violation is not entitled to court leave as a witness under 5 U.S.C. 6322 in connection with his appearance in court as a defendant 87
Granting
Administrative determination
Employee who qualifies for maximum annual leave accumulation of 45 days under 5 U.S.C. 6304(b)(1) and has completed a basic period

LEAVES OF ABSENCE—Continued Page
Granting—Continued
Administrative determination—Continued
of 24 months continuous service abroad is entitled to accrue home leave under 5 U.S.C. 6305(a) on the basis of her continuous service. Although rate at which employee earned home leave was subject to agency interpretation of implementing regulations at 5 C.F.R. 630.604, agency's total denial of statutory home leave accrual entitlement was improper. However, the agency has discretion as to when and in what amount home leave may be granted 545
Home leave. (*See* OFFICERS AND EMPLOYEES, Overseas, Home leave)
Time and attendance records
Retention (*See* RECORDS, Retention)
Traveltime
Excess
Annual leave charge
Where employee, who traveled by privately owned vehicle as a matter of preference and took additional time away from his official duties, is to be reimbursed at the constructive cost of rail transportation, the employee's annual leave may be charged for the work hours involved in the trip exceeding those hours which would have been required had he used rail transportation 393

LEGISLATION
Recommended by GAO
Presidential inaugural ceremonies
Participation by Federal agencies
Extent and types of participation
The Presidential Inaugural Ceremonies Act, now largely codified at 36 U.S.C. 721–730, is the primary legislation dealing with Presidential inaugurations. It authorizes Department of Defense (DOD) to provide limited assistance, primarily safety and medical in nature, to the Presidential Inaugural Committee (PIC), but even in these instances, the statute requires the PIC to indemnify the Government against losses. DOD itself recognizes that much of its extensive participation in Presidential inaugural activities is fundamentally a matter of custom rather than being rooted in legal authority. Nevertheless, Presidential inaugurations are highly symbolic national events and DOD support was provided with the knowledge and approval of many members of the Congress over a period of years. General Accounting Office recommends that the Congress provide specific legislative guidance on the extent and types of support and participation in inaugural activities which Federal agencies are authorized to provide 323
Statutory construction. (*See* STATUTORY CONSTRUCTION)

LOBBYING
Appropriation prohibition
Promoting public support or opposition
During a January 1981 training session at the LSC Denver Region, Alan Rader, a staff attorney with the Western Center on Law and Poverty in Los Angeles, an LSC grantee, gave a presentation on how he had organized a campaign with LSC funds to defeat a 1980 Cali-

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LOBBYING—Continued Page
Appropriation prohibition—Continued
Promoting public support or opposition—Continued
fornia tax reduction ballot measure entitled "Proposition 9." He hired campaign coordinators and organized broad-based coalitions with community groups and agencies. This activity constitutes a violation of 42 U.S.C. 2996e(d)(4) which prohibits the Corporation and its grantees from using corporate funds to advocate or oppose ballot measures 654
Legislation
Use of Federal funds
During January 1981, the Denver Regional Office of the Legal Services Corporation (LSC) held a training session for grantee personnel of the region. The training session speakers included Corporation headquarters officials and officials from grantees, who presented material on the LSC Survival Plan. These officials advocated the public policy of resisting the threatened Reagan Administration cuts in the legal services and other social benefits programs. These same speakers encouraged those in attendance to engage in political activities of building coalitions in order to mount a grass roots campaign to lobby Congress to vote against measures to curtail these programs. This activity constituted a violation of 42 U.S.C. 2996f(b)(6) which prohibits the use of corporate funds by grantees to conduct training programs that advocate public policies or encourage political activities 654
The LSC held a training session in its Denver Region in January 1981. Representatives of grantees in the 5-state region attended. Corporate officials and grantee staff attorneys presented lectures and workshops on how grantees could build coalitions with community groups and agencies to form a grass roots organization to lobby Congress for legal services and other social benefit programs. Grantee representatives described coalition building projects that were underway. This activity constitutes a violation of 42 U.S.C. 2996f(b)(7) which prohibits grantees from using corporate funds to build organizations such as coalitions and networks 654

MARSHALS
Services
Property seizure
Storage costs. (*See* **APPROPRIATIONS, Availability, Seizure of private property *and* APPROPRIATIONS, Permanent indefinite, Unavailability, Storage charges**)

MEALS
Furnishing
General rule
Government employee who uses personal funds to procure goods or services for official use may be reimbursed if underlying expenditure itself is authorized, failure to act would have resulted in disruption of relevant program or activity, and transaction satisfies criteria for either ratification or *quantum meruit,* applied as if contractor had not yet been paid. While General Accounting Office emphasizes that use of personal funds should be discouraged and retains general prohibition against reimbursing "voluntary creditors," these guidelines

MEALS—Continued Page
Furnishing—Continued
General rule—Continued
will be followed in future. Applying this approach, National Guard officer, who used personal funds to buy food for subordinates during weekend training exercise when requisite paperwork was not completed in time to follow normal purchasing procedures, may be reimbursed. 4 Comp. Dec. 409 and 2 Comp. Gen. 581 are modified. This decision was later distinguished by 62 Comp. Gen. 595 419
Temporary duty
Day of departure. (*See* SUBSISTENCE, Actual expenses, Meals)

MEDICAL TREATMENT
Officers and employees
Travel expenses
Limitations
Administrative discretion
An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed 294

MEETINGS
Travel, etc. expenses
State officials
Use of appropriated funds by National Highway Traffic Safety Administration (NHTSA) to pay travel and lodging expenses of State officials to attend a proposed training workshop on odometer fraud is prohibited by 31 U.S.C. 1345 (formerly 551), as the proposed expenditures are not specifically provided for by the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1981 *et seq.* (1976), or other statute. Also, as this proposal is to be carried out by contract, the exception in our cases for grants does not apply. 35 Comp. Gen. 129 is distinguished 531

MERIT SYSTEMS PROTECTION BOARD
Employees
Administrative leave
Retroactive application
Administrative authority
Brief, partial office shutdown
The Merit Systems Protection Board asks whether administrative leave may be granted retroactively to employees who were ordered not to report for work during a brief partial shutdown of the agency. The employees were placed on half-time, half-pay status in order to forestall a funding gap which would have necessitated a full closedown. In its discretion, the Board has the authority to retroactively grant administrative leave with pay to the affected employees to the extent appropriated funds were available and adequate on the dates of the partial shutdown 1

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MERITORIOUS CLAIMS ACT. (*See* CLAIMS, Reporting to Congress, Meritorious Claims Act)

MILEAGE

Military personnel

Ports of embarkation and debarkation

Payment basis

Notwithstanding a Marine Corps regulation authorizing a mileage allowance and per diem from an alternate aerial port of debarkation to a new permanent duty station incident to a transfer from outside the United States to the United States, for the purpose of recovering a relocated privately owned vehicle, the member's entitlement is limited to allowances based on travel from the appropriate aerial port of debarkation serving the new station to the new station, in the absence of an amendment to the Joint Travel Regulations 651

Travel by privately owned automobile

Between residence and terminal

To closest serviceable airport

Reimbursement limitation

Taxicab one-way fare

Employee was driven to and picked up from airport when he went on temporary duty travel. Airport used was 45 miles from employee's home and 33 miles from duty station. There was a closer airport in same town as duty station, but appropriate air carrier service was not available. Use of commercial bus to airport actually used had been found to be neither convenient nor cost effective by transportation officer. Fact that airport used was not the closest to duty station does not preclude reimbursement of round-trip mileage under Volume 2 of the Joint Travel Regulations, para. C4657, or under Federal Travel Regulations para. 1-4.2(c)(1), where airport used was nearest serviceable airport offering appropriate carrier service. Reimbursement is still limited to no more than one-way taxi fare. B-177562, May 21, 1973, is distinguished 48

In lieu of Government vehicle

Reimbursement

Employee, who was a member of an agency review team and authorized to perform temporary duty travel in a group by Government-owned van, received permission to travel by privately owned vehicle as an exercise of personal preference. Since the agency did approve his privately owned vehicle use, and since the regulations do not authorize proration of reimbursement where Government vehicle is used anyway, employee may be reimbursed mileage at 7.5 cent rate authorized by Federal Travel Regulations para. 1-4.4c 321

MILITARY PERSONNEL

Acceptance of foreign presents, emoluments, etc.

Foreign Government employment

Prohibition

Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of

MILITARY PERSONNEL—Continued Page

Acceptance of foreign presents, emoluments, etc.—Continued

Foreign Government employment—Continued

Prohibition—Continued

Congress in Art. I, sec. 9, cl. 8 of the Constitution and the approvals required by section 509 of Public Law 95-105 (37 U.S.C. 801 note) in order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government 432

Allowances

Basic allowance for quarters (BAQ). (*See* **QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ)**)

Dependents

Annuity election

Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

Incompetents

Beneficiary eligibility

Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan, Beneficiary payments, Mentally incapacitated beneficiaries**)

Discharges. (*See* **DISCHARGES AND DISMISSALS, Military personnel**)

Involuntary separation

Travel and transportation allowances. (*See* **DISCHARGES AND DISMISSALS, Military personnel**)

Jury duty

Fees. (*See* **COURTS, Jurors, Fees**)

Mileage. (*See* **MILEAGE, Military personnel**)

Missing, interned, etc. persons

Retired members

Retired pay entitlement. (*See* **PAY, Missing, interned, etc. persons, Retired pay**)

Pay. (*See* **PAY**)

Retired. (*See* **PAY, Retired**)

Per diem. (*See* **SUBSISTANCE, Per diem, Military personnel**)

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

Record correction

General Accounting Office jurisdiction

Corrections of military records made pursuant to actions by boards for correction of military records under 10 U.S.C. 1552 are final and conclusive on all officers of the United States, except when procured by fraud. Thus, the Comptroller General does not have jurisdiction to review correction board actions in individual cases but must apply the pertinent laws and regulations to the facts as shown by the corrected records to determine the amounts payable as a result of the corrections 406

Retired pay. (*See* **PAY, Retired**)

Subsistence

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

Survivorship annuities. (*See* **PAY, Retired, Survivor Benefit Plan**)

MILITARY PERSONNEL—Continued Page
Temporary duty
Per diem. (*See* SUBSISTENCE, Per diem, Military personnel, Temporary duty)
Transportation
Household effects. (*See* TRANSPORTATION, Household effects, Military personnel)
Travel expenses. (*See* TRAVEL EXPENSES, Military personnel)

MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT
(*See* PROPERTY, Private, Damage, loss, etc., Personal property, Claims Act of 1964)

MISCELLANEOUS RECEIPTS
Agency appropriation *v.* miscellaneous receipts
Amounts recovered under defaulted contracts
Disposition
Funding replacement contract
Excess costs of reprocurement recovered from a breaching contractor by the Bureau of Prisons may be used to fund a replacement contract. It is illogical to hold a contractor legally responsible for excess reprocurement costs and then not permit the recovery of those costs to be used for the purpose for which they were recovered. As long as the Bureau receives only the goods and services for which it bargained under the original contract, there is no illegal augmentation of the Bureau's appropriation. Therefore these funds need not be deposited into the Treasury as miscellaneous receipts. Comptroller General decisions to the contrary are modified 678
Interest
Investments
Interest/earnings paid to U.S.
Excess funds in international organization's custody
General Accounting Office (GAO) has no legal objection to the establishment of a separate account for deposit of excess funds pursuant to the International Natural Rubber Agreement under which the United States has management and investment control yet physical custody of the funds remains with the INRO. However, any funds actually received by Treasury must be deposited into miscellaneous receipts 70
Special account *v.* miscellaneous receipts
Refund of excess payments *v.* sale proceeds
Membership in international organizations
Repayments of money the United States has contributed to the International Natural Rubber Organization (INRO), which have been returned as excess due to the contributions of new members to the INRO or due to a reduction in the amount of rubber imported by the United States, are refunds and may be credited to the appropriation enacted for contributions to INRO. Repayments which constitute proceeds of the sale of rubber may not be credited to the account but must be deposited into the Treasury as miscellaneous receipts 70

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MISSING PERSONS ACT

Military personnel

Retired

Employed by Government contractors

Inapplicability of Act

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 211

MOBILE HOMES

Transportation

Civilian personnel. (*See* **TRANSPORTATION, Household effects, House trailer shipments, etc.**)

Military personnel. (*See* **TRANSPORTATION, Household effects, Military personnel, Trailer shipment**)

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Contracts

Research and development

Small business set-asides

Appropriation availability

In calculating its 1983 set-aside for small business innovation research program, National Aeronautics and Space Administration should apply definition of "research and development" that appears in Small Business Innovation Development Act, Pub. L. 97-219, 96 Stat. 217, July 22, 1982, to its budget for Fiscal Year 1983 without regard to appropriation heading "Research and Development." Since Congress clearly appropriated funds for certain operational activities under that heading, it would be contrary to congressional intent for set-aside to be based on amounts not available for research and development 232

NATIONAL GUARD

Civilian employees

Technicians

Severance pay

A National Guard member was denied reenlistment as a result of his refusal to attend training drills on Saturdays which required his removal as a civilian National Guard technician. He was dénied severance pay on the ground of delinquency in refusing to work on Saturdays. We hold that he is entitled to severance pay under 5 U.S.C. 5595 because his refusal to attend Saturday drills based on his religious beliefs was not delinquency within the meaning of the statute. See *Sherbert* v. *Verner*, 374 U.S. 398 (1963) 625

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NUCLEAR REGULATORY COMMISSION
Adjudicative proceedings
Public intervenors
Appropriation availability. (*See* APPROPRIATIONS, Availability, Intervenors)

OFFICE OF PERSONNEL MANAGEMENT
Jurisdiction
Fair Labor Standards Act
Compliance determination
Review by GAO
Findings of fact

The Office of Personnel Management (OPM) has found that certain air traffic control specialists who worked 8-hour shifts were not afforded lunch breaks. No lunch break was established and because of staffing shortages lunch breaks were either not taken or employees were frequently interrupted while eating by being called back to duty so that no *bona fide* lunch break existed. This Office accepts OPM's findings of fact unless clearly erroneous. Therefore, since the employees worked a 15-minute pre-shift briefing they are entitled to overtime compensation under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, for hours worked in excess of 40 in a week as no offset for lunch breaks may be made 58

OFFICERS AND EMPLOYEES
Administrative leave. (*See* LEAVES OF ABSENCE, Administrative leave)
Annual leave. (*See* LEAVES OF ABSENCE, Annual)
Compensation. (*See* COMPENSATION)
Contracting with Government
Former employees
Contracts with other than former employing agency
Conflict of interest statutes
Inapplicability of 18 U.S.C. 207(c)

Contrary to protester's allegation, there is no blanket prohibition on contracts between the Government and a former employee for a period of at least 1 year after former employee has left Government employment. Provisions contained in 18 U.S.C. 207(c) (Supp. IV, 1980), as implemented by 5 C.F.R. 737.11 (1981), generally restrict certain kinds of contact between former senior Government employees and their former agencies and do not apply to situation at hand where former employee of Veterans Administration is awarded contract by Department of the Navy 230

Public policy objectionability
Regulation restrictions
Violation criteria
Military procurements

Where contracting officer was unaware the awardee was employed by another Government agency on date of award, there was no violation of regulation against knowingly contracting with Government employee. Moreover, agency considered allegation when raised after award and determined that termination of contract for convenience of Government was not warranted since employment was terminat-

OFFICERS AND EMPLOYEES—Continued Page
Contracting with Government—Continued
Public policy objectionability—Continued
Regulation restrictions—Continued
Violation criteria—Continued
Military procurements—Continued
ed. In addition, General Accounting Office (GAO) finds no evidence in the record of any favoritism towards awardee. In these circumstances, GAO concludes that there is no reason to disturb award..... 230
Court leave. (*See* LEAVES OF ABSENCE, Court)
Discrimination alleged
Civil Rights Act, Title VII. (*See* CIVIL RIGHTS ACT, Title VII, Discrimination complaints)
Excusing from work. (*See* LEAVES OF ABSENCE, Administrative leave)
Grievances
Grievance examiners
Determinations
Review by GAO
Per diem claim
Employee of Forest Service grieved entitlement to per diem in connection with assignment to seasonal worksite every 6 months. We agree with the Grievance Examiner's factual determination that the employee was in a temporary duty status and therefore entitled to per diem as provided for in the Forest Service's regulations. No transfer orders were prepared or relocation expenses allowed in connection with the annual assignment, and the employees maintained their permanent homes at their official duty station while living in Government quarters at the seasonal worksite..... 80
Health services. (*See* MEDICAL TREATMENT, Officers and employees)
Home leave. (*See* OFFICERS AND EMPLOYEES, Overseas, Home leave)
Household effects
Transportation. (*See* TRANSPORTATION, Household effects)
Leaves of absence. (*See* LEAVES OF ABSENCE)
Mileage. (*See* MILEAGE)
New appointments
Relocation expense reimbursement and allowances
Manpower shortage category
Real estate expenses
A Commissioned Officer in the Public Health Service (PHS) was separated from the officer corps and recruited to fill a manpower shortage position in the Veterans Administration. Employee seeks reimbursement of real estate expenses occasioned by sale of his old residence in Maryland and purchase of new residence in California. Reimbursement is denied because as a commissioned officer in the PHS, employee was a member of a uniformed service whose pay and allowances are prescribed by Title 37 of U.S. Code, which does not provide for such reimbursement. Consequently, claimant was not embraced by reimbursement provisions of sections 5721-5733 of Title 5, applicable to civilian employees of Government only. Thus, purported transfer was a separation from uniformed service followed by sub-

OFFICERS AND EMPLOYEES—Continued Page
New appointments—Continued
Relocation expense reimbursement and allowances—Continued
Manpower shortage category—Continued
Real estate expenses—Continued
sequent new appointment, and there is no authority for reimbursement of real estate expenses for new appointees 462
Overpayments
Waiver
Debt collections. (*See* **DEBT COLLECTIONS, Waiver, Civilian employees**)
Overseas
Home leave
Entitlement
Employee who qualifies for maximum annual leave accumulation of 45 days under 5 U.S.C. 6304(b)(1) and has completed a basic period of 24 months continuous service abroad is entitled to accrue home leave under 5 U.S.C. 6305(a) on the basis of her continuous service. Although rate at which employee earned home leave was subject to agency interpretation of implementing regulations at 5 C.F.R. 630.604, agency's total denial of statutory home leave accrual entitlement was improper. However, the agency has discretion as to when and in what amount home leave may be granted 545
Agency policy, which purports to deny 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruited from places of actual residence in continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements 545
Renewal agreement travel expenses. (*See* **TRAVEL EXPENSES, Overseas employees, Renewal agreement travel**)
Travel expenses. (*See* **TRAVEL EXPENSES, Overseas employees**)
Overtime. (*See* **COMPENSATION, Overtime**)
Per diem. (*See* **SUBSISTENCE, Per diem**)
Personal property damage, loss, etc. (*See* **PROPERTY, Private, Damage, loss, etc., Personal property**)
Quarters allowance
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Temporary quarters**)
Relocation expenses
Transferred employees
Real estate expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses**)
Resignation
Separation date changes
Widow of former employee seeks to cancel employee's resignation on January 9, 1982, and substitute sick and annual leave until employee's death on July 3, 1982. A separation date may not be changed absent administrative error, violation of policy or regulation, or evidence that resignation was not the intent of the parties. There is no

OFFICERS AND EMPLOYEES—Continued Page
Resignation—Continued
Separation date changes—Continued
evidence of administrative error, violation of policy or regulation, or contrary intent which would warrant a change in the employee's separation date 620
Voluntary *v.* involuntary
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) 171
Senior Executive Service
Bonuses, awards, etc.
Fiscal Year 1982 bonuses and presidential rank awards were paid to members of the Senior Executive Service (SES) at various times depending on the particular agency's payment schedule. Under 5 U.S.C. 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award is considered paid on the date of the Treasury check 675
Career Senior Executive Service members who receive presidential rank awards under 5 U.S.C. 4507 are entitled to either $10,000 or $20,000, subject to the aggregate amount limitation in 5 U.S.C. 5383(b). For Fiscal Year 1982 rank award recipients who received a reduced initial payment by Treasury check dated on or after Oct. 1, 1982, an agency is required to make a supplemental payment up to the full entitlement, limited only by the new Executive Level I pay ceiling of $80,100. No supplemental payment may be made if the check is dated before Oct. 1, 1982 675
Performance awards (bonuses) may be paid to career Senior Executive Service members under 5 U.S.C. 5384, not to exceed 20 percent of annual basic pay and subject to the aggregate limitation in 5 U.S.C. 5383(b). If a bonus was paid by Treasury check dated on or after Oct. 1, 1982, an agency may, in its discretion, make a supplemental payment limited only by the new Executive Level I ceiling of $80,100, provided the bonus amount was calculated on a percentage basis. No supplemental payment may be made if the check is dated before Oct. 1, 1982 675
Severance pay. (*See* **COMPENSATION, Severance pay**)
Sick leave. (*See* **LEAVES OF ABSENCE**)
Temporary duty
Per diem. (*See* **SUBSISTENCE, Per diem**)

OFFICERS AND EMPLOYEES—Continued Page

Transfers

House trailers, mobile homes, etc. (*See* **TRANSPORTATION, Household effects, House trailer shipments, etc.)**

Household effects transportation. (*See* **TRANSPORTATION, Household effects)**

Leases

Unexpired lease expense

Reimbursement

Governed by terms of lease

To settle lease which did not contain termination clause, transferred employee paid rent for unexpired 4½ month term of lease. Employee is entitled to full amount of lease settlement expenses paid in avoidance of potentially greater liability. Reimbursement is not diminished by agency's finding that it is customary for landlord to refund rent when he has relet premises during unexpired term of lease since reimbursement is governed by terms of lease and not what is customary in locality 319

Miscellaneous expenses

Catalytic converters

Installed in automobiles

Cost of reconnecting, etc.

Department of Defense civilian employees participating in a Privately Owned Vehicle Import Control Program may be reimbursed for cost of reinstallation of catalytic converters upon reentry of vehicles into the United States. Cost of securing a bond allowing the vehicle to be admitted to the United States incurred by nonparticipants may also be reimbursed since it is required for those who do not participate in the program. B–163107, May 18, 1973, is distinguished 282

Members of the uniformed services are reimbursed miscellaneous expenses incurred incident to a permanent change under 37 U.S.C. 407, a set allowance, which does not require an itemization of the expenses. Accordingly, no authority exists for any additional reimbursement of the costs of reconnecting a catalytic converter or the costs of securing a bond to allow the vehicle to be admitted to the United States on return from an overseas assignment. B–163107, May 18, 1973, is distinguished 282

Mobile home dwelling purchase, etc.

Employee may be reimbursed, in connection with the purchase of a sailboat to be occupied as a residence upon transfer of station, those expenses which would be reimbursed in connection with the purchase of a residence on land. Expenses necessary for the operation of utilities and of launching the boat may be reimbursed as miscellaneous expenses under FTR para. 2–3.1b 289

Real estate expenses

Finance charges

Reimbursement prohibition

Veterans Administration funding fee

The Veterans Administration (VA) questions whether the VA funding fee, consisting of one-half of 1 percent of the amount of a loan guaranteed or insured by the VA, required under the Omnibus Budget Reconciliation Act of 1982, is reimbursable under para. 2–6.2d of the Federal Travel Regulations, FPMR 101–7 (September 1981)

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Real estate expenses—Continued
Finance charges—Continued
Reimbursement prohibition—Continued
Veterans Administration funding fee—Continued
(FTR), as amended. We hold that the funding fee is not reimbursable under FTR para. 2-6.2d because the fee constitutes a finance charge under Regulation Z (12 C.F.R. 226.4 (1982)) 456
Former residence utilized as a downpayment
Transferred employee traded a former residence as downpayment on purchase of residence at new official station. He seeks reimbursement of $163 premium paid for title insurance on property traded as a downpayment. Title insurance is generally reimbursable to a seller under the provisions of FTR para. 2-6.2c. However, since employee did not obtain the title insurance on his residence at his old duty station at time of transfer but on a former residence, he is not entitled to reimbursement of the fee paid for title insurance under "total financial package" concept enunciated in *Arthur J. Kerns*, 60 Comp. Gen. 650 (1981), and subsequent similar decisions 426
Loan origination fee
Employee may be reimbursed the loan origination fee he incurred incident to purchasing a house on December 1, 1982, at his new duty station since paragraph 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended, specifically authorizes reimbursement for such a fee. Revised FTR para. 2-6.2d represents a change from the predecessor regulations, as interpreted by decisions of this Office, in that it specifically allows reimbursement for a fee that may constitute a finance charge within the meaning of Regulation Z, (12 C.F.R. 226.4(a) (1982). Nevertheless, the revised regulation is consistent with the authorizing legislation in 5 U.S.C. 5724a(a)(4) (1976), and, therefore, will be followed by this Office 534
Time limitation
Regulation amendment
Employee is not entitled to reimbursement for real estate expenses incurred in connection with his permanent change of station from New Cumberland, Pa., to Warren, Mich., on May 19, 1980, since settlement date did not occur within 2 years of date on which employee reported to new duty station as required by FTR para. 2-6.1e (May 1973). The amendment to FTR para. 2-6.1e, allowing 1 year extension of 2-year time limitation for completion of residence transactions, is effective only for employees whose entitlement period had not expired prior to Aug. 23, 1982. Since the employee's entitlement period expired prior to that date, the amendment is not applicable 264
Relocation expenses
Leases. (*See* OFFICERS AND EMPLOYEES, Transfers, Leases)
Miscellaneous expenses. (*See* OFFICERS AND EMPLOYEES, Transfers, Miscellaneous expenses)
New appointees. (*See* OFFICERS AND EMPLOYEES, New appointments, Relocation expense reimbursement and allowances)

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Temporary quarters
Subsistence expenses
Computation of allowable amount
A transferred employee reclaims $25 per day for temporary quarters while residing with friends at new duty station. Agency disallowed amount claimed as unreasonable in view of lack of documentation to substantiate basis for the $25 or to establish that host family did incur extra expenses. Under Federal Travel Regs. para. 2-5.4c, agency provided a formula under which maximum reimbursement was $375 for 10-day period in question. Since employee has been reimbursed $343.22 for meal subsistence expenses, maximum available for lodging is $31.78 for 10-day period. Therefore, agency requirement for substantiation of $25 per day does not appear to be germane. Employee need only support lodging expense of friends for $31.78 for 10-day period. We find amount reasonable based upon use of host's utilities, cleaning services and linens 401
Entitlement
Delays en route to new station
Employee who performed travel incident to transfer of duty station was delayed by breakdown of mobile home in which he and his family were traveling. On basis of such delay, he claimed temporary quarters expenses for a 6-day period during which the mobile home was being repaired. Temporary quarters expenses may not be paid since, for the period of actual travel en route to the new station, the employee's rights are limited by 5 U.S.C. 572a to an appropriate per diem allowance rather than temporary quarters expenses 629
Transportation
Household effects. (*See* TRANSPORTATION, Household effects)
Travel by foreign air carriers. (*See* TRAVEL EXPENSES, Air travel, Fly America Act)
Travel expenses. (*See* TRAVEL EXPENSES)

OMNIBUS RECONCILIATION ACT OF 1981
Dual Benefits Payment Account
Railroad Retirement Board. (*See* RAILROADS, Railroad Retirement Board, Dual Benefits Payment Account)

PANAMA CANAL
Employees
Panama Canal employment system. (*See* COMPENSATION, Panama Canal employment system)

PAY
Active duty
Concurrent retired, etc. pay
An Air Force officer who is removed from the temporary disability retired list and placed on the active duty list for 1 day on the 31st day of the month, and retired for years of service the next day, is entitled to a full month's retired pay in addition to pay for the 1 day of active duty 266

PAY—Continued Page
Additional
Diving duty
Requirements
To qualify for special pay for diving duty, under 37 U.S.C. 304(a), an individual must be assigned to, maintain a proficiency in, and actually perform diving duty. Each requirement must be met before special pay begins to accrue. Therefore, where a member was assigned to duty as a student at Officer Candidate School during which he did not actually perform diving duty, although he may have met the other requirements, he may not receive special pay. 37 Comp. Gen. 546 is distinguished 612
From sources other than United States
Jury fees
Duty in State courts. (*See* COURTS, Jurors, Fees, Military personnel in State courts)
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 is 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 211
Readjustment payment to reservists on involuntary release
Separation pay in lieu of
Pub. L. 96–513
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 174
Retired
Annuity elections for dependents
Survivor Benefit Plan. (*See* PAY, Retired, Survivor Benefit Plan)
Computation
Alternate method
Public Law 94–106 effect
An Army officer, after completing over 30 years of active service, who could have retired with retired pay unconditionally resigned from the military in 1961. Subsequently, the Army Board for Correction of Military Records corrected the officer's record to show that he retired in Feb. 1982. His situation falls within the provisions of 10

PAY—Continued Page
Retired—Continued
Computation—Continued
Alternate method—Continued
Public Law 94-106 effect—Continued
U.S.C. 1401a(f) for the computation of his retired pay since he initially retired in 1982 and initially became entitled to retired pay at that time. However, under that section the 1972 basic pay rates (which would be most advantageous to him) in computing his retired pay may not be used because he was not a member of the Army in 1972. Thus, he could not have retired then and had no grade or basic pay rate for use in computing retired pay 406
Pub. L. 96-342
Pay base establishment
Erroneous payments' exclusion
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 157
Forfeitures and demotions' effect
A service member's retired pay base, upon which his retired pay is computed, is an average of basic pay he "received" on active duty over a period of months. Reductions in the basic pay received because of forfeitures and demotions must be included in computing the pay "received" to determine the retired pay base 157
"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 157
Foreign employment
Congressional consent
Pub. L. 95-105
Applicability
Corporation incorporated in the United States does not necessarily become an instrumentality of foreign government when its principal shareholder is a foreign corporation substantially owned by a foreign government. Therefore, prohibitions against employment of Federal officers or employees by a foreign government without the consent of Congress in Art. I, sec. 9, cl. 8 of the Constitution and the approvals required by section 509 of Public Law 95-105 (37 U.S.C. 801 note) in

PAY—Continued Page
Retired—Continued
Foreign employment—Continued
Congressional consent—Continued
Pub. L. 95-105—Continued
Applicability—Continued
order to permit such employment do not apply to retired members of uniformed services employed by that corporation, if the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government 432
Increases
Cost-of-living increases
Adjustment of retired pay
Pub. L. 96-342
Cost-of-living adjustments to military retired pay under 10 U.S.C. 1401a(b) which are based on the periodic cost-of-living adjustments made in Civil Service annuities also apply to military retired pay computed on the new retired pay base system provided for by 10 U.S.C. 1407 157
Partial adjustments
Pub. L. 96-342
Partial cost-of-living adjustments under 10 U.S.C. 1401a (c) and (d) made in military retired pay when the member first becomes entitled to retired pay should be applied to military retired pay based on averaging of pay received under 10 U.S.C. 1407 as long as it is reasonably possible to do so. The partial cost-of-living adjustment provisions were enacted to apply to retired pay computed under the old system in which retired pay is based on a single specific rate of basic pay; however, there is no indication of legislative intent that they should not also be applied to retired pay computed under the new retired pay base system 157
Non-Regular service
Post-age 60 application
Date of pay accrual
***Garcia* case**
A service member filed an application for non-Regular retired pay under 10 U.S.C. 1331 almost 6 years after meeting the age requirement, but retired pay was not granted because records did not show he had sufficient years of service. Upon his submission of additional proof, it was determined that he had sufficient service. Although more than 6 years elapsed between his meeting the age requirement and the determination that he was eligible for retired pay, none of his retroactive retired pay is barred by 31 U.S.C. 71a (now sec. 3702(b)), in view of *Garcia* v. *United States*, 617 F.2d 218 (Ct. Cl. 1980), since such claims will now be deemed to accrue only after the service's determination that the claimant has the required service 227
Reservists
Waiver of retired pay
Reserve duty on thirty-first day of the month
Retired members of the armed services who perform Reserve duty, active or inactive, on the 31st day of a calendar month must waive 1 day's retired pay (or other compensation received on account of their prior service) in order to be entitled to active duty pay or inactive

PAY—Continued Page
Retired—Continued
Reservists—Continued
Waiver of retired pay—Continued
Reserve duty on thirty-first day of the month—Continued
duty pay which would otherwise accrue for that day. This is required by 10 U.S.C. 684 266
Service credits. (*See* PAY, Service credits)
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 recurring loss of self-sufficiency, we will consider whether the annuity may be reinstated in an appropriate case 193
Mentally incapacitated beneficiaries
Effect of incapacity on payments
Under the rules of agency, a known mental incapacity of the principal may operate to vitiate the agent's authority even in the absence of a formal adjudication of incompetency. Hence, Survivor Benefit Plan annuity payments may not be made to an agent designated in a power of attorney which was signed by an annuitant known to be suffering from mental illness but not adjudged incompetent, since in the circumstances the validity of the power of attorney is too doubtful to serve as a proper basis for a payment from appropriated funds. 44 Comp. Gen. 551 is modified in part 302
Survivor Benefit Plan annuity payments in the case of an adult beneficiary known to be suffering from mental illness, but not adjudged incompetent, may be made directly to the beneficiary if by psychiatric opinion the beneficiary is considered sufficiently competent to manage the amounts due and to use the annuity properly for personal maintenance. Otherwise, the amounts due should remain unpaid and credited on account until a guardian authorized to receive payment is appointed by a court. 44 Comp. Gen. 551 is modified in part 302
Suspension and reinstatement
Mentally incapacitated beneficiaries' employment
A deceased military officer's daughter, considered eligible for a Survivor Benefit Plan annuity on the basis of mental illness making her incapable of self-support, then recovered from her illness to the extent that she was able to support herself for 6 months through gainful employment. She subsequently suffered a relapse requiring rehospitalization. The annuity may properly be suspended during the 6-month period of employment. It may be reinstated during the fol-

PAY—Continued Page
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Survivor Benefit Plan—Continued
Beneficiary payments—Continued
Suspension and reinstatement—Continued
Mentally incapacitated beneficiaries' employment—Continued
lowing period when she was again incapable of self-support because of the original disabling condition, since the applicable laws governing military survivor annuity plans do not preclude reinstatement in appropriate circumstances. 44 Comp. Gen. 551 is modified in part 302
Children
Born after election
If a Survivor Benefit Plan participant with dependent child annuity coverage acquires a new dependent child after all of his other children have become ineligible for an annuity and all cost assessments for their coverage have been terminated, the newly acquired child is eligible for an annuity even if the participant fails to notify the concerned finance center of the child's existence. However, in that situation the delinquent costs would have to be collected before annuity payments could commence 553
Cost of coverage
Actuarial basis
Statutory provisions of the Survivor Benefit Plan direct that costs of dependent child annuity coverage be assessed "by an amount prescribed under regulations of the Secretary of Defense." Consistent with express Congressional intent, the regulations prescribe computation of those costs on an actuarial basis in which the ages of the Plan participant and his eligible dependents are used. When a Plan participant acquires a dependent child and he has no other children remaining who are eligible for an annuity, those costs are to be reinstated, computed under that prescribed method based on the age of the newly acquired child 553
Dependency status
Mental incapacity during school year
Under the Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, eligible beneficiaries include a deceased service member's "dependent child," a term defined by statute as including one who is incapable of supporting himself because of mental or physical incapacity incurred before his twenty-second birthday while pursuing a full-time course of study. Given this definition, a military officer's daughter who suffered a mental breakdown at the age of 19 during the summer vacation following the successful completion of her first year of college, and who was thus rendered incapable of self-support, may properly be considered a "dependent child" eligible for an annuity under the Plan. 44 Comp. Gen. 551 is modified in part 302
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 employ-

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Retired—Continued
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Children—Continued
Physically handicapped adults—Continued
Dependency status during employment—Continued
ment 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 193
Post-participation election changes of member
In August 1981, the Congress granted a 1-year "open enrollment" period under the Survivor Benefit Plan for retired military personnel who had previously elected to participate in the Plan at less than the maximum level, or not to participate at all. However, the "open enrollment" legislation did not give personnel who were already participating in the Plan the option of either reducing the level of their participation or withdrawing from the program. Consequently, that legislation did not authorize a Plan participant to revoke the full dependent child annuity coverage he had previously elected to have 553
Guaranteed minimum income
The Survivor Benefit Plan, 10 U.S.C. 1447-1455, is an income maintenance program for the surviving dependents of deceased service members. If a member elects to have dependent child annuity coverage when he becomes a participant in the Plan, that coverage is not limited to children he has at the time of the election, but extends automatically and involuntarily to any child he thereafter acquires. Hence, annuity coverage automatically extended to the son acquired by birth in 1981 following a remarriage by a retired Army officer who had elected to have dependent child coverage when he became a Plan participant in 1973 553
Spouse
Social Security offset
Computation
Computation of setoffs from Survivor Benefit Plan annuities which are required to be made in an amount equal to the retiree's social security benefit based solely on military service must take into account the reduction in social security benefits when the retiree received benefits before reaching age 65. Thus, where a widow's social security benefit is reduced because of the reduction in the retiree's benefit, the services may not calculate the offset against the Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment 471
Termination or reduction
Children's benefits
The election made by a retired service member who is married and has dependent children to participate in the Survivor Benefit Plan with full spouse and dependent child annuity coverage is binding and may not be unilaterally revoked by him, so that a retired Army officer who elected to have such coverage in 1973 could not, after divorce and remarriage, withhold dependent child annuity coverage from a

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Termination or reduction—Continued
Children's benefits—Continued
son he acquired in 1981 even though by that time the only dependent child he had in 1973 was no longer eligible for an annuity 553
Severance
Separation pay in lieu of
Pub. L. 96-513
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 174
Service credits
Absences due to misconduct, etc.
Retired pay purposes
Pub. L. 96-342 effect
Pay base computation
A period of unauthorized absence, for which a service member forfeits pay, generally should not be included in computing the member's retired pay base unless such period may also be included in the member's years of service and thus the percentage multiplier (2½ percent per year) used in computing retired pay 157
Special (*See* PAY, Additional)
Thirty-first day of the month
Active duty for part of month
An Air Force officer who is removed from the temporary disability retired list and placed on the active duty list for 1 day on the 31st day of the month, and retired for years of service the next day, is entitled to a full month's retired pay in addition to pay for the 1 day of active duty 266
Reserve duty
Computation of pay
Retired members of the armed services who perform Reserve duty, active or inactive, on the 31st day of a calendar month must waive 1 day's retired pay (or other compensation received on account of their prior service) in order to be entitled to active duty pay or inactive duty pay which would otherwise accrue for that day. This is required by 10 U.S.C. 684 266

PAYMENTS
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. B-189622, Mar. 24, 1978, is distinguished 168
Progress. (*See* CONTRACTS, Payments, Progress)

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Prompt Payment Act

Waiver of payment

Propriety

A Government contractor may waive an interest penalty payment issued to it under the Prompt Payment Act either by an express written statement or by acts and conduct which indicate an intent to waive 673

Quantum meruit/valebant basis

Absence, etc. of contract

Government acceptance of goods/services

When goods are furnished or services rendered to the Government, but the contract provision under which performance occurred is void, the Government is obliged to pay the reasonable value of the goods or services under an implied contract 337

Voluntary

No basis for valid claim

Exception

Public necessity

Payment in Government's interest

Government employee who uses personal funds to procure goods or services for official use may be reimbursed if underlying expenditure itself is authorized, failure to act would have resulted in disruption of relevant program or activity, and transaction satisfies criteria for either ratification or *quantum meruit,* applied as if contractor had not yet been paid. While General Accounting Office emphasizes that use of personal funds should be discouraged and retains general prohibition against reimbursing "voluntary creditors," these guidelines will be followed in future. Applying this approach, National Guard officer, who used personal funds to buy food for subordinates during weekend training exercise when requisite paperwork was not completed in time to follow normal purchasing procedures, may be reimbursed. 4 Comp. Dec. 409 and 2 Comp. Gen. 581 are modified. This decision was later distinguished by 62 Comp. Gen. 595 419

Supervisory, etc., direction

Claim for reimbursement of personal funds used to pay for repair of telephone answering system may be paid. Since the procurement of the repair services was authorized by superiors it would be unfair for the Government to retain the advantages of the services without repaying claimant. 62 Comp. Gen. 419 is distinguished 595

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

PRESIDENT

Inaugural ceremonies

Inaugural balls

Status

Private gatherings

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

PRESIDENT—Continued Page
Inaugural ceremonies—Continued
Inaugural balls—Continued
Status—Continued
Private gatherings—Continued
Therefore, DOD's appropriated funds are not available to cover the costs of participation by any of its employees or members 323
Participation by Federal agencies
Defense Department
The Presidential Inaugural Ceremonies Act, now largely codified at 36 U.S.C. 721–730, is the primary legislation dealing with Presidential inaugurations. It authorizes Department of Defense (DOD) to provide limited assistance, primarily safety and medical in nature, to the Presidential Inaugural Committee (PIC), but even in these instances, the statute requires the PIC to indemnify the Government against losses. DOD itself recognizes that much of its extensive participation in Presidential inaugural activities is fundamentally a matter of custom rather than being rooted in legal authority. Nevertheless, Presidential inaugurations are highly symbolic national events and DOD support was provided with the knowledge and approval of many members of the Congress over a period of years. General Accounting Office recommends that the Congress provide specific legislative guidance on the extent and types of support and participation in inaugural activities which Federal agencies are authorized to provide 323
Appropriation availability
Section 601 of the Economy Act, as amended, 31 U.S.C. 686 (now 31 U.S.C. 1535), permits one agency or bureau of the Government to furnish materials, supplies or services for another such agency or bureau on a reimbursable basis. However, since the Presidential Inaugural Committee (PIC) is not a Government agency and DOD used its own appropriations without reimbursement from either the PIC or Joint Congressional Committee on Inaugural Ceremonies in participating in the 1981 Presidential inaugural activities, the authority of the Economy Act was not available 323
Participation in the inaugural ceremony and in the inaugural parade can be justified on the basis of its obvious significance for DOD, as well as for other Federal agencies. However, each agency may only incur and pay expenses directly attributable to the participation of its own employees. It is therefore improper for DOD, in the absence of specific statutory authority, to pay such costs as housing of high school band participants in the parade, lending military jeeps to pull floats provided by non-military organizations, providing administrative and logistical support to PIC offices, etc 323
Use of military personnel for VIPs and other non-military persons in the capacity of chauffeurs, personal escorts, social aides and ushers is improper under the general appropriations law principles and under DOD's community relations regulations. See 32 C.F.R. Parts 237 and 238 323
Presidential inaugural balls are basically private gatherings or parties not generally available to the community, whose proceeds go to the private, non-Government PIC. They are neither official civil

PRESIDENT—Continued Page
Inaugural ceremonies—Continued
Participation by Federal agencies—Continued
Defense Department—Continued
Appropriation availability—Continued
ceremonies nor official Federal Government functions under the DOD's community relations regulations (32 C.F.R. Parts 237 and 238). Therefore, DOD's appropriated funds are not available to cover the costs of participation by any of its employees or members..... 323

PRESIDENTIAL INAUGURAL CEREMONIES ACT (*See* **PRESIDENT, Inaugural ceremonies**)

PRISONS AND PRISONERS
Federal Prison Industries
Products
Requirement of Federal agencies to purchase
Exceptions
Forest Service, Department of Agriculture, is not required to request clearance from Federal Prison Industries Incorporated (FPI) when making purchases from private sources using funds appropriated by Public Law 98-8. 18 U.S.C. 4124 generally requires Federal agencies to buy all FPI products which meet their requirements from FPI rather than from private sources. Public Law 98-8 (98th Cong., 1st sess., 97 Stat. 13 (March 24, 1983)) is an emergency measure which appropriates funds for projects designed to combat the economic recession occurring at the time of its passage. Specific legislation prevails over general. Since private purchases further the Act's purposes the requirement to purchase from FPI does not apply..... 617

PROCUREMENT
Bids. (*See* **BIDS**)

PROMPT PAYMENT ACT. (*See* **PAYMENTS, Prompt Payment Act**)

PROPERTY
Private
Damage, loss, etc.
Personal property
Claims Act of 1964
Settlement authority
The concept of administrative discretion does not permit an agency to refuse to consider all claims submitted to it under the Military Personnel and Civilian Employees' Claims Act, which authorizes agencies to settle claims of Government employees for loss or damage to personal property. While General Accounting Office will not tell another agency precisely how to exercise its discretion, that agency has a duty to actually exercise it, either by the issuance of regulations or by case-by-case adjudication..... 641

Seizure
Costs incurred
Appropriation availability. (*See* **APPROPRIATIONS, Availability, Seizure of private property**)
Public
Exchanges
Strategic and critical materials. (*See* **STRATEGIC AND CRITICAL MATERIALS, Barter exchange**)

PUBLIC HEALTH SERVICE Page

Commissioned personnel

Separation

Subsequent appointment to civilian position

Relocation expense reimbursement and allowances

A Commissioned Officer in the Public Health Service (PHS) was separated from the officer corps and recruited to fill a manpower shortage position in the Veterans Administration. Employee seeks reimbursement of real estate expenses occasioned by sale of his old residence in Maryland and purchase of new residence in California. Reimbursement is denied because as a commissioned officer in the PHS, employee was a member of a uniformed service whose pay and allowances are prescribed by Title 37 of U.S. Code, which does not provide for such reimbursement. Consequently, claimant was not embraced by reimbursement provisions of sections 5721-5733 of Title 5, applicable to civilian employees of Government only. Thus, purported transfer was a separation from uniformed service followed by subsequent new appointment, and there is no authority for reimbursement of real estate expenses for new appointees 462

PUBLIC LANDS

Acquisition

Exchange agreements

Bidding rights

As basis for State payments

Mineral Lands Leasing Act requirements

Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under sec. 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt 102

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 non-responsibility 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

PURCHASES—Continued Page
Small—Continued
Small business concerns—Continued
Certificate of Competency procedures under SBA—Continued
Applicability—Continued
Change in SBA regulations—Continued
current SBA regulations provide that it is within the contracting officer's discretion to refer when contract value is less than $10,000 213

QUARTERS
Government-furnished
Members of uniformed services
Basic allowance entitlement. (*See* QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ))
Temporary
Incident to employee transfers. (*See* OFFICERS AND EMPLOYEES, Transfers, Temporary quarters)

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Assigned to Government quarters
Partial allowance entitlement
Single quarters assigned
Cost/value consideration
A service member who is single, without dependents, was assigned to a Government-leased apartment. While the apartment did not qualify as family quarters because of size, it still substantially exceeded the single member housing standards of the Air Force. In line with the purpose for which a basic allowance for quarters at the partial rate (37 U.S.C. 1009) is payable and the reasoning in 56 Comp. Gen. 894, since the member's housing here is of a significantly higher value than would normally be assigned him, the member is not entitled to a basic allowance for quarters at the partial rate while so assigned. 56 Comp. Gen. 894, expanded 37
Dependents
Husband and wife both members of armed services
A member of the uniformed services who is separated from his or her spouse, who is also a member, and who has legal custody of one or more of their children on whose behalf the spouse contributes no support, is entitled to a basic allowance for quarters at the with-dependents rate, regardless of the spouse's entitlement, provided that the dependents on account of whom the increased allowance is paid do not reside in Government quarters 315
Dependent children from prior marriage
Parent not occupying Government quarters
Both of two uniformed service members, who are married to each other, and had dependent children in their own right prior to their marriage, may be paid an increased basic allowance for quarters on account of their respective dependents when the spouses do not reside together as a family unit because of their duty assignments. Whether the dependents reside with one, both, or neither of them would not affect their entitlement, provided that each member individually supports his or her dependent and is not assigned to Government family quarters. 60 Comp. Gen. 399 is modified 666

QUARTERS ALLOWANCE—Continued Page
Basic allowance for quarters (BAQ)—Continued
Dependents—Continued
Husband and wife both members of armed services—Continued
Dependent children from prior marriage—Continued
Parent not occupying Government quarters—Continued
When two uniformed service members who are married to each other, and who had dependent children in their own right prior to their marriage, are assigned to the same or adjacent bases, are not assigned Government quarters, and live together as a family unit, only one member may receive a quarters allowance at the increased "with-dependents" rate, and the other member may receive it at the "without-dependents" rate. Only one set of family quarters is required and all the dependent children belong to the same class of dependents upon which the increased allowance is based whether the children live with the members or not. To the extent that 60 Comp. Gen. 399 may be understood to contradict this holding, it is hereby modified 666
When a uniformed service member's child meets the qualifications for becoming the member's dependent following the member's marriage to another member who is not the child's natural parent and the members have other dependent children, the child joins the class of dependent children upon which the member-parent's increased basic allowance for quarters entitlement is determined. 60 Comp. Gen. 399 is modified 666
With dependent rate
Child support payments by divorced member
Both parents service members
Dual payment prohibition for common dependents
Where two married Air Force members with common dependents subsequently divorce, only one member may receive basic allowance for quarters based on the children as dependents, unless the class of common dependents is divided by separation agreement or court order. The member paying child support, which is stated to be on behalf of one child but is sufficient to qualify for entitlement under the applicable regulation, is entitled to the basic allowance for quarters at the with dependents rate while the member having custody of the children receives the allowance at the without dependents rate 350
Eligibility
Separation of husband and wife
Legal sufficiency of separation agreement
A properly executed separation agreement generally is legally sufficient as a statement of the parties' marital separation and resulting legal obligations, for the purpose of determining entitlement to a basic allowance for quarters, even though the agreement was not issued or sanctioned by a court. However, a member's entitlement to basic allowance for quarters based on child support obligations created by a separation agreement should be reassessed following court action since the court is not bound by the agreement in awarding custody 315

QUARTERS ALLOWANCE—Continued Page
Dependents
Proof of dependency
Administrative *v.* GAO determination
Under 37 U.S.C. 403(h) the Secretary of the service concerned may make dependency and relationship determinations for enlisted members' quarters allowance entitlements and the determinations are final and may not be reviewed by the General Accounting Office. However, that provision does not apply to officers and the Comptroller General renders decisions in officers' cases and also in enlisted members' cases when requested by the service. In the interest of uniformity it seems appropriate to forward doubtful cases to the Comptroller General for decision particularly where an officer is married to an enlisted member 666
Occupancy of quarters
Government-furnished. (*See* **QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ), Assigned to Government quarters**)

RAILROADS
Railroad Retirement Board
Dual Benefits Payment Account
Borrowing funds from Railroad Retirement Account
Authority
Authority of Railroad Retirement Board to borrow from Railroad Retirement Account to make payments from Dual Benefits Payments Account is limited to the 30-day period before the beginning of the fiscal year 521
The authority of the Railroad Retirement Board to borrow funds from the Railroad Retirement Account to permit payment of the Dual Benefits Payments for the first month of a fiscal year does not depend upon the existence of an enacted appropriation or continuing resolution for the Dual Benefits Payments Account for the new fiscal year 521
Carry-over authority
Since the authorization for appropriation to the Dual Benefits Payments Account authorizes an annual appropriation, any amounts remaining in the account at the end of a fiscal year must be returned to the Treasury under 31 U.S.C. 1552(a)(2) unless the actual appropriation act provides carry-over authority 521
Investment authority
Under the Omnibus Reconciliation Act of 1981, interest may be earned on funds appropriated to the Dual Benefits Payments Account if invested by the Secretary of the Treasury and this interest credited to the Dual Benefit Payment Account. However, investment is precluded by the terms of the fiscal year 1983 appropriation to the Dual Benefits Payments Account 521

RATTLESNAKE NATIONAL RECREATION AREA AND WILDERNESS ACT
Exchange agreements
Bidding rights
As basis for State payments. (*See* **PUBLIC LANDS, Acquisition, Exchange agreements, Bidding rights, As basis for State payments**)

RATTLESNAKE NATIONAL RECREATION AREA AND WILDERNESS ACT—Continued Page

Exchange agreements—Continued

Bidding rights—Continued

Retirement by payment

Legality

Under proposed "Exchange Agreement" where Montana Power Company's total payment is in cash but it is accompanied by notice of use of bidding rights, Treasury would be required to pay Company for the amount of rights used pursuant to the notice. Reimbursement to Company is not proper absent authority to retire bidding rights by payment and lack of available appropriation for that purpose 102

Value limitation

Interest on unused rights

Legality

Proposed "Exchange Agreement" calls for increased bidding rights for Montana Power Company at 10 percent interest rate on outstanding unused bidding rights. Increase in value of bidding rights is not legally permissible since their value is limited to fair market value of lands under sec. 4(b)(2) of the Rattlesnake National Recreation Area and Wilderness Act, 16 U.S.C. 460*ll*–3(b)(2) (Supp. IV, 1980)..... 102

RECORDS

Correction

Military personnel. (*See* **MILITARY PERSONNEL, Record correction**)

Recordkeeping requirements

Fair Labor Standards Act

Claims accruing beyond 3 years

Denial propriety

Absence-of-records basis

Where an agency destroys T&A reports after 3 years, the agency may not then deny claims of more than 3 years on the basis of absence of official records. Claims are subject to a 6-year statute of limitations, and pertinent payroll information may be available on other records which are retained 56 years. Furthermore, the Fair Labor Standards Act (FLSA) requires that the employer keep accurate records, and, in the absence of such records, the employer will be liable if the employee meets his burden of proof. The Office of Personnel Management may wish to reconsider and impose a specific FLSA recordkeeping requirement on Federal agencies..... 42

Retention

Extension of period

Claim settlement pending

Where claims have been filed by or against the Government, records must be retained without regard to record retention schedules until the claims are settled or the agency has received written approval from General Accounting Office. See 44 U.S.C. 3309 42

RECORDS—Continued Page
Retention—Continued
General Records Schedule 2
Time and attendance
Three-year period extension
Agency requests *v.* Schedule change
Federal Aviation Authority questions whether time and attendance (T&A) reports should be retained more than 3 years in order to adjudicate claims subject to 6-year statute of limitations. Without additional information, we would not recommend any change in the General Records Schedule 2 with regard to extending retention period for T&A reports from 3 to 6 years 42

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 219
Defense Acquisition Regulation. (*See* DEFENSE ACQUISITION REGULATION)
Travel
Federal
Real estate transactions
Time limitation for reimbursement
Effective date of amendment
Employee is not entitled to reimbursement for real estate expenses incurred in connection with his permanent change of station from New Cumberland, Pa., to Warren, Mich., on May 19, 1980, since settlement date did not occur within 2 years of date on which employee reported to new duty station as required by FTR para. 2-6.1e (May 1973). The amendment to FTR para. 2-6.1e, allowing 1 year extension of 2-year time limitation for completion of residence transactions, is effective only for employees whose entitlement period had not expired prior to Aug. 23, 1982. Since the employee's entitlement period expired prior to that date, the amendment is not applicable 264
Joint. (*See* JOINT TRAVEL REGULATIONS)

RELEASES
Proper release or acquittance
Survivor Benefit Plan annuitant
Mentally incapacitated adult
It is necessary that a good acquittance be obtained when payments are made to persons under Federal law. When amounts due a minor are involved, a good acquittance results through payment to the minor's natural guardian without formal court appointment, provided that the laws of the State of domicile authorize that procedure as a means of obtaining acquittance. However, payments may not be made to one claiming to act as natural guardian and custodian of a

RELEASES—Continued Page
Proper release or acquittance—Continued
Survivor Benefit Plan annuitant—Continued
Mentally incapacitated adult—Continued
payee, when the payee is in fact an adult suffering from mental illness. 44 Comp. Gen. 551 is modified in part 302

RELOCATION EXPENSES
Transfers
Officers and employees. (*See* OFFICERS AND EMPLOYEES, Transfers, Relocation expenses)

SALES
Bids
Deposits
Agent's authority
Evidence timeliness. (*See* AGENTS, of private parties, Authority, Contracts, Time for submitting evidence)
Insufficiency
Waiver
De minimus rule
In solicitation for a contract of sale requiring a bid deposit of 20 percent of the bid, a deficiency of $100 on a deposit of $73,522 is *de minimus*, and properly may be waived 75
Personal checks
Sufficiency of funds verification
Right to Financial Privacy Act (1978)
When both Department of Defense manual covering disposal of property and solicitation for contract of sale specifically permit bid deposit to be in the form of a personal check, contracting officer may accept such a check and need not attempt to determine whether it is backed by sufficient funds 75

SET-OFF
Authority
Social Security benefits, etc. (*See* SOCIAL SECURITY, Benefits)
Contract payments
Assignments
"No set-off" provision
Absence effect
Under the Assignment of Claims Act, now codified at 31 U.S.C. 3727, a lender is not protected against set-off by the presence of a no-set-off clause in the assigned contract unless the assignment was made to secure the assignee's loan to the assignor and only if the proceeds of the loan were used or were available for use by the assignor in performing the contract that was assigned. To the extent that our holdings in 49 Comp. Gen. 44 (1967), 36 Comp. Gen. 19 (1956), and other cases cited herein are not consistent with this decision they will no longer be followed. 60 Comp. Gen. 510 (1981) is clarified 683
Tax debts
Set-off precluded
When a contract containing a no-set-off clause is validly assigned under the Assignment of Claims Act, now codified at 31 U.S.C. 3727,

SET-OFF—Continued Page
Contract payments—Continued
Assignments—Continued
"No set-off" provision—Continued
Tax debts—Continued
Set-off precluded—Continued
to an eligible assignee who substantially complies with the statutory filing and notice requirements, the Internal Revenue Service cannot set off the contractor's tax debt against the contract proceeds due the assignee, even if the tax debt was fully mature prior to the date on which the contracting agency had received notice of the assignment. B-158451, Mar. 3, 1966, and B-195460, Oct. 18, 1979, are modified accordingly. 60 Comp. Gen. 510 (1981) is clarified 683
Recovery of overpayments
Procuring agency should attempt to recover payments that are in excess of the fair and reasonable value of services rendered under illegal contract provision. This can be done by setting off overpayments against any other amounts due the contractor, and may be done any time up to 10 years in appropriate circumstances 337

SEVERANCE PAY
Officers and employees. (*See* COMPENSATION, Severance pay)

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 205
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 205
Subcontracting under "8(a)" program. (*See* SMALL BUSINESS ADMINISTRATION, Contracts, Contracting with other Government agencies, Procurement under 8(a) program)
Purchases
Small
Procedures. (*See* PURCHASES)

Page

SMALL BUSINESS INNOVATION DEVELOPMENT ACT

Research and development

Small business set-asides

Appropriation availability. (*See* **APPROPRIATIONS, Availability, Contracts, Research and development, Small Business Innovation Development Act**)

SOCIAL SECURITY

Benefits

Overpayments

Debt collection

Social Security Administration is not bound by Federal Claims Collection Standards (FCCS) requiring administrative offset "in every instance in which this is feasible," in light of section 8(e) of the Debt Collection Act of 1982, 31 U.S.C. 3701(d). The FCCS, 4 CFR Chapter II, to the extent they implement the 1982 legislation, do not govern the use of administrative offset to collect debts arising under the Social Security Act. However, Social Security Administration may continue to use administrative offset to collect such debts when authorized by other statutes or principles of common law, and should look to FCCS for guidance to the extent it has not issued its own offset regulations 599

Military personnel

Retired

Survivor Benefit Plan

Offset

Formula

Computation of setoffs from Survivor Benefit Plan annuities which are required to be made in an amount equal to the retiree's social security benefit based solely on military service must take into account the reduction in social security benefits when the retiree received benefits before reaching age 65. Thus, where a widow's social security benefit is reduced because of the reduction in the retiree's benefit, the services may not calculate the offset against the Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment 471

STATE DEPARTMENT

Employees

Home to work transportation

Government vehicles

GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those persons who have been properly appointed or have properly succeeded to the heads of Foreign Service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so 438

STATE DEPARTMENT—Continued Page
Employees—Continued
Home to work transportation—Continued
Government vehicles—Continued
The State Department's reliance on the GAO decision in 54 Comp. Gen. 855 (1975) to support the proposition that the use of Government vehicles for home-to-work transportation of Government officials and employees lies solely within the administrative discretion of the head of the agency was based on some overly broad dicta in that and several previous decisions. Read in context, GAO decisions, including the one cited by the State Department's Legal Advisor, only authorize the exercise of administrative discretion to provide home-to-work transportation for Government officials and employees on a temporary basis when (1) there is a clear and present danger to Government employees or an emergency threatens the performance of vital Government functions, or (2) such transportation is incident to otherwise authorized use of the vehicles involved 438

STATES
Federal aid, grants, etc.
Interest on Federal funds
Accountability
Where subgrantee of CETA grant to State of Arkansas earned interest on recovered FICA taxes before the recovery was returned to the Federal Government, the interest is an applicable credit under the grant agreement and grant cost principles. As a result, all interest earned by subgrantee on the recovery is owed to the grantee and by the grantee to the Department of Labor to the extent not offset by allowable grant costs 701
Where a subgrantee of State CETA grantee recovers grant funds and earns interest on recoveries, the interest is not held on advance basis and is not exempt from accountability under the Intergovernmental Cooperation Act of 1968, 31 U.S.C. 6503(a) 701

STATUTES OF LIMITATION
Accountable officers
Irregularities in accounts
An agency must report financial irregularities to GAO within 2 years from the time that the agency is in receipt of substantially complete accounts. This requirement is to allow the Government the opportunity to raise a charge against the account within the 3-year statute of limitations period 476
Although a certifying officer at National Institutes of Health (NIH) made a computational error in certifying a voucher for payment, thus proximately causing an overpayment of $11,184, his accounts are settled by operation of law and he cannot be held liable for the loss where the Government did not raise a charge against the account within 3 years of receipt by the NIH of the substantially complete accounts of the certifying officer 498
Claims
Claims settlement by GAO
Retention of agency records
Federal Aviation Authority questions whether time and attendance (T&A) reports should be retained more than 3 years in order to

STATUTES OF LIMITATION—Continued Page
Claims—Continued
Claims settlement by GAO—Continued
Retention of agency records—Continued
adjudicate claims subject to 6-year statute of limitations. Without additional information, we would not recommend any change in the General Records Schedule 2 with regard to extending retention period for T&A reports from 3 to 6 years 42
Date of accrual
Compensation payments
Backpay
Two employees were awarded backpay pursuant to a Dec. 10, 1973 ruling by the Board of Appeals and Review of the Civil Service Commission that they had involuntarily resigned from their positions in 1972. The employees' claims that overtime earnings were improperly deducted from their backpay awards were received in this Office on June 16 and July 14, 1980. The claims may not be allowed since they accrued on Dec. 10, 1973, the date of the Board's determination, and 31 U.S.C. 71a (1976) (now sec. 3702) bars consideration of claims received in this Office more than 6 years after the date the claim first accrues. 61 Comp. Gen. 57 is amplified 275
Retired pay
Non-Regular service
Garcia case
A service member filed an application for non-Regular retired pay under 10 U.S.C. 1331 almost 6 years after meeting the age requirement, but retired pay was not granted because records did not show he had sufficient years of service. Upon his submission of additional proof, it was determined that he had sufficient service. Although more than 6 years elapsed between his meeting the age requirement and the determination that he was eligible for retired pay, none of his retroactive retired pay is barred by 31 U.S.C. 71a (now sec. 3702(b)), in view of *Garcia* v. *United States,* 617 F. 2d 218 (Ct. Cl. 1980), since such claims will now be deemed to accrue only after the service's determination that the claimant has the required service 227
Filing in other than GAO
Does not meet requirements of 10/9/40 act, as amended
Employee of Forest Service claims per diem in connection with transfer to seasonal worksite every 6 months for period from May 7, 1973, through Nov. 19, 1976. Claim was subject of grievance proceeding in agency and was not received in General Accounting Office (GAO) until Jan. 18, 1982. Portion of claim arising before Jan. 18, 1976, may not be considered since Act of Oct. 9, 1940, as amended, 31 U.S.C. 71a, bars claims presented to GAO more than 6 years after date claim accrued. Filing with administrative office concerned does not meet requirement of Barring Act 80

STATUTORY CONSTRUCTION
General and specific statutes
Precedence
Forest Service, Department of Agriculture, is not required to request clearance from Federal Prison Industries Incorporated (FPI) when making purchases from private sources using funds appropri-

STATUTORY CONSTRUCTION—Continued Page

General and specific statutes—Continued

Precedence—Continued

ated by Public Law 98-8. 18 U.S.C. 4124 generally requires Federal agencies to buy all FPI products which meet their requirements from FPI rather than from private sources. Public Law 98-8 (98th Cong., 1st sess., 97 Stat. 13 (March 24, 1983)) is an emergency measure which appropriates funds for projects designed to combat the economic recession occurring at the time of its passage. Specific legislation prevails over general. Since private purchases further the Act's purposes the requirement to purchase from FPI does not apply..... 617

Legislative history, title, etc.

Public Law 97-377

Federal judges comparability pay increases

Question presented is entitlement of Federal judges to 4 percent comparability increase under sec. 129 of Pub. L. 97-377, Dec. 21, 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. We conclude that the language of sec. 129(b) of Pub. L. 97-377, combined with specific intent evidenced in the legislative history, constitutes the specific congressional authorization for a pay increase for Federal judges.... 358

Legislative intent

Appropriation restrictions

Interpretation of enforcing agency

Absence of congressional objection

Specialty metals' procurements

Agency interpretation of Department of Defense Appropriation Act restriction against the purchase of articles consisting of foreign specialty metals as reflected in DAR 6-302 is to be accorded deference. General Accounting Office will not object to DAR 6-302 provision that statutory restriction is met if the specialty metal is melted in the United States, notwithstanding protester's contention that statute requires that such articles be manufactured entirely in the United States. DAR provision is based on wording in legislative history and has been in existence for 10 years without congressional objection. 49 Comp. Gen. 606 is distinguished 256

Presumption against superfluity

Question presented is entitlement of Federal judges to 4 percent comparability adjustment granted to General Schedule employees in Oct. 1982. Section 140 of Pub. L. 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since sec. 140, a provision in an appropriations act, constitutes permanent legislation, Federal judges are not entitled to a comparability increase on Oct. 1, 1982, in the absence of specific congressional authorization 54

Prospective effect of acts

Section 145 of Pub. L. 97-377, Dec. 21, 1982, which amends 5 U.S.C. 5546a(a) to provide that certain instructors at the Federal Aviation Academy are entitled to premium pay, is effective from the date of enactment and is not retroactive to Aug. 3, 1981, as were the original provisions of 5 U.S.C. 5546a(a) added by subsec. 151(a) of Pub. L. 97-276. The general rule is that an amendatory statute is applied prospectively only unless a retroactive construction is required by express language or by necessary implication. Neither the express lan-

STATUTORY CONSTRUCTION—Continued Page
Prospective effect of acts—Continued
guage nor the legislative history supports the view that the amendment made by sec. 145 is retroactively effective 396

STOCKPILING
Strategic and critical materials
Barter exchange. (*See* **STRATEGIC AND CRITICAL MATERIALS, Barter exchange**)

STRATEGIC AND CRITICAL MATERIALS
Barter exchange
Excess Stockpile materials
Authority of GSA
Sales as contractor's agent
Congressional oversight
Proposal by General Services Administration (GSA) to sell, on behalf of contractor, excess Stockpile materials under the Strategic and Critical Stock Piling Act, 50 U.S.C. 98e(c), where title has been transferred to the contractors in exchange for other needed Stockpile materials, is legally within the parameters of GSA's existing barter authority. Where a statute confers duties in general terms, all powers and duties incidental and necessary to make such authority effective are included by implication. Congress has encouraged barter transactions and the proposed plan helps accomplish the purposes of the Act. However, since it may have a significant effect on congressional control over the Stockpile transaction, GSA should discuss the proposal with its congressional oversight and appropriations committees before implementation 245
National Defense Stockpile Fund
Crediting non-necessity
Government sales in agent capacity
Where United States is acting as agent in sale of excess Stockpile materials on behalf of contractors to whom title of materials has been transferred, GSA may pay proceeds from the sale directly to the contractor rather than deposit it to the credit of the National Defense Stockpile Fund, 50 U.S.C. 98h, since the proceeds are for the benefit of the contractor rather than the United States 245

SUBSISTENCE
Actual expenses
Maximum rate
Reduction
Meals, etc. cost limitation
Lodging costs incurred
Volume 2 of Joint Travel Regs. does not specify across-the-board dollar limitation for purpose of determining reasonableness of actual subsistence claims for meals and miscellaneous expenses. In this case, accounting and finance officer considered a meal expense to be excessive and applied a dollar limitation to reimbursement. Absent sufficient justification for the higher dinner cost, that action is upheld. It is noted that provisions of 2 JTR para. C4611 limit meal and miscellaneous expenses reimbursement to 50 percent of high cost area rate in specific situations where lodging costs are not incurred.

SUBSISTENCE—Continued Page
Actual expenses—Continued
Maximum rate—Continued
Reduction—Continued
Meals, etc. cost limitation—Continued
Lodging costs incurred—Continued
A similar limitation for application to subsistence expenses claims involving commercial lodging costs could be applied 88
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 168
Per diem
Actual expenses. (*See* SUBSISTENCE, Actual expenses)
Fractional days
Thirty-minute period at beginning or end
The 30-minute rule applicable to the payment of per diem under para. 1-7.6e, FTR, when the time of departure or arrival is within 30 minutes before or after the beginning of a quarter, respectively, is not intended to be applicable to continuous travel of 24 hours or less. 40 Comp. Gen. 400 (1961) 269
Headquarters
Permanent or temporary
Criteria
The assignment of a Customs Service employee to a new duty station for 2 years under a rotational staffing program is held to be a permanent change of station rather than a temporary duty assignment. We have held that the duration of an assignment and the nature of the assigned duties are the vital elements in the determination of whether an assignment is temporary duty or permanent change of station. Although the assignment here is for a definite time period and further reassignment of the employee is contemplated, the duration of the assignment is far in excess of that normally contemplated as temporary. Moreover, the duties assigned are not those usually associated with temporary duty 560
Seasonal worksites
Transfer orders not issued
Employee of Forest Service grieved entitlement to per diem in connection with assignment to seasonal worksite every 6 months. We agree with the Grievance Examiner's factual determination that the employee was in a temporary duty status and therefore entitled to per diem as provided for in the Forest Service's regulations. No transfer orders were prepared or relocation expenses allowed in connection with the annual assignment, and the employees maintained

SUBSISTENCE—Continued Page
Per diem—Continued
Headquarters—Continued
Permanent or temporary—Continued
Seasonal worksites—Continued
Transfer orders not issued—Continued
their permanent homes at their official duty station while living in Government quarters at the seasonal worksite 80
Illness, etc.
Medical examination
An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed 294
"Lodgings-plus" basis
Computation
Average cost of lodgings
Annual leave effect
An employee rented a house for a month while on temporary duty, rather than obtaining lodgings on a daily basis. He went on annual leave for 1 day during the period but continued to occupy the rented lodgings that night. The employee's average cost of lodging for the purpose of per diem computation on a lodgings-plus basis is to be determined by prorating the total rental cost over the 30 days of temporary duty, excluding the day of annual leave, if the agency determines the employee acted prudently in obtaining the lodgings for a month and the cost to the Government does not exceed the cost of suitable lodging at a daily rate 63
Military personnel
Personal convenience
Alternate port of debarkation
Notwithstanding a Marine Corps regulation authorizing a mileage allowance and per diem from an alternate aerial port of debarkation to a new permanent duty station incident to a transfer from outside the United States to the United States, for the purpose of recovering a relocated privately owned vehicle, the member's entitlement is limited to allowances based on travel from the appropriate aerial port of debarkation serving the new station to the new station, in the absence of an amendment to the Joint Travel Regulations 651
Temporary duty
Appropriation limitations
Exceptions
The holding in 60 Comp. Gen. 181 regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Temporary duty—Continued
Appropriation limitations—Continued
Exceptions—Continued
to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals. 60 Comp. Gen. 181 is extended 308
Rates
Lodging costs
Leased television with option to purchase
Absent evidence that the claimant terminated a television lease agreement with option to purchase at end of temporary duty assignment he may not include cost of renting the television in the computation of the lodgings portion of his per diem allowance. Payments on personal property for the purpose of eventual ownership are not within the purview of lodging costs recognized as reimbursable..... 635
Temporary duty
Headquarters determination. (*See* **SUBSISTENCE, Per diem, Headquarters, Permanent or temporary**)
Lodging in rental property owned
An employee who uses his mobile home for lodging while on temporary duty may not include $600 rental payment allegedly made to himself in computing the lodgings portion of his per diem allowance even though he claims that the mobile home is held for rental purposes. If the employee submits documentation to establish that the property is held and used as a rental unit and would otherwise have been rented out during period of his claim, allocable interest and taxes incurred, if any, may be included in determining lodging costs .. 635
Transferred employees
Delays
Employee who performed travel incident to transfer of duty station was delayed by breakdown of mobile home in which he and his family were traveling. On basis of such delay, he claimed temporary quarters expenses for a 6-day period during which the mobile home was being repaired. Temporary quarters expenses may not be paid since, for the period of actual travel en route to the new station, the employee's rights are limited by 5 U.S.C. 5724a to an appropriate per diem allowance rather then temporary quarters expenses..... 629
Employee's entitlement to travel expenses en route to new station is generally limited to per diem for number of days authorized for travel. However, when employee is delayed en route for reasons acceptable to agency, per diem may be allowed for period of delay. Since employee here was delayed by breakdown of his mobile home residence, he would have had to occupy temporary quarters, pending completion of repairs, even if he had proceeded directly to his new station. Under these circumstances, employee's per diem expenses may be allowed 629
Temporary quarters. (*See* **OFFICERS AND EMPLOYEES, Transfers, Temporary quarters**)

Page

SURVIVOR BENEFIT PLAN (*See* **PAY, Retired, Survivor Benefit Plan**)

TAXES

Federal

Interest and penalties

Interest earned by subgrantee of Federal grant

Where subgrantee of CETA grant to State of Arkansas earned interest on recovered FICA taxes before the recovery was returned to the Federal Government, the interest is an applicable credit under the grant agreement and grant cost principles. As a result, all interest earned by subgrantee on the recovery is owed to the grantee and by the grantee to the Department of Labor to the extent not offset by allowable grant costs 701

TRAILER ALLOWANCES

Military personnel. (*See* **TRANSPORTATION, Household effects, Military personnel, Trailer shipment**)

TRANSPORTATION

Air carriers

Foreign

American carrier availability. (*See* **TRAVEL EXPENSES, Air travel, Fly America Act**)

Claims

Settlement

Contract Disputes Act effect. (*See* **CONTRACTS, Contract Disputes Act of 1978, Inapplicability, Matters covered by other statutes, Transportation Act**)

Household effects

Actual expenses

Allowance basis

Cost comparison

Timeliness of comparison

Employee who made his own arrangements and shipped his own household goods on Oct. 1, 1981, should not have his entitlement limited to the low-cost available carrier on the basis of a GSA rate comparison made 2 months after-the-fact. GSA regulations require that cost comparisons be made as far in advance of the moving date as possible, and that employees be counseled as to their responsibilities for excess cost if they choose to move their own household goods. However, cost of insurance must be recouped 375

Weight certificate invalid

Constructive weight substitution

Transferred employee was assessed weight charges for 4,300 pounds over statutory maximum household goods shipment of 11,000 pounds. Mover admitted that weight certificates were invalid because 200 pounds unrelated to employee's move were included in weight due to unintended error and for which mover made refund to Government. The invalidation of the weight certificates does not claim excess weight costs in the move; rather, a constructive shipment weight should be obtained under para. 2-8.2b(4) of the Federal Travel Regulations 19

TRANSPORTATION—Continued Page

Household effects—Continued

Commutation

Actual expenses *v.* commuted rate

Administrative determination

Employee of Dept. of Energy made his own arrangements and shipped his household goods on Oct. 1, 1981, under travel orders which stated that the "method of reimbursing household goods costs to be determined." Agency obtained a cost comparison from General Services Administration (GSA) after-the-fact in Dec. 1981, and reimbursed employee for his actual expenses rather than the higher commuted rate. Under GSA regulation effective Dec. 30, 1980, agency's action was proper since its determination was consistent with the purpose of the new regulation; to limit reimbursement to cost that would have been incurred by the Government if the shipment had been made in one lot from one origin to one destination by the available low-cost carrier on a Government Bill of Lading. Decisions of this Office allowing commuted rate prior to effective date of GSA regulation will no longer be followed 375

House trailer shipments, etc.

Purchase costs

Employee may be reimbursed, in connection with the purchase of a sailboat to be occupied as a residence upon transfer of station, those expenses which would be reimbursed in connection with the purchase of a residence on land. Expenses necessary for the operation of utilities and of launching the boat may be reimbursed as miscellaneous expenses under FTR para. 2-3.1b 289

Reimbursement

Ownership at time of transportation requirement

Although it is held that a boat may qualify as a mobile dwelling under 5 U.S.C. 5724(b), an employee who purchased a sailboat to be occupied as his residence incident to permanent change of station is not entitled to freight charges in transporting the boat from the place of construction to the delivery site where it was launched since the employee was not the owner of the boat at the time it was transported 289

Military personnel

Trailer shipment

Residence use requirement

Transferred member of the Air Force may be reimbursed the cost of transporting the houseboat he uses as his dwelling under 37 U.S.C. 409, which permits the transportation at Government expense of a mobile home dwelling, because it is determined that a boat may qualify as a "mobile home dwelling" under the law. 48 Comp. Gen. 147 is overruled and regulations issued to implement that decision need not be applied so as to exclude payment for transporting boats which are used as residences 292

Overseas employees

Return to United States

Separation

Criteria for expense reimbursement

In order for employee to be reimbursed expenses incident to return travel to former place of residence, travel must be clearly incidental

TRANSPORTATION—Continued Page
Household effects—Continued
Overseas employees—Continued
Return to United States—Continued
Separation—Continued
Criteria for expense reimbursement—Continued
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 200
Weight limitation
Excess cost liability
Constructive weight basis
Computation formula
To correct error resulting from invalidation of weight certificates, the constructive weight of the household goods shipment should be computed and substituted for the incorrect actual weight. Where the constructive weight under para. 2-8.2b(4) is unobtainable, the weight of the shipment must be determined by other reasonable means. Here, mover's evidence supporting revised constructive weight determination is unrebutted by employee, is the only evidence of record on the correct weight of the shipment, and is not unreasonable. Excess weight charges should be computed on the revised constructive weight 19
Constructive weight substitution
Weight certificate invalid
Transferred employee was assessed weight charges for 4,300 pounds over statutory maximum household goods shipment of 11,000 pounds. Mover admitted that weight certificates were invalid because 200 pounds unrelated to employee's move were included in weight due to unintended error and for which mover made refund to Government. The invalidation of the weight certificates does not claim excess weight costs in the move; rather, a constructive shipment weight should be obtained under para. 2-8.2b(4) of the Federal Travel Regulations 19
What constitutes bicycle/utility trailers
Employee who was transferred to a new duty station claims reimbursement for the cost of transporting a bicycle trailer to his new residence and for temporary storage of the trailer prior to shipment. The costs of transporting and storing a bicycle trailer are reimbursable by the Government since such a trailer may properly be categorized as "household goods," as defined in para. 2-1.4h of the Federal Travel Regulations (FTR). Moreover, the FTR does not specifically prohibit the shipment of a bicycle trailer as household goods 45
Military personnel
Release from active duty
Rights
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

TRANSPORTATION—Continued Page
Military personnel—Continued
Release from active duty—Continued
Rights—Continued
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 174
Mobile homes
Civilian personnel. *(See* TRANSPORTATION, Household effects, House trailer shipments, etc.)
Military personnel. *(See* TRANSPORTATION, Household effects, Military personnel, Trailer shipment)
Rates
Classification
Inapplicable
"Freight, all kinds"
Class rate in quotation
Where formula for determining freight all kinds (FAK) rate offered in carrier's tender provides for taking percentage of applicable class 100 rate from appropriate tariff, there is no intention to further refer to the National Motor Freight Classification to determine each article's individual class rating because the formula clearly implies a class 100 basis and to do so would defeat the obvious purpose of the tender to offer Government FAK rates which are in the nature of commodity rates and designed to bypass the classification rating process 29
Section 22 quotations
Construction
NMFC rule applicability
Weight consideration in shipping same commodity
Generally, for the same commodity, a carrier may not charge a shipper a greater amount to transport a lesser weight 29

TRAVEL EXPENSES
Air travel
Constructive cost reimbursement
Military Airlift Command service
Employee of the Navy en route from temporary duty overseas selected a particular schedule for the purpose of taking leave along a usually traveled route. He used a foreign air carrier for one leg of his travel even though he could have used Military Airlift Command (MAC) chartered air service for travel from his place of origin to the United States. Since MAC full plane charter services need not be considered as available U.S. air carrier under the Fly America Act his use of a foreign air carrier may be justified in the usual manner using only available commercial flights. However, under his travel order and applicable regulation reimbursement for return travel is limited to the constructive MAC cost 512
Rail travel
Medical condition
Where employee, who traveled by privately owned vehicle as a matter of preference and took additional time away from his official duties, is to be reimbursed at the constructive cost of rail transporta-

TRAVEL EXPENSES—Continued Page
Air travel—Continued
Constructive cost reimbursement—Continued
Rail travel—Continued
Medical condition—Continued
tion, the employee's annual leave may be charged for the work hours involved in the trip exceeding those hours which would have been required had he used rail transportation 395
Fly America Act
Employees' liability
Travel by noncertificated air carriers
Under guidelines issued by the Comptroller General, reasons for use of foreign air carrier must be properly certified. Comptroller General decisions contain guidelines regarding the adequacy of reasons for utilizing a foreign carrier. The Joint Travel Regulations require a determination of unavailability by the transportation or other appropriate officer and the requirements contained therein are in keeping with the Comptroller General's guidelines and reimbursement is not authorized absent compliance 278
Involuntary re-routing
En route home from temporary duty overseas an employee indirectly routed his travel to take annual leave in Dublin and scheduled his return flight from Shannon to the United States on a U.S. air carrier. Upon arrival in Shannon the employee was informed that his scheduled flight had been discontinued and the carrier scheduled the employee's transoceanic travel on a foreign air carrier. Since there were no alternative schedules at that point under which the employee could have traveled on U.S. air carriers available under the Comptroller General's "Guidelines for Implementation of the Fly America Act" for the transoceanic portion of his travel, there need be no penalty for the use of a foreign air carrier 496
Meals
At airport
Reimbursement
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 168
Constructive travel costs
Computation
Because of medical condition affecting employee's eardrums, he was unable to travel by air to a temporary duty station. Instead of traveling by train, he chose to travel by privately owned vehicle, with reimbursement limited to constructive cost of travel by common carrier. Since travel by air was not available to employee, the "appropriate" common carrier transportation under FTR para. 1-4.3 was rail transportation, and the constructive cost of rail rather than air transportation is thus applicable 393

TRAVEL EXPENSES—Continued Page

Conventions, conferences, etc.

Attendees

State officials

Use of appropriated funds by National Highway Traffic Safety Administration (NHTSA) to pay travel and lodging expenses of State officials to attend a proposed training workshop on odometer fraud is prohibited by 31 U.S.C. 1345 (formerly 551), as the proposed expenditures are not specifically provided for by the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1981 *et seq.* (1976), or other statute. Also, as this proposal is to be carried out by contract, the exception in our cases for grants does not apply. 35 Comp. Gen. 129 is distinguished 531

Illness. (*See* **SUBSISTENCE, Per diem, Illness, etc.**)

Medical treatment. (*See* **MEDICAL TREATMENT, Officers and employees, Travel expenses**)

Mileage. (*See* **MILEAGE**)

Military personnel

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

Subsistence

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

Temporary duty

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel, Temporary duty**)

Transfers

Reimbursement basis

Notwithstanding a Marine Corps regulation authorizing a mileage allowance and per diem from an alternate aerial port of debarkation to a new permanent duty station incident to a transfer from outside the United States to the United States, for the purpose of recovering a relocated privately owned vehicle, the member's entitlement is limited to allowances based on travel from the appropriate aerial port of debarkation serving the new station to the new station, in the absence of an amendment to the Joint Travel Regulations 651

Official business

Medical treatment

An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed 294

Overseas employees

Renewal agreement travel

Employee recruited from her place of actual residence in the continental United States for assignment in Puerto Rico and who meets all of the eligibility requirements under 5 U.S.C. 5728(a) is entitled to tour renewal agreement travel. An agency cannot defeat an employ-

TRAVEL EXPENSES—Continued Page
Overseas employees—Continued
Renewal agreement travel—Continued
ee's travel entitlement under section 5728(a) by refusing to negotiate a renewal agreement where the particular position could have been filled locally because payment of renewal agreement travel expenses to an employee who meets all of the eligibility requirements is mandatory rather than discretionary with the employing agency 545

Agency policy, which purports to deny 45-day annual leave accumulation, home leave accrual, and tour renewal travel agreement entitlements to employees recruited from places of actual residence in continental United States for assignment in Puerto Rico by arbitrarily identifying some assignments as "rotational" and others "permanent" and refusing to let some "permanent" transferees execute overseas employment agreements because the positions could have been filled by local hires, may not be given effect so as to defeat express statutory entitlements 545

Constructive travel costs
Computation

Special air fares should be used to compute constructive travel expenses to an employee's residence as the maximum entitlement to tour renewal travel to an alternate location, provided the agency can determine before the travel begins that the discount fare would be practical and economical. Applicability of special fares should be determined on the basis of constructive travel to the actual place of residence, using the scheduled dates of departure and return, even though the travel is to an alternate location 596

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 200

Per diem. (*See* SUBSISTENCE, Per diem)
Prudent person rule

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 168

Vehicles
Use of privately owned
Between residence and terminal
Mileage reimbursement claim. (*See* MILEAGE, Travel by privately owned automobile, Between residence and terminal)

TRAVEL EXPENSES—Continued Page
Vehicles—Continued
Mileage reimbursement claim. (*See* MILEAGE, Travel by privately owned automobile)

TREASURY DEPARTMENT
Secretary of Treasury
Authority
Investment
Dual Benefits Payment Account
Under the Omnibus Reconciliation Act of 1981, interest may be earned on funds appropriated to the Dual Benefits Payment Account if invested by the Secretary of the Treasury and this interest credited to the Dual Benefits Payment Account. However, investment is precluded by the terms of the fiscal year 1983 appropriation to the Dual Benefits Payment Account 521
Treasurer of United States
Relief
Duplicate check losses
Appropriation adjustment
Statutory authority status
Loss in duplicate check case (payee alleges non-receipt of original check, Treasury issues replacement, payee negotiates both checks) occurs when second check is paid. In general, General Accounting Office (GAO) thinks 31 U.S.C. 156 (now sec. 3333) is more appropriate than 31 U.S.C. 82a-2 (now secs. 3527 (c) and (d)) to deal with duplicate check losses. However, in view of conclusions and recommendations in 1981 report to Congress (AFMD-81-68), GAO thinks problem warrants congressional attention. Therefore, to give Congress and Treasury adequate time to develop solutions, GAO will maintain status quo for reasonable time and will handle cases under either statute as they are submitted 91

VEHICLES
Government
Home to work transportation
Government employees
Misuse of vehicles
Liability of employees
Because so many agencies have relied on apparent acquiescence by the Congress during the appropriations process when funds for passenger vehicles were appropriated without imposing any limits on an agency's discretion to determine the scope of "official business," and because dicta in GAO's own decisions may have contributed to the impression that use of cars for home-to-work transportation was a matter of agency discretion, GAO does not think it appropriate to seek recovery for past misuse of vehicles (except for those few agencies whose use of vehicles was restricted by specific Congressional enactments). This decision is intended to apply prospectively only. Moreover, GAO will not question such continued use of vehicles to transport heads of non-cabinet agencies and the respective seconds-in-command of both cabinet and non-cabinet agencies until the close of this Congress 438

VEHICLES—Continued Page
Government—Continued
Home to work transportation—Continued
Government employees—Continued
Prohibition
GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those persons who have been properly appointed or have properly succeeded to the heads of Foreign Service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so 438
Exemptions
GAO disagrees with the Legal Advisor of the Department of State and the General Counsel of the Defense Department who have interpreted the phrase "heads of executive departments," contained in 31 U.S.C. 1344(b)(2), to be synonymous with the phrase "principal officers of executive departments." Congress has statutorily defined the "heads" of the executive departments referred to in 31 U.S.C. 1344(b)(2) (including the Departments of State and Defense) to be the Secretaries of those departments 438
GAO disagrees with the State Department's Legal Advisor and the General Counsel of the Defense Department who have construed the phrase "principal diplomatic and consular officials," contained in 31 U.S.C. 1344(b)(3), to include those high ranking officials whose duties require frequent official contact on a diplomatic level with high ranking officials of foreign governments. GAO construes 31 U.S.C. 1344(b)(3) to only include those persons who have been properly appointed, or have properly succeeded, to head a foreign diplomatic, consular, or other Foreign Service post, as an ambassador, minister, charge d'affaires, or other similar principal diplomatic or consular official 438
Official use determination
Administration discretion
The State Department's reliance on the GAO decision in 54 Comp. Gen. 855 (1975) to support the proposition that the use of Government vehicles for home-to-work transportation of Government officials and employees lies solely within the administrative discretion of the head of the agency was based on some overly broad dicta in that and several previous decisions. Read in context, GAO decisions, including the one cited by the State Department's Legal Advisor, only authorize the exercise of administrative discretion to provide home-to-work transportation for Government officials and employees on a temporary basis when (1) there is a clear and present danger to Government employees or an emergency threatens the performance of vital Government functions, or (2) such transportation is incident to otherwise authorized use of the vehicles involved 438

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VESSELS
Charters
Long-term
Obligational availability
Navy Industrial Fund
Anti-Deficiency Act compliance
The Antideficiency Act, 31 U.S.C. 1431, would not prevent the Navy from entering into the TAKX long-term ship leasing program, to be financed through the Navy Industrial Fund, so long as the unobligated balance of the Fund is sufficient to cover the Government's obligation until commencement of the lease period. Navy may not, through acceptance of vessel delivery, agree to commencement of the lease arrangement if the obligational availability of the Fund is at that time insufficient to cover any consequential increase in the Government's obligation 143
Termination expenses
Under the Navy's TAKX ship leasing program, ship charters will cover a base period of 5 years, renewable up to 20 years at 5-year intervals, and with substantial termination costs for failure to renew. Such contracts, once in effect, should be recorded as firm obligations of the Navy Industrial Fund at an amount sufficient to cover lease costs for the 5-year base period, plus any termination expenses for failure to renew 143

VOLUNTARY SERVICES
Meals, etc.
Appropriation availability
Government employee who uses personal funds to procure goods or services for official use may be reimbursed if underlying expenditure itself is authorized, failure to act would have resulted in disruption of relevant program or activity, and transaction satisfies criteria for either ratification or *quantum meruit*, applied as if contractor had not yet been paid. While General Accounting Office emphasizes that use of personal funds should be discouraged and retains general prohibition against reimbursing "voluntary creditors," these guidelines will be followed in future. Applying this approach, National Guard officer, who used personal funds to buy food for subordinates during weekend training exercise when requisite paperwork was not completed in time to follow normal purchasing procedures, may be reimbursed. 4 Comp. Dec. 409 and 2 Comp. Gen. 581 are modified. This decision was later distinguished by 62 Comp. Gen. 595 419
Personal funds in interest of Government. (*See* PAYMENTS, Voluntary)

WORDS AND PHRASES
"Adversary adjudication"
Equal Access to Justice Act
Recovery under the Equal Access to Justice Act of attorney's fees and costs incurred in pursuing a bid protest at General Accounting Office (GAO) is not allowed because GAO is not subject to the Administrative Procedures Act (APA) and in order to recover under Equal Access to Justice Act claimant must have prevailed in an adversary adjudication under the APA 86

WORDS AND PHRASES—Continued Page

"Appropriate remedies"
Civil Rights Act, as amended
Title VII
The scope of remedial actions under Title VII is generally for determination by EEOC. However, EEOC's present regulations on informal settlements do not provide sufficient guidance for Federal agencies to carry out their responsibilities under Title VII of the Civil Rights Act of 1964, as amended. We recommend that EEOC review and revise its present regulations to provide such guidance. Until that time agencies may administratively settle Title VII cases in a manner consistent with the guidelines in this decision 239

Basic pay "received"
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 157

Bidding rights
Rattlesnake National Recreation Area and Wilderness Act
Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under sec. 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt 102

Compensatory time off for religious observances
Employees whose salaries have reached the statutory limit may earn and use compensatory time for religious observances under 5 U.S.C. 5550a, despite fact that they are not otherwise entitled to premium pay or compensatory time. In granting the authority for Federal employees to earn and use compensatory time for religious purposes, Congress intended to provide a mechanism whereby all employees could take time off from work in fulfillment of their religious obligations, without being forced to lose pay or use annual leave. Since section 5550a involves mere substitution of hours worked, rather than accrual of premium pay, we conclude that compensatory time off for religious observances is not premium pay under Title 5, United States Code, and, therefore, is not subject to aggregate salary limitations imposed by statute 589

"Dependent child"
Survivor Benefit Plan
Under the Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*, eligible beneficiaries include a deceased service member's "dependent child," a term defined by statute as including one who is incapable of supporting himself because of mental or physical incapacity incurred before his twenty-second birthday while pursuing a full-time course of study. Given this definition, a military officer's daughter who suf-

WORDS AND PHRASES—Continued Page
"Dependent child"—Continued
Survivor Benefit Plan—Continued
fered a mental breakdown at the age of 19 during the summer vacation following the successful completion of her first year of college, and who was thus rendered incapable of self-support, may properly be considered a "dependent child" eligible for an annuity under the Plan. 44 Comp. Gen. 551 is modified in part 302
"Equivalent increase"
Civil Service Reform Act of 1978
Where a General Schedule employee who was demoted is repromoted to his former position during a 2-year period of grade retention under 5 U.S.C. 5362, the schedule for his periodic step increases established before demotion and grade retention remains in effect. *Grade* retention under 5 U.S.C. 5362 is to be distinguished from *pay* retention under sec. 5363. Repromotion during a period of grade retention is not an "equivalent increase" under 5 U.S.C. 5335(a) and 5 C.F.R. 531.403. Prior decisions arising before Civil Service Reform Act of 1978 are not applicable. This decision reversed on new information submitted, by 63 Comp. Gen. ——— (B-209414, Dec. 7, 1983) ... 151
"Extramural budgets"
What constitutes
Small Business Innovation Development Act
In calculating its 1983 set-aside for small business innovation research program, National Aeronautics and Space Administration should apply definition of "research and development" that appears in Small Business Innovation Development Act, Pub. L. 97-219, 96 Stat. 217, July 22, 1982, to its budget for Fiscal Year 1983 without regard to appropriation heading "Research and Development." Since Congress clearly appropriated funds for certain operational activities under that heading, it would be contrary to congressional intent for set-aside to be based on amounts not available for research and development 232
"Fitness for duty" medical examination
An employee, who is required to undergo fitness for duty examination as a condition of continued employment, may choose to be examined either by a United States medical officer or by a private physician of his choice. The employee is entitled to reasonable travel expenses in connection with such an examination, whether he is traveling to a Federal medical facility or to a private physician. The agency may use its discretion to establish reasonable limitations on the distance traveled for which an employee may be reimbursed 294
"Heads of executive departments"
GAO disagrees with the Legal Advisor of the Department of State and the General Counsel of the Defense Department who have interpreted the phrase "heads of executive departments," contained in 31 U.S.C. 1344(b)(2), to be synonymous with the phrase "principal officers of executive departments." Congress has statutorily defined the "heads" of the executive departments referred to in 31 U.S.C. 1344(b)(2) (including the Departments of State and Defense) to be the Secretaries of those departments 438

WORDS AND PHRASES—Continued Page

Home to work transportation

GAO disagrees with the legal determinations of officials of the Departments of State and Defense that it is proper under 31 U.S.C. 1344(b) for agency officials and employees (other than the Secretaries of those departments, the Secretaries of the Army, Navy, and Air Force, and those persons who have been properly appointed or have properly succeeded to the heads of Foreign Service posts) to receive transportation between their home and places of employment using Government vehicles and drivers. GAO construes 31 U.S.C. 1344(b) to generally prohibit the provision of such transportation to agency officials and employees unless there is specific statutory authority to do so 438

"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 187

"Household effects"

Employee who was transferred to a new duty station claims reimbursement for the cost of transporting a bicycle trailer to his new residence and for temporary storage of the trailer prior to shipment. The costs of transporting and storing a bicycle trailer are reimbursable by the Government since such a trailer may properly be categorized as "household goods," as defined in para. 2-1.4h of the Federal Travel Regulations (FTR). Moreover, the FTR does not specifically prohibit the shipment of a bicycle trailer as household goods 45

"Money"

Mineral Lands Leasing Act

Rattlesnake National Recreation Area and Wilderness Act of 1980 authorized exchange of Montana Power Company's lands for equal value of "bidding rights" for competitive Federal coal leases. Proposed "Exchange Agreement" would require Treasury to pay State of Montana 50 percent share of total received, including bidding rights, under sec. 35 of Mineral Lands Leasing Act of 1920, 30 U.S.C. 191, which provides for remitting "money" received by Treasury. Since bidding rights are not money, State payment may not be based on their receipt 102

"Prequalification statement"

Indian housing procurements

Preference to Indian firms

Indian Housing Authority (IHA) had a reasonable basis for rejecting bid submitted by firm that by bid opening had not demonstrated to IHA's satisfaction through a required "prequalification statement" that it was a qualified Indian-owned organization or Indian-owned enterprise 138

"Principal diplomatic and consular officials"

GAO disagrees with the State Department's Legal Advisor and the General Counsel of the Defense Department who have construed the phrase "principal diplomatic and consular officials," contained in 31 U.S.C. 1344(b)(3), to include those high ranking officials whose duties require frequent official contact on a diplomatic level with high ranking officials of foreign governments. GAO construes 31 U.S.C.

WORDS AND PHRASES—Continued Page

"Principal diplomatic and consular officials"—Continued

1344(b)(3) to only include those persons who have been properly appointed, or have properly succeeded, to head a foreign diplomatic, consular, or other Foreign Service post, as an ambassador, minister, charge d'affaires, or other similar principal diplomatic or consular official 438

"Public utility services"

Contract between General Services Administration (GSA) and a non-tariffed supplier for procurement of telephone equipment and related installation and maintenance services is one for "public utility services" within the scope of 40 U.S.C. 481(a)(3) (authorizing GSA to make contracts for public utility services for periods up to 10 years), since it is the nature of the services provided and not the nature of the provider of the services that is determinative for the purpose of the law. Sale of telephone equipment is a utility type service. Installment purchase contracts as well as leases or leases with options to purchase are within the scope of 40 U.S.C. 481(a)(3) 569

"Request"

Progress payments

Request for progress payments "in accordance with governing United States procurement regulations" does not render bid nonresponsive where there is nothing which indicates that the "request" was more than a mere wish or desire. 45 Comp. Gen. 809, 46 *id.* 368, 47 *id.* 496, and similar cases modified in part 113

"Research and development"

What constitutes

Small Business Innovation Development Act

In calculating its 1983 set-aside for small business innovation research program, National Aeronautics and Space Administration should apply definition of "research and development" that appears in Small Business Innovation Development Act, Pub. L. 97-219, 96 Stat. 217, July 22, 1982, to its budget for Fiscal Year 1983 without regard to appropriation heading "Research and Development." Since Congress clearly appropriated funds for certain operational activities under that heading, it would be contrary to congressional intent for set-aside to be based on amounts not available for research and development 232

Slash (/) virgule

Bid stating that country of manufacture is "USA/England" was correctly evaluated as offering foreign end product for purposes of applying Buy American Act because the bid can reasonably be construed to permit the bidder to furnish either a domestic or a foreign product in the event of award 154

"Total financial package"

Transferred employee traded a former residence as downpayment on purchase of residence at new official station. He seeks reimbursement of $163 premium paid for title insurance on property traded as a downpayment. Title insurance is generally reimbursable to a seller under the provisions of FTR para. 2-6.2c. However, since employee did not obtain the title insurance on his residence at his old duty station at time of transfer but on a former residence, he is not entitled to reimbursement of the fee paid for title insurance under "total fi-

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"Total financial package"—Continued

nancial package" concept enunciated in *Arthur J. Kerns,* 60 Comp. Gen. 650 (1981), and subsequent similar decisions 426

Veterans Administration funding fee

The Veterans Administration (VA) questions whether the VA funding fee, consisting of one-half of 1 percent of the amount of a loan guaranteed or insured by the VA, required under the Omnibus Budget Reconciliation Act of 1982, is reimbursable under para. 2-6.2d of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), as amended. We hold that the funding fee is not reimbursable under FTR para. 2-6.2d because the fee constitutes a finance charge under Regulation Z (12 C.F.R. 226.4 (1982)) 456

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