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[B-193432]

Transportation—Motor Carrier Shipments—Mobile Homes—Carmack Amendment to ICC Act

Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984.

Matter of: Chandler Trailer Convoy, Inc.—Reconsideration, December 3, 1984:

Chandler Trailer Convoy, Inc. (Chandler), requests reconsideration of our decision in *Chandler Trailer Convoy, Inc.—Reconsideration,* B-193432, B-211194, Aug. 16, 1984, 84-2 C.P.D. ¶ 185, disallowing the claim of Chandler for refund of $8,685 recovered by the United States Marine Corps (USMC) for the destruction in transit of a mobile home transported from Jacksonville, North Carolina, to Pittston, Pennsylvania, under government bill of lading (GBL) No. K-0,997,949.

We reverse the decision.

In our prior decision, we denied Chandler's claim because, under the Interstate Commerce Act, 49 U.S.C. § 11707 (1982), commonly referred to as the Carmack Amendment, a *prima facie* case of carrier liability for the damage in transit was established by a showing that the mobile home was in better condition when received by Chandler at origin than when delivered by Chandler at destination and Chandler failed to establish that the damage resulted solely from an exception to carrier liability.

On pickup of the mobile home at Jacksonville, North Carolina, the only defects noted by Chandler were a small buckle and small dent on the right side, small dents in front, shower door broken inside and the A-frame behind the hitch was bent and rusty. However, near Harrisburg, Pennsylvania, the main framework under the trailer was buckling over the axle, and the owner of the mobile home authorized the installation of a third axle and reinforcement of the framework by Penn Welding and Automotive Service (Penn Welding) at a cost of $2,814. The transportation resumed, but was terminated at Pittston, Pennsylvania, after traveling about 105 miles, because the walls appeared to be collapsing. The USMC then issued a corrected GBL terminating the shipment at Pittston because of "trailer disintegrating."

On request for reconsideration, Chandler contends that we erred in holding that Chandler had "not shown the damages in transit to have resulted solely from premove latent defects in the mobile home" and that Chandler had not shown, therefore, "that the damage resulted solely from an excepted cause," alleged by Chandler to be shipper fault, under the decision in *Missouri Pacific Railroad Company v. Elmore & Stahl,* 377 U.S. 134 (1964). That is,

that the shipper had tendered for shipment a commodity, the mobile home, in a condition in which it could not be safety transported and that the defects in the condition of the mobile home were not apparent to Chandler on ordinary observation. Chandler alleges that the

> * * * evidence of record clearly and positively shows that the damages were caused by broken springs, fracture in the hitch, main framework bending and buckling over the axle necessitating welding and reinforcement of the main beams with channels and new cross beams and the installation of a third axle.

Although no new evidence of the cause of the structural failure has been presented by Chandler, the USMC, in response to our request for comments on the request for reconsideration, specifically our request for information on the salvage value of the trailer, for the first time advised our Office that the private insurance carrier of the owner of the mobile home had denied liability under the insurance contract because the damage was caused by a defective frame. The inspector for the insurance carrier stated that, in his opinion, the damage was caused by the severe rusting of the undercarriage which broke up in flexing over the axle and that the rust-weakened condition of the undercarriage would not have been apparent on ordinary observation. Penn Welding confirmed the opinion of the insurance carrier and added that the flexing of the mobile home in transit was aggravated by an unbalanced overload of books in one end of the mobile home. There is no evidence in the record that Chandler knew or should have known either of the rust-weakened condition of the undercarriage or the unbalanced load in the mobile home.

The record contains an affidavit by Michael L. Chandler attesting that a review and examination of the documents, papers, records and files kept in the normal course of business in connection with this transportation disclose no record or evidence of collision, accident, traffic violations, or any acts of omission or commission that would indicate or constitute negligence of Chandler.

The record now establishes that the transportation was performed by Chandler without negligence and that the damage in transit resulted solely from acts of the shipper, the tender of the mobile home with an unbalanced load and rust-weakened undercarriage. Consequently, Chandler is not liable for the damage in transit, and the claim for refund of the amount recovered by setoff for the damage is allowed.

[B-215046]

Contracts—Negotiation—Sole-Source Basis—Procedures—*Commerce Business Daily* Notice Procedures—Incomplete Synopsis

A protest is sustained where the agency rejected a potential source of supply for failure to demonstrate compliance with a requirement which was neither set forth in a CBD "source sought" synopsis nor otherwise made known to the vendor.

Contracts—Negotiation—Sole-Source Basis—Propriety

Where the contracting agency concluded that a vendor's software was not acceptable but found that the vendor's hardware was acceptable, and there was no requirement for obtaining the hardware and software from one vendor, a sole source award for the hardware was unreasonable.

Matter of : Masstor Systems Corporation, December 3, 1984:

Masstor Systems Corporation protests the Department of the Air Force's sole source contract award to Network Systems Corporation (NSC) for hardware and software to augment an existing government-owned hyperchannel network. We sustain the protest.

Masstor responded to a synopsis published in the Commerce Business Daily (CBD), which stated that sources were sought for:

> [H]yperchannel network adaptor hardware and software as described herein. The [agency] anticipates a sole source award against a GSA schedule to [NSC] * * * for the equipment and software which will include: * * * f. Software that will provide IBM MVS and DECVAX operating system users with facilities for high-speed task-to-task communications via hyperchannel equipment * * *. This hardware and software will augment an existing government-owned hyperchannel network which interconnects a Control Data Corp. Cyber 175, several Digital Equipment Corp. VAX 11/780s, two IBM 4341s, and other contractors' computational hardware. The current [NSC] hyperchannel is a 50 megabyte/second serial bus. Firms are invited to submit a complete description of the capabilities of their proposed equipment for evaluation to determine acceptability as a potential source to fulfill the requirements of the above-described acquisition.

The agency states that the CBD notice was published pursuant to 15 U.S.C. § 637(e)(2)(C) (Law. Co-op. 1984). This provision requires that any proposed procurement of $10,000 or more be publicized in the CBD at least 30 days before negotiations for a sole source contract are commenced.[1]

Masstor responded to the CBD notice and stated that it could supply NSC equipment to satisfy the hardware requirements and its own "MASSNET" software to fulfill the software requirements. It enclosed a detailed description of the MASSNET software.

The Air Force evaluated Masstor's response and found that the hardware offered was identical to that it expected to acquire from NSC. It concluded, however, that the MASSNET software was not acceptable because it was not compatible with the existing "NETEX" software in use by the agency. The Air Force found that in order to use MASSNET, the existing software would have to be rewritten and modified to interface with the MASSNET software. This would result in lengthy and costly delays to all projects using the current system, including high priority projects such as the Advanced Medium Range Air to Air Missile program. Therefore, the agency found the MASSNET software unacceptable and proceeded with an award to NSC.

Masstor contends that its MASSNET software is compatible with NETEX and argues that as a result, the award to NSC was improper. The protester asserts that it would have supplied a description

[1] The purpose of section 637(e) is to improve small business access to federal procurement information.

of its NETEX interfaces, which allow NETEX programs to be executed unmodified on a MASSNET network, if it had known that a requirement for compatibility with NETEX software existed. Masstor points out that the CBD notice contained no mention of such a requirement. It also disputes the agency's position that since the CBD notice stated that the software would augment an existing hyperchannel network, the notice conveyed a requirement for software which would be compatible with the existing software.

We agree that the statement that the hardware would augment an existing network does not specifically require compatibility, but we do think it conveys a need for software which can be used with the existing system. We therefore believe that an experienced vendor should have been alerted to the possibility of a requirement for compatibility. Nevertheless, the notice did not identify the existing software, and an offeror obviously could not make any representation concerning compatibility without that information. While the Air Force implies that Masstor therefore had a duty to inquire about the existence of a compatibility requirement, we disagree.

The CBD notice stated that it was for information and planning purposes only and did not constitute a solicitation for bids or proposals. It invited firms to submit a description of their equipment so that the agency could determine their acceptability as potential sources for fulfilling the requirement stated in the announcement. Accordingly, we believe vendors reasonably could assume that so long as they responded to the specific requirements contained in the CBD notice, they would be supplying sufficient information for the Air Force's stated purposes.

In our view, it was the Air Force's duty to make its essential requirements clear to potential offerors and allow them an opportunity to demonstrate their ability to comply before rejecting them as potential sources of supply. *Cf. U.S. Financial Services, Inc.,* B-197082, Aug. 7, 1981, 81-2 CPD ¶ 104 at 7 (agency could not properly reject a response to a CBD notice of intent to lease disk drives, even though proposed lease to ownership and purchase plans exceeded the agency's needs, because the agency had never limited offers to lease plans). Since the CBD notice did not fully accomplish that purpose here, the agency at least should have contacted Masstor for further information concerning the compatibility of its software before excluding it from further consideration. Without having done so, we think the Air Force lacked a reasonable basis for rejecting Masstor as a source of supply.

There is another procurement deficiency apparent from the record in this case which has not been protested, but which we cannot ignore. The agency states that the hardware Masstor could supply is identical to that it intended to and later did acquire from NSC. Yet, despite the clear availability of a competitor, the agency purchased the hardware from NSC on a sole source basis. The CBD notice contained no indication of any necessity for acquiring the

software and hardware from the same source. Nor is any justification for the agency's action apparent from the record. We therefore conclude that the agency also lacked a reasonable basis for the sole source hardware purchase.

The protest is sustained.

The agency advises us that the software and hardware were acquired on a purchase basis and have been delivered. Therefore, it is impracticable to recommend termination of the contract. By letter of today, however, we are recommending to the Secretary of the Air Force that steps be taken to prevent the recurrence of the procurement deficiencies found in this case.

[B-216022, B-215284]

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

Where two military members are divorced, or legally separated, the children of the marriage are in the legal custody of a third party, and each member is required to pay child support to the third party, only one of the members may receive the increased basic allowance for quarters ("with-dependent" rate) based upon these common dependents. If the members are unable to agree as to which should claim the children as dependents, the parent providing the greater or chief support should receive the increased allowance, unless both members provide the same amount of support, in which case the senior member should receive the increased allowance.

Matter of: Sergeants Mason and Smith, December 3, 1984:

This action responds to questions concerning the entitlement to basic allowance for quarters at the "with-dependent" rate of Staff Sergeant Kathleen Smith, USAF, and Staff Sergeant Bradley Smith, USAF, based on their dependent children, and Staff Sergeant Mary A. Mason, USAF, and Sergeant James E. Mason Jr., USAF, based on their dependent children.[1] The matter involves the situation where two service members having been married to each other are separated or divorced, and their dependent children are in the legal custody of a third party to whom the members must pay child support.

We find that since the children of each couple are one class of dependents, only one parent may claim the children of each couple for purpose of entitlement to basic allowance for quarters at the "with-dependent" rate. Absent an agreement between the parents, the increased "with-dependent" allowance should go to the member providing greater support. If the support payments are the same, the increased allowance should go to the senior member.

[1] The questions concerning the Smiths were submitted by the Accounting and Finance Officer, 354th Tactical Fighter Wing, Myrtle Beach Air Force Base, South Carolina, and the questions concerning the Masons were submitted by the Accounting and Finance Officer, United States Air Force Academy, Colorado. Since they involve similar questions, the two separate requests were approved and consolidated by the Department of Defense Military Pay and Allowance Committee and assigned control number DO-AF-1441.

Background Facts—Smith

Staff Sergeant Kathleen Smith is legally divorced from Staff Sergeant Bradley Smith. Two children were born of their marriage. The divorce decree, issued April 4, 1983, requires both members to pay child support to the paternal grandparents, who have legal custody of the children. Bradley Smith was ordered to pay $150 per month, Kathleen Smith, $100 per mount. Bradley had been receiving basic allowance for quarters at the "with-dependent" or increased allowance rate, and Kathleen at the "without-dependent" rate. As a result of the divorce and the decree, Kathleen has requested that she be paid at the "with-dependent" or increased allowance rate, since she is also a non-custodial parent required to pay child support. Both members are at the same pay grade (E–5) and cannot agree upon who should receive the quarters allowance at the increased rate.

Background Facts—Mason

Staff Sergeant Mary A. Mason and Sergeant James E. Mason, Jr. were married members residing with the two dependent children of their marriage in military family housing. The two members separated and filed a legal separation agreement dated January 23, 1984. The agreement gives custody of both children to their paternal grandmother, Mrs. Betty H. Mason. It also requires each member to pay $200 per month to Mrs. Mason for child support which both members are doing by allotments from their pay.

Mary Mason terminated use of Government quarters on January 11, 1984, and was authorized to reside in off-base housing and to receive basic allowance for quarters at the "without-dependent" rate. After providing additional information, apparently concerning her child support obligation, she was authorized basic allowance for quarters at the "with-dependent," or increased allowance rate. However, due to James Mason's claim for the increased allowance, Mary Mason's quarters allowance rate was reduced pending our decision on the matter.

James Mason is currently residing in Government single quarters, and he is receiving only the partial rate quarters allowance payable to a member in such circumstances.

Discussion

If adequate Government quarters are not provided for the dependents of a member of the uniformed services entitled to basic pay, that member is entitled to an increased basic allowance for quarters, based upon his or her dependents. 37 U.S.C. § 403 (1982). The purpose of the increased allowance is to reimburse the member for part of the expense of providing private quarters for his or her dependents. 60 Comp. Gen. 399 (1981). See also, *Airman*

Donna L. McCoy and Sergeant Marty L. Cooper, 62 Comp. Gen. 315 (1983). As the Air Force has pointed out in its submission, the implementing regulations in the Department of Defense Military Pay and Allowances Entitlements Manual do not address which member is entitled to basic allowance for quarters at the "with-dependent" or increased allowance rate, when neither member has custody, yet both are required to pay child support equal to or greater than the difference between the "with-dependent" rate and the "without-dependent" rate.

When two members are married to each other and have one or more children born of their marriage, only one member is entitled to an increased basic allowance for quarters based on their common dependents, even though one of the members may already receive and increased allowance on behalf of dependents acquired prior to the present marriage. *McCoy and Cooper,* 62 Comp. Gen. at 317; *Chief Warrant Officer Ronald G. Hull and Petty Officer Doris H. Hull,* 62 Comp. Gen. 666 (1983); and 54 Comp. Gen. 665 (1975).

If the two members subsequently divorce, generally only one of the members may receive the increased quarters allowance for their common dependents. For example, the regulations provide that, when a non-custodial member supports the common dependents, the member paying the court-ordered support is entitled to claim the increased quarters allowance for the common dependents. *See* Department of Defense Military Pay and Allowances Entitlements Manual (DOD Pay Manual) para. 30236a; and *McCoy and Cooper,* 62 Comp. Gen. at 317. The rules in the DOD Pay Manual are based on the assumption that the non-custodial member is providing support pursuant to a legal obligation to common dependents not residing with him or her. In addition, the amounts being paid must be in excess of the difference between the quarters allowance at the "with-dependent" rate and at the "without-dependent" rate. DOD Pay Manual para. 30236.

Whether or not the allowance may be paid to both members depends upon whether the dependents are common dependents and are living in one household. When there are separate dependents or classes of dependents, each member may be allowed an increased allowance for his or her dependents. For example, in *McCoy and Copper,* 62 Comp. Gen. 315, *supra,* each member was allowed to receive the increased allowance when each member had custody and support of one or more of the children born of the marriage and no support was to be paid by the other member. In that case, the members had, in essence, set up two families, two separate households and legally divided the common dependents.

In the present cases, neither member-parent has custody of the children, and both are required to pay child support. The dependents are in a common household in the custody of a third person. Thus, only one of the members may receive the increased allowance based upon their common dependents.

The question of who should receive the "with-dependent" allowance should be decided between the members. If necessary, the members may seek to have the child support payments adjusted accordingly. However, when the members cannot agree between them, we suggest that as in the case with illegitimate children (DOD Pay Manual para. 30238(d)), the parent "providing the chief support," or the majority of support, receive the increased allowance. In situations where the members pay equal amounts, and cannot agree, the increased allowance should, as is the general rule, go to the senior member (DOD Pay Manual para. 30232(a)). Thus, in the Smith case, Bradley is entitled to the quarters allowance at the "with-dependent" rate since he is providing the chief support. In the Mason case since they are both providing the same amount of support, the quarters allowance at the "with-dependent" rate should be paid to the senior member as determined by the service.

[B-215404]

Appropriations—Availability—Plaques

Pennsylvania Avenue Development Corporation (PADC) may install a memorial plaque and designate a site within an area under its jurisdiction and control in honor of a deceased former chairperson of the PADC using funds donated to it. PADC has been vested with authority to determine the character of and necessity for its obligations and expenditures and to accept gifts of financial aid from any source and comply with the terms thereof. These authorities are sufficient to free PADC from restriction otherwise imposed upon Government agencies in the expenditure of appropriated funds except where a statutory restriction expressly applies to Government corporations. No law expressly precludes proposed expenditure by PADC. Furthermore, no law precludes PADC from designating property under its control in honor of deceased former chairperson of PADC.

Matter of: Pennsylvania Avenue Development Corporation authority to purchase and install memorial plaque on Federal land, December 4, 1984:

This decision responds to a request from the General Counsel of the Pennsylvania Avenue Development Corporation (PADC), for a decision on the PADC's authority to purchase and install a memorial plaque acquired with donated funds and to dedicate the site of the plaque on Federal land under its control to a deceased former chairperson of the PADC.

The PADC posed these questions:

1. Does the PADC have the authority to use public space within the designated project area for the installation of a memorial plaque to a former chairperson on public land?
2. Can private donations be legally spent for such a plaque and its installation?
3. Is there a restriction as to how the memorial is designated (i.e., can the site of the plaque be formally "named" for the individual, or can a plaque only be placed on a site which otherwise carries a different name)?

For the reasons stated below, we find that the PADC may install a memorial plaque and designate a site within an area under its

jurisdiction and control, in honor of a deceased former chairperson of the PADC using funds donated to it.

Generally, the decisions of the accounting officers of the Government have been to the effect that the purchase of medals, trophies, insignia, etc., is not authorized under appropriations made in general terms unless the purchase is specifically authorized by law. 45 Comp. Gen. 199 at 200 (1965) and decisions cited therein. These decisions are based upon the rationale that awards such as these constitute personal gifts to their recipients and appropriated funds are unavailable for making personal gifts. Other decisions have held that appropriated funds generally are unavailable for construction of memorials unless specifically authorized. A-26628, April 11, 1929, 19 Comp. Dec. 100 (1912).

The PADC is a wholly owned Government corporation charged with the responsibility of preparing and implementing a development plan in a development area roughly corresponding to the corridor along Pennsylvania Avenue between the White House and the U.S. Capitol in Washington, D.C. 40 U.S.C. § 874. In order to accomplish this, the PADC is authorized and empowered to acquire, hold, maintain, use and operate property within the development area necessary to carry out the development plan. 40 U.S.C. § 875(6). Furthermore, it may construct improvements within the development area. 40 U.S.C. § 875 (15) and (16). Additionally, the PADC has been vested with the authority to determine the character of and necessity for its obligations and expenditures. 40 U.S.C. § 875(14). Finally, the PADC is authorized to accept gifts of financial and other aid from any source and to comply with the terms thereof. 40 U.S.C. § 875(13). These authorities are sufficiently broad to free the PADC from the statutory restrictions otherwise imposed upon Government agencies in the expenditure of appropriated funds except where the restriction expressly applies to Government corporations. B-193573, December 19, 1979; B-35062, July 28, 1943. The restrictions mentioned above have not been made expressly applicable to Government corporations by statute.

We are unaware of any prohibitions in law precluding the PADC from providing identifying designations to property under its jurisdiction and control for the purpose of providing a means of identifying the property.[1] Further, it is authorized to receive and expend donations for this propose.

[1] It should be noted that the payment of expenses for cornerstone ceremonies and for building dedication ceremonies are allowed even though no appropriation or other law specifically authorizes them, since the ceremonies are traditional practices associated with the construction of public buildings. 53 Comp. Gen. 119 (1973); B-11884, August 26, 1940. Naming public buildings or constructing markers providing names to open areas under agency control similarly would seem to be authorized either as traditional expenses connected with the administration of such areas or as necessarily incident thereto. Thus, a designation in the honor of someone should not change the character of the expenditure.

However, we note that once the development plan is implemented, the PADC is to dissolve, 40 U.S.C. § 872(b), with property under its jurisdiction and control to be transferred to other Federal and District of Columbia Government agencies for administration. 40 U.S.C. § 875(20). Thus, any agency assuming control of the property will be free to redesignate the area or maintain or remove the plaque as it deems appropriate. In the present case, this should not be a problem since the governmental agencies which are likely to assume jurisdiction over property in the development area (the Department of the Interior, the General Services Administration and the District of Columbia government) are all represented on the Board of Directors of the PADC. See 40 U.S.C. § 872(c).

[B-216053]

Transportation—Household Effects—Military Personnel—Household Effects Damaged or Lost in Transit—Military-Industry Memorandum of Understanding—Presumption of Correct Delivery After 45 Days

Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage.

Matter of: CVL Forwarders, December 4, 1984:

CVL Forwarders (CVL) requests review of our Claims Group decision to disallow CVL's claim for refund of freight charges of $245.67 that the government recovered by setoff as unearned in connection with the shipment of a United States Marine Corps (USMC) member's household goods under government bill of lading No. AP-092, 475. The charges were recovered because the USMC determined that a part of the shipment was irreparably damaged in transit.

We find that CVL is entitled to the refund.

No exception to the condition of the household goods was noted on delivery of the shipment, and the first notice to CVL of damage in transit was receipt of a claim 77 days after delivery. CVL's claim is based on its contention that pursuant to a Military-Industry Memorandum of Understanding, damage is deemed not to have occurred in transit if the damage is not discovered within 45 days after delivery. (In fact, the USMC canceled a claim for the damage because the damage was not discovered within the 45-day period.) The USMC contends, however, that the 45-day reporting requirement applies only to a claim for damage to the shipment and argues that failure to meet the 45-day reporting requirement thus does not preclude a claim for unearned freight charges. Our Claims Group agreed with the USMC.

The Interstate Commerce Commission regulations applicable to the shipment, 49 C.F.R. § 1056.26 (1983), provide that a common carrier of household goods shall not collect or retain freight charges on the portion of a shipment that is lost or destroyed in transit. However, the shipper bears the burden of proving, *inter alia,* that the carrier failed to deliver the same quantity or quality of goods at destination as received at origin. *Julius Klugman's Sons, Inc. v. Oceanic Steam Nav. Co. Ltd.,* 42 F.2d 461 (1930). Ordinarily, this is established by the notation of discrepancies on the bill of lading or other delivery document at the time of delivery. *United States v. Mississippi Valley Barge Line Company,* 285 F.2d 381, 388 (1960); Sigmond, *Miller's Law of Freight Loss and Damage Claims* 206 (4th ed. 1974).

However, associations representing carriers of household goods have entered into the Memorandum of Understanding with the military departments, which provides:

> To establish the fact that loss or damage to household goods owned by members of the military was present when the household goods were delivered at destination by the carrier, it is agreed that the rules set forth below will be implemented * * *.

One of those rules is that all loss or damage is to be noted on the delivery document, the inventory form, or the Defense Department Statement of Accessorial Services, DD Form 619. The parties have also agreed that if exception to the delivery has not been taken at the time of delivery,

> * * * later discovered loss or damage * * * dispatched not later than 45 days following delivery, shall be accepted by the carrier as overcoming the presumption of the correctness of the [clear] delivery receipt.

On the other hand, loss or damage to household goods discovered more than 45 days after the data of delivery will be presumed not to have occurred in the possession of the carrier. This presumption is rebuttable by the presentation of evidence substantiating in-transit damages.

By its express terms, the Memorandum of Understanding is for the purpose of establishing the fact of loss or damage in transit in general and is not, as the USMC suggests, limited in application to claims for damage to household goods. Also, by the Memorandum's terms, loss or damage not discovered within 45 days of delivery is presumed not to have occurred in the carrier's possession in the absence of contrary evidence. The USMC has not presented any contrary evidence.

Since the USMC has not shown that the irreparable damage occurred in transit, CVL is entitled to refund of the freight charges collected by the USMC from CVL as unearned.

[B-215313]

Contracts—Negotiation—Offers or Proposals—Evaluation—Basis for Evaluation—Undisclosed

When telex request for prices for movement of military air cargo does not indicate how prices will be evaluated, protester is not free to make assumptions as to method that will be used. Rather, it has a duty either to inquire or to file a bid protest before submitting its prices.

Contracts—Protests—Moot, Academic, Etc. Questions—Future Procurements

General Accounting Office Bid Protest Procedures are intended to resolve questions concerning the award or proposed award of particular contracts, and allegation that evaluation criteria in future solicitations may unduly restrict competition is premature.

Matter of: Southern Air Transport, December 7, 1984:

Southern Air Transport, Inc. protests the Air Force's award of a contract for movement of military air cargo by Hercules L-100 aircraft. The firm alleges that the evaluation of prices by a method announced after their submission resulted in an improper award to Transamerica Airlines, Inc.

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

The protester and Transamerica were the only two vendors solicited by telex on April 9, 1984. Each was advised that Headquarters, Military Airlift Command, Scott Air Force Base, Illinois, required varying amounts of cargo, expressed in tons per month, to be moved on specified international routes and dates between June 1 and September 30, 1984. A total of 138 trips on four different routes was involved. The telex stated "Please submit information on available capability and estimated cost. Also need pallet position for each L-100 series [aircraft]."

The following is an example of one of the line items in the telex:

Routing	No. Tons	Month/Dates JUNE
KCHS-MHCG-MPHO-MHCG-KCHS [1]	195	1-4-6-8-11-13-15-18-20-22-25-27-29

Southern Air Transport indicates that it found the request unusual because this was the first time that Military Airlift Command had not specifically required L-100-30 aircraft. Representatives of the firm state that before submitting their offer, they questioned the Air Force and were told that either L-100-20 or L-100-30 aircraft would be acceptable. Each has 23 tons available capac-

[1] According to Southern Air Transport, this route is from Charleston, South Carolina, to Comayagua, Honduras, to Howard Air Force Base, Panama Canal Zone, and return. The other routes were from Charleston to Bermuda and return and from Norfolk, Virginia to either Guantanamo Bay, Cuba, or Roosevelt Roads, Puerto Rico, and return, with an outbound stop at the alternate destination.

ity; however, the L-100-20 can carry only 7 pallets, while the L-100-30 is configured to carry 8 pallets.[2]

On April 17, 1984, by telex, Southern Air Transport, which proposed to use a mix of L-100-20s and L-100-30s, and Transamerica, which proposed using all L-100-30s, submitted prices. On either a per-trip basis or a package basis, *i.e.*, a single price if all 138 trips were awarded to one firm, Southern Air Transport's price was low:

Route	Price Per Trip	
	Southern Air Transport	Transamerica
Charleston—Howard Air Force Base (52 trips)	$33,664	$37,464
Charleston—Bermuda (34 trips)	$15,581	$17,846.30
Norfolk—Cuba (34 trips)	$26,608	$29,067.50
Norfolk—Puerto Rico (18 trips)	$26,608	$29,067.50
	Package Price	
All Routes (138 trips)	$3,610,243	$3,697,182.20

The contracting officer states that in light of the different capacities of the L-100-20 and L-100-30, he sought to evaluate proposals in a fair manner that would reflect the best airlift/per dollar cost. He further states that after submission of prices he learned that the weight of the cargo to be loaded onto each pallet would average less than their 4,000 pound capacity. He therefore decided to evaluate prices on a cost-per-pallet basis, rather than according to cost per ton. He states that he advised offerors of this by telephone and that Southern Air Transport did not object. (Southern Air Transport, on the other hand, denies that it knew of the evaluation method until after the award to Transamerica.)

The contracting officer made the following calculations:

Offeror	Package Price	Pallet Miles (miles x Pallets x Trips)	Cost per Pallet Mile
Southern Air Transport	$3,610,230	3,524,403	$1.0244
Transamerica	$3,697,182	3,693,408	$1.0010

[2] A pallet is a portable platform, designed to be handled by forklift truck, on which cargo is loaded.

Thus, on a cost-per-pallet basis, Transamerica's price was low, and on April 24, 1984, the Air Force awarded it the contract.

Southern Air Transport protested, first orally and then in writing, to the Air Force, but on May 11, 1984, the agency advised it that evaluation based on pallets was a fair and appropriate method of comparing the two types of aircraft offered. In the future, the Air Force stated, all requests for L-100 service would specify the evaluation method to be used. Southern Air Transport's protest to our Office followed. The firm alleges that the award violates statutes and regulations that generally require procurement by formal advertising and award to the low, responsive, responsible bidder.

GAO Analysis:

First, despite the contracting officer's repeated use of terms such as "bid," the Air Force states that this was a negotiated procurement. However, in most cases neither the formal advertising rules that Southern Air Transport cites nor the procedures for negotiation permit a contracting agency not to specify any method of evaluation and then inform offerors, after proposal submission, of the evaluation scheme that will be used without giving them an opportunity to revise their proposals. See *Parker-Kirlin, Joint Venture,* B-213667, June 12, 1984, 84-1 CPD ¶ 621. Here, the Air Force did not announce any method of evaluation until after proposals had been submitted, and the contracting officer apparently assumed that because Southern Air Transport did not ask to revise its prices, an opportunity to do so need not be announced.

This does not mean, however, that we sustain the protest. Southern Air Transport must accept some responsibility for the situation in which it found itself following the award to Transamerica. Given the unusual telex solicitation, we do not believe Southern Air Transport was free to assume that the low offeror would be determined by a comparison of proposed prices per trip or for all trips. Further, since the omission of evaluation criteria was a defect that was apparent on the face of the solicitation, it normally should have been protested either to the Air Force or to our Office before the due date for submission of proposals. (Another problem here is that the telex did not specify any due date.) Nevertheless, we believe Southern Air Transport had a duty either to inquire as to how offers would be evaluated or to file a bid protest before submitting its prices to the Air Force. *See Wilson & Hayes, Inc.,* B-206286, Feb. 28, 1983, 83-1 CPD ¶ 191.

The firm also protests that if the Air Force evaluates future offers on a per-pallet basis, it will in effect be establishing a requirement that can only be met by Transamerica with its L-100-30s. Our Bid Protest Procedures, 4 C.F.R. Part 21 (1984), are intended to resolve questions concerning the award or proposed award of particular contracts. If the Air Force issues a solicitation with such evaluation criteria, and if Southern Air Transport believes they are

unduly restrictive, we would entertain a timely protest. At present, however, a protest on this basis is premature. *D.J. Findley, Inc.*, B-214310, Apr. 12, 1984, 84-1 CPD ¶ 413. We therefore dismiss this aspect of the protest.

Although Southern Air Transport has not complained of them, we find other serious legal deficiencies in this procurement. We are concerned, among other things, with the following:

—failure of the solicitation to define the type of proposed contract and to spell out its terms and conditions;
—lack of information as to whether the tons of cargo to be transported would be divided evenly among trips;
—failure to advise offerors that they might revise their prices when they were advised of the proposed method of evaluation; and
—qualification of both initial offers (Southern Air Transport's was contingent upon aircraft availability, and Transamerica's upon the government's providing war risk insurance when and if Honduras was declared a war risk zone by underwriters).

The Air Force has supplied us with copies of existing contracts for movement of military air cargo held by Transamerica and Southern Air Transport. These were negotiated under the defense mobilization base authority contained in 10 U.S.C. § 2304(A)(16) (1982). Under these contracts, each airline is guaranteed a certain percentage of airlift requirements for both passengers and cargo; each agrees to provide required services at "class rates," negotiated using a formula for cost analysis originally developed by the Civil Aeronautics Board. Particular flights are scheduled by issuance of services orders, and the contracts permit the Air Force to reroute, reschedule, or cancel flights on short notice without penalty under certain conditions.

The Deputy for Contracting and Acquisitions, Military Airlift Command, Scott Air Force Base, has advised us by telephone that since there are no "class rates" for the routes covered by the protest, the Air Force intended to conduct a price competition and then either to issue a service order under one of the existing contracts or to incorporate its terms and conditions in a new one.[3]

It is impossible to establish this from the telex solicitation, which nowhere refers to the existing contracts. Much of the other missing information may have been understood by the Air Force and the offerors as a result of their previous course of dealing or because certain practices are common in the military airlift trade. We are not aware, however, of any statute or regulation that permits the Air Force to obtain airlift services or to solicit prices on as vague a basis as this.

[3] After making the award to Transamerica, the Air Force actually did issue a service order under the firm's existing contract, No. F11626-83-C-0037.

By letter of today, we are advising the Secretary of the Air Force of our concerns, so that future procurements will be conducted in a manner that will meet requirements for full and free competition and permit offerors to calculate their prices intelligently and on an equal basis.

The protest is denied in part and dismissed in part.

[B-215493, B-215493.2]

Contracts—Protests—Interested Party Requirement—Potential Contractors, Etc. Not Submitting Bids, Etc.

Firms that did not submit offers or had their offers found technically unacceptable are interested parties to pursue timely protests against allegedly unduly restrictive specifications that prevented them from competing or from having their offered items found acceptable.

Equipment—Replacement—Trade-in Allowances

Where agency seeks to acquire new items and plans to solicit trade-in allowances for the items being replaced, the agency must solicit offers for the old items on an exchange (trade-in) basis and/or a cash basis, unless circumstances indicate that permitting both types of offers will not result in a better price than allowing one type.

Contracts—Negotiation—Offers or Proposals—Evaluation—Life-Cycle Costing

Solicitation's listed method for evaluating the residual-value element of typewriters' life cycle costs, by surveying sellers of used typewriters to determine the current trade-in value of models and then discounting that amount to represent a reduction in value for each year of the machines' useful lives, is reasonable.

Contracts—Negotiation—Requests for Proposals—Specifications—Restrictive—Parts, Etc. Procurement

General Services Administration's decision to limit its Federal Supply Service requirements contracts for typewriters to models with 15-inch carriages, based on anticipated savings from efficiency of acquisition and allowing suppliers to realize the economies of scale and larger production runs, is not a proper reason to restrict competition similarly in other typewriter procurements where there is no evidence that anticipated savings from standardization would not be offset by lower prices obtained through competition and other models would meet the user agency's needs.

Contracts—Negotiation—Requests for Proposals—Specifications—Restrictive—Undue Restriction Not Established

Decision to limit procurement of typewriters to models that previously had undergone a lengthy life-cycle-cost (LCC) analysis was reasonable where the procurement's urgency did not permit an LCC analysis of other models.

Matter of: Canon U.S.A. Inc. and Swintec Corporation, December 7, 1984:

Canon U.S.A., Inc. and Swintec Corporation protest that General Services Administration (GSA) solicitation No. FGE-D3-75306-N-6-12-84, requesting proposals to supply 600 electric single-element typewriters for the Department of Defense Dependent Schools

(Schools) in West Germany, unduly restricts competition and unfairly favors an award to International Business Machines Corporation (IBM). Both protesters objects to the solicitation's provision for the evaluation of a trade-in allowance for the government's old typewriters, because the old equipment consists of 185 IBM typewriters for which IBM allegedly has more use than do the protesters. Both protesters also challenge the methodology set forth in the solicitation for evaluating life cycle costs, particularly the typewriters' residual values, since IBM's machines have significantly higher residual values than any of its competitors' machines. In addition, Swintec complains that the solicitation unreasonably restricts competition to offers of typewriters with a minimum carriage length of 15 inches, since the solicitation limits eligibility for award to offers of the 15-inch machines that GSA has evaluated previously in its Life Cycle Costing (LCC) Qualification Program.

We sustain the protest in part and deny it in part.

I. Procedural Issue—Interested Parties

Initially, GSA has questioned whether Canon and Swintec meet our Bid Protest Procedures' requirement that a protester be an "interested party" in order to have its protest considered. 4 C.F.R. § 21.2(a) (1984).

GSA maintains that neither protester has an interest in the award. In Canon's case, the firm, after filing its protest, did not submit an offer when GSA proceeded with the procurement in the face of the protest because of the Schools' need to have the typewriters when the Schools opened in August 1984. (A contract was awarded to IBM.) Regarding Swintec, GSA points out that the procurement effectively was limited to offerors of typewriters evaluated under the LCC Qualification Program, and Swintec does not offer such a product.

Both protesters contend, however, that their protests challenge allegedly defective and unduly restrictive specifications that precluded them from competing or from consideration for award, and that their interest lies in an opportunity to compete under appropriately amended specifications.

We have recognized that a nonbidding party, who would be a potential competitor under a solicitation purged of the allegedly undue restrictions, is an interested party for the purpose of our review. *E.g., Deere & Company* B-212203, Oct. 12, 1983, 83-2 CPD ¶ 456. That clearly is the situation here, and the fact that GSA already awarded a contract based on a public exigency does not defeat the complainants' interest in having their protests resolved. We therefore will proceed to consider the protests' merits.

II. Trade-In Allowance

The solicitation provided separate line items for offers to acquire the Schools' old typewriters on the basis of an exchange or "trade-

in" allowance that GSA would deduct from the offered price to supply the new models. Canon complains that GSA's evaluation of trade-in allowances gave IBM an unfair advantage since all the old typewriters were IBM machines. The protester alleges that IBM maintains its own network of dealers of used IBM typewriters, and thus enjoys, among suppliers of new typewriter models, a "unique ability to economically use or dispose of them and could quote much higher values to GSA." In this respect, both GSA and IBM aver that there exists a sizeable third-party market of used-typewriter dealers for whom the Schools' old typewriters have substantial value. IBM suggests that anyone could resell the used typewriters to these dealers at the same value as the used machines represent to IBM.

Even assuming Canon is correct that IBM had an advantage for the stated reason, the government has no obligation to eliminate a competitive advantage that a firm may enjoy because of its own particular circumstances unless such advantage results from a preference or unfair action by the contracting agency. *E.g., ADC Ltd., Inc.*, B-211117.3, Oct. 24, 1983, 83-2 CPD ¶ 478. There is no suggestion in the record that IBM's advantage resulted from any unfair government action. Moreover, the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 481(c) (1982), authorizes exchange allowances to be applied to the replacement equipment's cost. *Mid-Atlantic Industries, Inc.* B-181146, Nov. 21, 1974, 74-2 CPD ¶ 275

Nevertheless, where an agency contemplates considering offers for the government's old equipment in conjunction with an acquisition of new equipment, we question whether it is fair or even in the government's best interest to limit offers for the old equipment to firms also offering to supply the new equipment, if there exists a third-party market for the old equipment that might be willing to offer more on a cash basis than the government could have obtained from any exchange allowance. In this case, if GSA had made the Schools' old typewriters available to any potential purchaser on a cash basis, as well as on an exchange basis, a used-typewriter dealer might have offered more for the old machines than IBM did in its trade-in allowance. Then, GSA could have sold the old equipment to the used typewriter dealer while acquiring the new typewriters at the lowest offered price without regard to any offered trade-in allowance, and realized a savings.

In fact, though the parties have not addressed this point, GSA's own regulations promulgated under the authority of 40 U.S.C. § 481(c) generally appear to require an agency to consider proceeding in this manner. Those regulations require that the contracting agency solicit bids for the property being replaced on a cash basis and/or an exchange basis unless recent solicitation for identical items on both bases has produced only one type of bid, indicating the futility of soliciting the other type, or prior solicitation on one

basis has proven clearly ineffective in reducing the cost of the acquisition. Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-46.402 (1983). The objective of this requirement is to assure that the government obtains the maximum return for the property to be sold or exchanged. *Id.;* 45 Comp. Gen. 671 (1966).

The record in this case does not include any statement from GSA or any other evidence to explain why the solicitation did not permit offers for the old typewriters on a cash basis. In light of the regulations requiring the agency to solicit offers on a cash and/or exchange basis unless there exist circumstances showing little likelihood that permitting both types of offers will benefit the government, the record fails to demonstrate a proper basis for the procurement method used. Since the contract already has been awarded and, as we have been advised by GSA, the typewriters delivered, no corrective action is feasible in this case. We nevertheless are recommending to the Administrator of GSA that he take appropriate action to prevent a recurrence of this problem in the future.

Canon points out that the regulations also require the contracting agency to make a written administrative determination to apply the exchange allowance to the acquisition, FPMR, 41 C.F.R. § 101-46.202(a)(4), and alleges that GSA failed to do so. We believe, however, that this requirement is procedural in nature, such that the agency's failure to follow it would not prejudice any offeror nor affect the validity of an award.

III. LCC Methodology and Residual Value

The crux of the protester's challenge to the solicitation's LCC provisions is that the methodology for computing and evaluating residual value, after an assumed useful life of 10 years, is unreasonable. The provisions basically credit an offeror with the current market trade-in or surplus-sale value of its models, ascertained through a survey of companies that sell large numbers of used typewriters, and discount that amount to reflect a compounded yearly 10-percent reduction in value over a 10-year period. The protesters argue that an estimate of a machine's residual value after 10 years that is based on current market values is unreasonable and cannot bear any reasonable relationship to the machine's actual value in 10 years. In this respect, both protesters contend that the electrically powered mechanical typewriters involved in this procurement will have practically no value in 10 years because of the availability of more sophisticated electronic machines with such features as automatic correcting memory.

We previously have rejected an objection to a similar GSA methodology—based principally on industry publications—for evaluating typewriters' residual values. See *Remington Rand Corp., et al.,* B-204084, *et al.,* May 3, 1982, 82-1 CPD ¶ 408, at pages 12-13. We held that residual value simply comprises a cost element that logically cannot be ignored despite the observed difficulty in determin-

ing the precise value of each model, and we found that GSA had a reasonable, objective approach to the task. GSA's current method for determining residual value is based on current value derived by survey rather than on industry publications, which we note do not provide actual residual values for all the eligible models since not all of them have been available for 10 years. We believe the current method is at least as objective and reasonable as the method discussed in *Remington Rand Corp., supra.* We therefore deny the portions of the protest concerning the method for calculating residual value. Regarding the allegedly impending obsolesence of electrically powered mechanical typewriters, we point out that electronic typewriters are available today, and there still exists a market for other typewriters. The protesters have failed to demonstrate that such will not be the case in the future.

Cannon also complains that the solicitation's provisions for projecting residual value based on current market value are inconsistent with what GSA said it was going to do when it started the LCC Qualification Program. Since the current solicitation announced this methodology for the purpose of this procurement, however, we do not believe that any of GSA's alleged previous representations provides a valid basis for protest.

IV. Allegedly Unduly Restrictive Requirements

Swintec complains that by limiting this procurement to models that had been evaluated in the LCC Qualification Program, which itself was limited to machines with a minimum carriage length of 15 inches, the solicitation precluded Swintec from offering its model 1146CM, which apparently has a carriage length of 14¾ inches.

GSA, in responding to the protest, does not contend that the Schools' actual needs are for machines with carriage lengths greater than 14¾ inches. Rather, the agency's report explains that in September 1982 the agency decided, for the purpose of making awards of Federal Supply Schedule (FSS) contracts covering federal agencies' requirements for electric single-element typewriters, to standardize future procurements under the LCC Qualifications Program. The reason for standardization was to increase the efficiency of acquisition, simplify the product line, and promote better prices by enabling successful suppliers to realize the economies of scale and larger production runs.

We see no basis to object to GSA's decision to standardize for purposes of FSS contract awards. We believe it is logical that by standardizing the government's requirements, to the extent possible, GSA could reduce the number of typewriter contractors and anticipate receiving lower-priced offers based on the larger estimated requirements for the standardized typewriters.

The reason behind standardizing carriage size for purposes of the FSS contract, however, does not support GSA's action here, since

the purchase is not from an FSS contract. The fact is that GSA could not fulfill the Schools' need for 600 machines by placing an order against the FSS contract because the dollar amount involved exceeded the contract's maximum order limitation. This procurement therefore was separate and distinct from any requirements contract or any other procurement, and we do not understand how GSA's explained benefits deriving from standardization apply to this case. We note in this respect that GSA does not argue that standardization was necessary to meet the government's functional requirements, but only to obtain lower prices under a single FSS requirements contract.

The result of GSA's action here thus was to limit the competition to models that previously had undergone LCC testing without regard to the fact that the group of models that had done so was not necessarily coextensive with the group of models that would satisfy the government's functional requirements in this procurement. Models that might have been able to meet the Schools' needs, but never had been accepted previously for LCC testing because of their shorter carriage lengths, were thus prevented from any opportunity to qualify for this procurement. There is no evidence that savings flowing from standardization would not be offset by lower prices obtained through full competition for the 600 typewriters. See *CPT Corporation,* B-211464, June 7, 1984, 84-1 CPD ¶ 606.

The record, however, provides another, and in our view legitimate, reason for limiting this procurement to typewriters that previously had undergone LCC testing. While LCC testing was necessary to assure that the government obtained the least costly typewriters, there was insufficient time to conduct testing prior to the date the Schools needed the typewriters. In this regard, we previously have held that because GSA's confining competition for FSS contracts to typewriters that have undergone LCC testing may well serve a legitimate need of the government, GSA properly may preclude a firm from competing until its model undergoes such testing. See *Remington Rand Corp., et al., supra,* where we did not object to a restriction like the one here. We therefore will not object to GSA's restricting this procurement to LCC-tested models.

We point out, however, that implicit in our holding in *Remington Rand* was recognition not only that the necessary testing was so extensive that, as a practical matter, it could not be performed within the time constraints of the procurement, but that an opportunity to make their products eligible for the procurement was extended to all manufacturers of models that would meet GSA's legitimate needs and were available for testing reasonably in advance of the procurement. We therefore are recommending to the Administrator, by separate letter, that if GSA desires to limit future procurements to offers of models that have undergone LCC testing, the agency should take steps to allow any model capable of

meeting the government's needs an opportunity to undergo LCC testing sufficiently in advance of the upcoming procurements to be eligible for evaluation. Otherwise, to strike a balance between the desirability of LCC testing and the general requirement to maximize competition, the agency should limit its evaluation of LCC factors to those under which all potential offerors have a fair and equal opportunity to offer any model capable of meeting the government's needs.

V. Conclusion

We sustain the protest about the trade-in allowance to the extent that GSA failed to solicit offers for the government's old typewriters on a cash and/or exchange basis. The protesters' challenge to the solicitation's methodology for computing and evaluating residual value is denied. We also deny the portion of Swintec's protest complaining that the solicitation in effect unduly restricted competition to offers of models that had undergone LCC testing and had a minimum carriage length of 15 inches.

[B-214145]

Appropriations—State Department—Official Residence Expenses

Expenditures for hiring extra waiters and busboys to serve at official functions at foreign posts must be charged to the State Department representational allowance appropriation. The allotment for official residence expenses, derived from the lump sum appropriations for salaries and expenses, covers household servants who maintain the official residence. State Department regulations do not appear to include temporary help hired for specific events as household servants.

Appropriations—State Department—Official Residence Expenses

Even if expenses for temporary help could be considered generally to be covered under regulations governing the appropriation allotment for official residence expenses, such expenses should only be paid from the representational allowance appropriation. Long-standing Comptroller General decisions prescribe the use of an appropriation specifically available for a purpose to the exclusion of a more general appropriation that could encompass the same purpose. Moreover, section 454 of the State Department Standardized Regulations forbids the use of official residence expense allotments if there is any other appropriation that covers the same purpose.

Matter of: Appropriations Chargeable with Expenses of Representational Events at Foreign Posts, December 10, 1984:

A Department of the State certifying officer has requested a decision on the proper appropriation to be charged for the expenses of hiring extra waiters and busboys to serve at official parties and other representational events hosted by United States principal representatives serving at foreign posts.

The Department receives an annual line item appropriation for "representation allowances as authorized by section 905 of the For-

eign Service Act of 1980, as amended (22 U.S.C. § 4085)." (*See, e.g.,* its fiscal year 1984 appropriation act, Pub. L. No. 98-166, 97 Stat. 1071, 1093, November 28, 1983.) The Department also receives an annual lump sum appropriation for salaries and expenses for the "administration of foreign affairs," a portion of which has been administratively allotted for "official residence expenses" (ORE). The latter account covers operation and maintenance costs of maintaining a "suitable" official residence and includes the costs of supporting a staff of household servants necessary to maintain the residence. (*See* Standardized Regulations (Government Civilians, Foreign Areas)). According to the certifying officer, the practice in Madrid and at other posts in Spain has been to treat these two appropriations as supplementary. Specifically, when the full amount allotted for household servants has not been expended, the Bureau of European Affairs has informally permitted the posts to charge the extra help needed for special entertaining to the ORE account. The certifying officer contends that this practice is unauthorized. The General Accounting Office agrees with him.

The State Department has issued Standardized Regulations governing the scope of expenditures covered by each of the two appropriations in question. Representational allowances are covered under Chapter 300 of the Regulations (March 4, 1984). Although the hiring of temporary waiters and busboys to provide extra help at specific functions is not mentioned in so many words, the regulations appear to include a broad range of expenditures associated with "entertainment of a protocol nature" or "entertainment undertaken by employees to promote personal relationships necessary to the performance of their official duties." Section 320 a. and b. This is consistent with the underlying legislation (section 905 of the Foreign Service Act of 1980, *supra*), which authorizes a specific appropriation "for official receptions and * * * entertainment and representational expenses * * * to enable the Department and the Service to provide for the proper representation of the United States and its interests."

It is not disputed that the representational allowance appropriation is specifically available for the "extra help" expenses at issue. The question is whether the ORE allotment is equally available for the same purpose.

Chapter 400 of the Standardized Regulations, which deals with "official residence expenses" (ORE), defines the term broadly, and at first reading appears to encompass the cost of hiring extra help for official parties. However, the list of "allowable expenditures" under sections 450-453 (April 29, 1984) is considerably more restricted. The only applicable provision is for "wages and maintenance of household servants" (section 451), and a "household servant" is "a servant employed to perform household duties within the official residence." Section 411(d). Such servants are entitled to "board, lodging, clothing, local transportation, medical and dental

care, social security, and other assessments, gratuities, burial expenses, and so forth, which are required in accordance with local law or custom to be provided by the principal representative in addition to wages." Section 411(e). In this context, it seems apparent to us that the temporary hire of extra waiters and busboys for particular representation functions does not fit the definition of a household servant employed to perform household duties on a regular basis and thus earning the fringe benefits enumerated above.

Even if the ORE regulation could be read more broadly as encompassing temporary held as well as household servants, the European foreign posts are precluded from electing to charge their ORE funds by virtue of section 454 of the regulations. That section prohibits charging any expenditures to the ORE account if they could be "properly borne" by any other appropriation. As mentioned above, there is no dispute that the temporary help expenses could be "properly borne" by the representational allowance appropriation.

This regulatory prohibition is consistent with a long-standing principle that appears in a number of Comptroller General decisions. (*See, e.g.,* 36 Comp. Gen. 526, 528 (1957) and B-202362, March 24, 1981.) We have held that an appropriation made for a specific purpose is available for that purpose to the exclusion of a more general appropriation that might also include that purpose. Applying this principle to the instant case, there is no question that the representational appropriation is specifically available to cover the expenses of representational functions. Compensation of waiters and busboys hired only for particular representational functions is clearly included. On the other hand, it is much less clear that these expenses are covered, if at all, under the lump sum appropriation for salaries and expenses from which the ORE allotment is derived.

Thus, under standard appropriation interpretations, in addition to the Department regulations, we find that only the representational allowances appropriation may be charged for the costs of hiring extra waiters and busboys to serve at representational functions. The certifying officer should make the appropriate accounting adjustments if he has not already done so.

[B-214718]

Accountable Officers—Relief—Physical Losses, Etc., of Funds, Vouchers, Etc.

Relief is denied to Secret Service Agent whose carry-on luggage containing $1,000 cash advance was stolen when left unattended in crowded Bogota, Colombia, airport. Advanced was for purchasing counterfeit U.S. currency, and therefore was of the nature anticipated in 61 Comp. Gen. 313 (1982). However, in this case, agent's negligence in leaving bag unattended in a public place was the proximate cause of the loss. Presence of armed police escort standing nearby does not absolve agent of duty to personally safeguard Government funds entrusted to his care. B-210507, April 4, 1983, distinguished.

To the Fiscal Assistant Secretary, Department of the Treasury, December 14, 1984:

Your letter of March 2, 1984, requested relief for Secret Service Special Agent Marino Radillo. Agent Radillo was the accountable officer for a $1000 cash advance made for the purpose of purchasing counterfeit U.S. currency in Colombia. On September 3, 1982, the funds were stolen in the Bogota, Colombia airport along with Agent Radillo's carry-on luggage. An investigation by the Secret Service Special Investigation and Security Division found that Agent Radillo was careless with the funds, but ruled out negligence on the ground that Agent Radillo was armed and had a police escort. We think Agent Radillo's careless handling of the bag and its contents allow the theft to take place. His negligence being the proximate cause of the loss, we must deny relief.

The facts stated in your submission, plus additional facts provided informally by Mr. Balkenbush of your office, are as follows. Agent Radillo was advanced $1000 cash to purchase counterfeit U.S. currency in Cali, Colombia. Agent Radillo and his partner had $2000 collectively which they had split between them to minimize the loss in case of theft. At the time of the loss Agent Radillo was carrying the money in a small shoulder bag. At the airport in Bogota, Agent Radillo needed to make ticket arrangements for himself and his party to continue to Cali. The airport was very crowded, and Agent Radillo stepped some distance away from his partner and their Colombian police escort to approach the Avianca ticket counter and conduct his business. Once at the ticket desk, he put his shoulder bag down on the counter near where he was standing and directed his attention to the ticket transaction. It took an estimated 2 to 5 minutes to completely secure the tickets. On completion of his business, Agent Radillo turned to pick up his bag. By then, it was gone.

Our decision in 61 Comp. Gen. 313 (1982) allows law enforcement agencies to write off as operating expenses certain thefts of funds sustained while conducting criminal investigations. This treatment dispenses with the need to seek relief for the accountable officers in such cases. However, that decision applies only when the funds are actually being used for the purposes for which they were entrusted (*i.e.*, paying an informant, purchasing controlled substances). *Id.* The decision does not apply to funds stolen while on the way to the location where the actual investigatory work is to take place. *Id* at 316, B-210507, April 4, 1983. Under such circumstances the standard relief analysis applies.

Relief may be granted under 31 U.S.C. § 3527 if the Comptroller General agrees with the agency head's decision that the accountable officer was carrying out official duties when the loss occurred and that the accountable officer did not cause the loss through fault or negligence.

Agent Radillo was performing official duties while en route to Cali. However, we think his admittedly careless actions in placing the bag on the counter and directing his full attention elsewhere for 2 to 5 minutes allowed the bag to be stolen. We think Agent Radillo was negligent and that his negligence was the proximate cause of the loss because his inattention gave the thief a clear opportunity to steal the bag and the funds.

We feel it is possible to distinguish this case from B-210507, cited above, on the basis of the length of time the bag was unattended and the reasonableness of the conduct. In the earlier case, we relieved a Drug Enforcement Administration agent whose briefcase containing $2000 to pay an informant was stolen when he set it down to remove his coat in the Sao Paolo, Brazil airport. That briefcase was out of the agent's control for only 15 to 20 seconds while he performed a reasonable task which he could not easily accomplish while holding the briefcase. Here, in contrast, the bag was left in plain sight for several minutes and there was no apparent reason why it could not have been better safeguarded while the ticket arrangements were being taken care of.

Further, in the earlier case a Board of Inquiry had completely exonerated the agent, while in this case the Investigation and Security Division found that Agent Radillo handled the funds carelessly.

Finally, we do not agree that Agent Radillo should be relieved solely because he was armed and had a police escort. As stated above Agent Radillo was at some distance from his escort in a crowded airport at the time of the theft, effectively negating any security they might have provided. Even if they had been close by, however, it remains incumbent on an accountable officer to devote his full personal attention to the physical security of the Government funds entrusted to his care.

Under our decisions, an accountable officer is personally liable for a loss of Government funds due to theft if the exercise of due care on his part would have prevented the loss. *See* B-188733, March 29, 1979, affirmed on reconsideration, January 17, 1980; and B-71445, June 20, 1949. If Agent Radillo had kept the bag under his immediate control, or entrusted it to his fellow agent while he made ticket arrangements, this theft would not have occurred. Accordingly, we deny relief.

[B-215128]

Debt Collections—Debt Collection Act of 1982—Applicability

Sections 5 and 10 of the Debt Collection Act of 1982, codified at 5 U.S.C. 5514, and 31 U.S.C. 3716 (1982), respectively, provide generalized authority to take administrative offset to collect debts owed to the United States. Their passage did not impliedly repeal 5 U.S.C 5522, 5705, or 5724 (1982), or other similar preexisting statutes which authorize offset in particular situations. This is because a statute dealing with a narrow, precise, and specific subject is not submerged or impliedly repealed

by a later-enacted statute covering a more generalized spectrum, unless those statutes are completely irreconcilable.

Debt Collections—Debt Collection Act of 1982—Applicability

Section 5 of the Debt Collection Act of 1982, 5 U.S.C. 5514, as implemented in 49 Fed. Reg. 27470-75 (1984) (to be codified in 5 C.F.R. 550.1101 through 550.1106), authorizes and specifies the procedures that govern all salary offsets which are not expressly authorized or required by other more specific statutes (such as 5 U.S.C. 5522, 5705, and 5724). Any procedures not specified in that statute and its implementing regulations should be consistent with the provisions of the Federal Claims Collection Standards, 49 Fed. Reg. 8898-8905 (1984) (to be codified in 4 C.F.R. ch. II).

Debt Collections—Debt Collection Act of 1982—Applicability

Except as provided in section 101.4 of the Federal Claims Collection Standards (FCCS), when taking administrative offset under 5 U.S.C. 5522, 5705, or 5724, or other similar statutes, or the common law, agencies should follow the procedures specified in section 10 of the Debt Collection Act of 1982, 31 U.S.C. 3716 (1982), as implemented by section 102.3 of the FCCS, 49 Fed. Reg. 8889, 8898-99 (1984) (to be codified in 4 C.F.R. ch. II).

Matter of: Offset under statutes other than Debt Collection Act of 1982, December 14, 1984:

The Chief Counsel of the Internal Revenue Service has requested our opinion on the procedures to be followed when collecting debts by administrative offset under statutory authority other than that contained in the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749, 5 U.S.C. 5514 note. In particular, the Chief Counsel inquired about administrative offset authority contained in 5 U.S.C. §§ 5522, 5705, and 5724. The question arises because sections 5 and 10 of the Debt Collection Act of 1982 (codified at 5 U.S.C. § 5514 and 31 U.S.C. § 3716 (1982), respectively) mandate specific, yet differing, offset procedures. Most other statutes, including the three cited above, do not address what, if any procedures must be followed when taking offset under their authority.

For the reasons given below, we conclude that when effecting offset under a statute which does not provide its own procedures, including 5 U.S.C. §§ 5522, 5705, and 5724, agencies should comply with the procedures prescribed by section 10 of the Debt Collection Act of 1982, as implemented by section 102.3 of the Federal Claims Collection Standards (FCCS), 4 C.F.R. ch. II, as amended, 49 Fed. Reg. 8889, 8898-99 (Mar. 9, 1984).

The Debt Collection Act of 1982

According to its legislative history, the Debt Collection Act of 1982 (DCA) was intended to "put some teeth into Federal [debt] collection efforts" by giving the Government "the tools it needs to collect those debts, while safguarding the legitimate rights of privacy and due process of debtors." 128 Cong. Rec. S12328 (daily ed. Sept. 27, 1982) (remarks of Sen. Percy). Two sections of the DCA, sections 5 and 10, were concerned with the collection of debts by means of setoff. Section 5 amended 5 U.S.C. § 5514, which authorizes agen-

cies to take offset against the salaries of Federal employees and military members. Previously, section 5514 had been limited to erroneous payments, and did not prescribe any procedural protections.

Section 5 expanded section 5514 by authorizing salary offset to collect "[any] debts which the United States is entitled to be repaid." 5 U.S.C. § 5514(a)(1). According to the legislative history, Congress intended this change to provide the Government with the authority to take salary offset in order to collect "general debts"—that is, *any* debts owed to the United States. *See, e.g.,* S. Rep. No. 378, 97th Cong., 2d Sess. 10-12, 22-24 (1982). At the same time, section 5 imposed a number of procedural requirements upon salary offsets undertaken pursuant to section 5514. 5 U.S.C. § 5514(a)(2). It was explained that "[I]t is imperative * * * that Federal employees be provided their full due process rights in any setoff procedure. Accordingly, [section 5] provides for a series of steps that must be taken prior to any setoff [under it]." S. Rep. No. 378, *supra,* at 12. The Office of Personnel Management (OPM) has promulgated regulations to implement section 5. 49 Fed. Reg. 27470 (July 3, 1984), to be codified at 5 C.F.R. Part 550, Subpart K (hereinafter, "Subpart K").

In addition to section 5, the DCA also addressed administrative offset authority in section 10. This latter section amended the Federal Claims Collection Act of 1966, codified in 31 U.S.C. ch. 37 (1982), to provide that "[a]fter trying to collect [any] claim from a person under [the provisions of the original 1966 act], the head of an executive or legislative agency may collect the claim by administrative offset." 31 U.S.C. § 3716(a).[1] Like section 5, section 10 prescribes certain procedural provisions that are required to be taken prior to offset. *Id.* However, the procedures in section 10 differ from those in section 5. *Compare* 31 U.S.C. § 3716(c) *with* 5 U.S.C. § 5514(a)(2). Section 10 has been implemented by GAO and the Department of Justice in amendments to sections 102.3 and 102.4 of the FCCS, 49 Fed. Reg. at 8898-8899.

Preexisting Offset Statutes

Prior to the enactment of the DCA, many other statutes had been enacted which authorized or required offset against salary or other amounts to be paid by the United States.[2] Among those stat-

[1] The terms "debt" and "claim" have been interpreted to be "synonymous and interchangeable" terms that refer to "any amount of money or property * * * owed to the United States." FCCS § 101.2(a), 49 Fed. Reg. at 8896. *Cf.* 31 U.S.C. § 3701(b).

[2] *E.g.,* 5 U.S.C. §§ 5511(b) (debts owed by employees removed for cause), 5512(a) (setoff against accountable officers), 5513 (setoff to recoup disallowed payments), 5522(a)(1) (setoff to recoup advance payments for evacuations), 5705 (1) and (2) (setoff to recoup travel advances), 5724(f) (setoff to recoup advances for travel and transportation expenses); 37 U.S.C. § 1007 (setoff against Army and Air Force members); 42 U.S.C. §§ 300w-5 (setoff to collect debts owed by states under the Preventive Health Services Block Grant); 300x-5 (setoff to collect debts owed by states under the Alcohol, Drug Abuse, and Mental Health Block Grant).

utes are the three cited by IRS. Under the first, 5 U.S.C. § 5522(a), setoff is authorized to recoup advance payments made to facilitate the evacuation of employees or their families and dependents from places where there is imminent military or other danger to their lives. Setoff may be made "against accrued pay, amount of retirement credit, or other amount due the employee from the Government." 5 U.S.C. § 5522(c)(1). Under the second statute, 5 U.S.C. § 5705, agencies are authorized to make travel advances to employees and to recover unused or misused amounts by "setoff against accrued pay, retirement credit, or other amount due the employee [or by] deduction from an amount due from the United States." The third statute, 5 U.S.C. § 5724, authorizes agencies to pay travel and transportation expenses in connection with permanent changes of station. Subsection 5724(f) provides that "an advance of funds may be made to an employee * * * with the same safeguards required under section 5705 of this title." We have previously interpreted this provision to authorize the use of administrative offset. 58 Comp. Gen. 501, 502 (1979); B-194159, October 30, 1979. None of these three statutes specifies the procedures, if any, that must be followed when taking administrative offset.

Effect of Debt Collection Act on Preexisting Statutes

The first issue to consider is the effect of sections 5 and 10 of the DCA on the various preexisting offset statutes. We begin our analysis with the premise that sections 5522, 5705, and 5724 (as well as the many other statutes which authorize administrative offset with regard to particular types of debts and debtors) have survived the enactment of sections 5 and 10 of the DCA. This premise follows from the well-settled principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged or impliedly repealed by a later-enacted statute covering a more generalized spectrum, unless the intent to do so has been made unmistakably clear. 58 Comp. Gen. 687, 691-92 (1974) (citing *Morton v. Mancari,* 417 U.S. 535, 550-551 (1974)). *Cf., e.g.,* 34 Comp. Gen. 170 (1954) (original enactment of the act codified at 5 U.S.C. § 5514 did not impliedly repeal 5 U.S.C. § 5513). Moreover, as this Office has previously observed:

> An act is not impliedly repealed because of a conflict, inconsistency, or repugnancy between it and a later act unless the conflict, etc., is plain, unavoidable, and irreconcilable, and the two acts cannot be harmonized or both cannot stand, operate, or be given effect at the same time. If it is possible to do so, by any fair and reasonable construction, two seemingly repugnant acts should be harmonized or reconciled so as to permit both to stand and be operative and effective and thereby avoid a repeal of the earlier act by implication. 53 Comp. Gen. 853, 856 (1974).

Under these longstanding rules, we find that the DCA did not impliedly repeal or amend other preexisting offset statutes. This conclusion was implicitly embraced in both Subpart K (which implements section 5) and the FCCS (which implement section 10).

See Subpart K, § 550.1102(b)(1), 49 Fed. Reg. at 27470, 27472; and FCCS, § 102.3(b), 49 Fed. Reg. at 8898, respectively.

Section 5 and the OPM Regulations

Under the definition contained in section 10 of the DCA, the term "administrative offset" means "the withholding of money payable by the United States or held by the United States on behalf of the person to satisfy a debt owed the United States by that person." 96 Stat. at 1755. In promulgating Subpart K, OPM expressly concluded that a salary offset taken pursuant to section 5 is a kind of "administrative offset." Subpart K, § 550.1102(b), 49 Fed. Reg. at 27472. We agree. In common parlance, the terms "salary offset" and "administrative offset" have come to be associated with sections 5 and 10, respectively, of the DCA. More accurately, however, the term "administrative offset" is a general term embracing all offsets accomplished by other than judicial process. Thus, in the sense that it is non-judicial, salary offset under 5 U.S.C. § 5514 is also a form of administrative offset. Similarly, salary offset under statutes other than 5 U.S.C. § 5514 is also a form of administrative offset. Nothing in the legislative history of section 10 suggests the contrary.[3]

In promulgating Subpart K, OPM also concluded that "[b]ecause it is an administrative offset, debt collection procedures for salary offset which are not specified in [section 5] and these [OPM] regulations should be consistent with the provisions of [the] FCCS." Subpart K, § 550.1102(b), 49 Fed. Reg. at 27472. We concur in this conclusion as well. In fact, section 5 specifically provides that "[t]he collection of any amount under [section 5] shall be in accordance with the [FCCS]." 5 U.S.C. § 5514(a)(3). Finally, OPM concluded that "the procedures contained in [Subpart K] do not apply * * * to any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute (*e.g.*, travel advances under 5 U.S.C. 5705 and employee training expenses under 5 U.S.C. 4108)." Subpart K, § 550.1102(b)(1), 49 Fed. Reg. at 27472. With this conclusion we also agree. Since the other salary offset statutes survive the enactment of section 5, and since section 5 does not expressly purport to set the procedures governing offset under those other statutes, we conclude, as did OPM, that section 5 and OPM's implementing regulations do not apply to offsets taken under statutes other than 5 U.S.C. § 5514.

To summarize our conclusions thus far, we find that:

—The Debt Collection Act did not repeal, either expressly or by implication, other preexisting statutes authorizing or mandating offset to collect debts owed to the United States.

[3] *Cf., e.g., Perrin v. United States,* 444 U.S. 37, 42 (1979); 38 Comp. Gen. 812, 813 (1959) (plain meaning rule of statutory construction).

—Salary offset taken under the authority of 5 U.S.C. § 5514 is governed by the procedures contained in that section and OPM's implementing regulations. Any procedures for salary offset under 5 U.S.C. § 5514 that are not specified in that statute or the OPM regulations should be consistent with the provisions of the FCCS.

—The procedures specified in 5 U.S.C. § 5514 and OPM's implementing regulations do not apply to offsets taken under other statutes such as 5 U.S.C. §§ 5522, 5705, or 5724.

Section 10 and the FCCS

We have noted the broad definition of "administrative offset" in section 10, and have established that all non-judicial offsets, including offsets against the salary of Federal employees, are varieties of "administrative offset." Therefore, and since salary offsets under statutes other than 5 U.S.C. § 5514 are not governed by section 5514 or OPM's implementing regulations, it is logical to look to section 10 and its implementing regulations, the FCCS, for relevant procedures.

The plain meaning of the "administrative offset" definition in section 10 clearly suggests that it encompasses offsets taken pursuant to other statutory or common law authority. However, section 10 also specifically provides that it shall not apply in any case in which a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved. 96 Stat. 1755. Consequently, even though offsets taken pursuant to other statutes fall within the definition of administrative offset, it may be argued that, without more, the specific procedural provisions of that section do not apply to the other statutory offsets. As we noted above, section 5 of the DCA specifically provides that offsets taken under its authority must be consistent with the FCCS. The other statutes cited by the Chief Counsel have no similar provision. The FCCS address this concern.

Since 1966, GAO and the Department of Justice have taken the position in the FCCS (based on an express provision in the 1966 act,[4] that nothing in the FCCS is intended to preclude agency disposition of any claim under other applicable statutes and appropriate implementing regulations. In those cases, the laws and implementing regulations which are specifically applicable to the claims collection activities of particular agencies (or particular classes of debts or debtors) take precedence over the FCCS. *E.g.,* FCCS, § 101.4, 31 Fed. Reg. 13381 (Oct. 15, 1966); FCCS § 101.4, 49 Fed. Reg. at 8897. However, the FCCS has also provided since 1966 that "the standards set forth in [the FCCS] should be followed in the disposition of civil claims by the Federal Government * * * where

[4] Federal Claims Collection Act, Pub. L. No. 89-508, § 4, 80 Stat. 309 (1966), 31 U.S. Code 3711 note.

neither the specific statute nor its implementing regulations establish standards governing such matters." *Id. Cf.* 62 Comp. Gen. 489, 494 (1983); 62 Comp. Gen. 599, 602 (1983); 63 Comp. Gen. 10, 11 n.1 (1983).

In accordance with this longstanding principle, the FCCS specifically provide in pertinent part that "[e]xcept as provided in section 101.4 [as quoted above], * * * the standards in this paragraph shall apply to the collection of debts by administrative offset under 31 U.S.C. § 3716, some other statutory authority, or the common law." FCCS, § 102.3(b), 49 Fed. Reg. at 8898.[5] In other words, the FCCS provide that, to the extent that a particular offset statute either specifically addresses the procedures to be followed, or authorizes an agency to specify procedures in its own regulations that are different from the FCCS provisions (and the agency promulgates such regulations), then the inconsistent provisions of the FCCS need not be complied with when taking offset under the other statute and regulations. For example, in 62 Comp. Gen. 489 (1983), we found that the Economic Development Administration (EDA) has independent statutory authority to compromise debts owed to it. Therefore, EDA may legally sell its accounts receivable at a discount, if it so chooses. Nevertheless, we pointed out that, to our knowledge, EDA has not adopted regulations establishing specific standards for collecting or compromising loans through the sale of accounts receivable. Accordingly, we advised EDA that "unless and until EDA adopts regulations establishing definite standards governing the compromise of claims, it should follow the applicable standards and guidelines set forth in the [FCCS]." *Id.* at 494. *Compare* 62 Comp. Gen. 599, 602 (applicability of FCCS to offset under the Social Security Act); *and* 63 Comp. Gen. 10, 11 n.1 (applicability of FCCS to programs and agencies specifically exempted from the DCA).

There is another reason why agencies taking offset under statutes other than section 10 should look to the procedures in section 10 and the implementing FCCS provisions. The fact that a statute or implementing regulation is silent with regard to the need or substance of procedural protections does not necessarily mean that none are required. Based on our review of existing case law, we think there is a high likelihood that the courts would conclude that a debtor-employee is entitled to notice and an opportunity to be heard in some appropriate form. *See,* for example, *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Atwater v. Roudebush,* 452 F. Supp. 622 (N.D. Ill. 1976); *Coleman v. Block,* 580 F. Supp. 194 (D.N.D. 1984). In *Sniadach,* the Supreme Court expressly recognized that a person's entitlement to earned wages is a property right. Thus, the question would seem to be not whether procedural protections are required, but what form they should take.

[5] An earlier version of the FCCS had expressly applied to offsets under 5 U.S.C. §§ 5522, 5705, and 5724. 4 C.F.R. § 102.3(b), 46 Fed. Reg. 39113 (1981).

Again based on our reading of existing case law, it is our opinion that the procedures set out in section 10, as implemented in section 102.3 of the FCCS, are fair and reasonable, and satisfy minimum procedural requirements.[6]

Conclusion

For the foregoing reasons, we find that sections 5 and 10 of the DCA of 1982 did not impliedly repeal 5 U.S.C. §§ 5522, 5705, or 5724, or any other similar statutes. Those statutes continue to provide the legal basis for the taking of administrative offset with regard to the specific types of debts or classes of debtors with which those statutes are concerned. We find further that 5 U.S.C. § 5514 (as amended by section 5 of the DCA and implemented in Subpart K, *supra*) provides the authority for, and specifies the procedures that govern, all salary offsets which are not expressly authorized or required by other more specific statues (such as 5 U.S.C. §§ 5522, 5705, and 5724). We also find that, except as provided in section 101.4 of the FCCS, when taking administrative offset under 5 U.S.C. §§ 5522, 5705, 5724, other similar statutes, or the common law, the procedures specified in section 10 of the DCA, as implemented in section 102.3 or 102.4 of the FCCS, should be followed.[7]

[B-215326]

Sales—Vehicles—Government Owned—Automobiles

GSA proposal to sell used Government vehicles on consignment through private sector auction houses is not objectionable. The proposal does not provide for an improper delegation of the inherent Government function of fee setting since the Government will set a minimum bid price on each vehicle and the final sales price will be determined by the market. The security of Government funds is assured by a contractor guarantee and bonding. 62 Comp. Gen. 339 (B-207731, Apr. 22, 1983), is distinguished.

Matter of: General Services Administration—Sale of Used Government Vehicles by Private Sector Auction Houses, December 14, 1984:

The General Services Administration (GSA) is currently implementing a program to test the feasibility of selling used Government vehicles on consignment through private sector auction houses. The General Counsel of the GSA has requested our opinion on whether the program, as outlined, would impermissibly place Government funds in the custody of the contractor. As will be ex-

[6] *See e.g., Goss v. Lopez*, 419 U.S. 565 (1975); *Mathews v. Eldridge*, 424 U.S. 319 (1976); and *Califano v. Yamaski*, 442 U.S. 682 (1979).

[7] This decision should not be construed as prohibiting a debtor and an agency from contractually agreeing to be bound by some alternative procedures, or to waive procedural protections. *See e.g., D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 185–86 (1972), citing *National Equipment Rental Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964).

plained below, we do not object to the GSA proposal since it does not provide for the improper delegation of an inherent governmental function. Furthermore, the proposal incorporates safeguards which are adequate to assure the security of Government funds.

The submission explains that the Federal Property and Administrative Services Act of 1949, as amended, authorizes the Administrator of General Services to dispose of surplus property. 40 U.S.C. § 484(a) (1982). The proceeds of such sales are available to pay the direct expenses incurred in disposing of the property, and amounts not used for this purpose are covered into the Treasury as miscellaneous receipts. 40 U.S.C. § 485 (1982). The Administrator is also authorized to exchange or sell property and use the proceeds of such transactions to acquire similar items. 40 U.S.C. § 481(c) (1982). GSA notes that virtually all of the vehicles that it sells are classified as either exchange/sale or surplus property.

According to the submission, GSA currently sells approximately 30,000 vehicles each year, primarily by public auction. This figure is expected to rise sharply due to the size of the fleet and a greater turnover of vehicles. At the same time, the number of GSA personnel available to conduct sales is being reduced. Although GSA currently performs most of its vehicle sales function internally, it has, on occasion, contracted with the private sector for transportation, storage, reconditioning, and auctioneering services. It now proposes to purchase these services as a package and to make the contractor, rather than the purchaser, responsible for paying the Government.

GSA indicates that the proposed program will incorporate the following elements:

—Within five days of notification of vehicle availability, the contractor will pick up vehicles and store them on contractor controlled premises.

—The contractor will recondition the vehicles to improve marketability.

—Approximately once a month the contractor will conduct a sale. All cars are to be offered for sale within 45 days of pick up.

—The contractor will collect all money from the sales and turn it over to GSA within three business days. (Three days are allowed in recognition of the banking process.) The contractor will be required to guarantee payment of sales receipts in full regardless of the status of collections.

—A GSA warranted contracting officer will be present at all sales and will execute the documents necessary to transfer title to the purchaser.

—The contractor, in turning over the sale proceeds and a sales report to GSA, will also submit an invoice for services rendered. Payment will be made from the appropriate agency ac-

count and the net proceeds will be remitted to the owning agency or to miscellaneous receipts of the Treasury depending on the status of the vehicle sold.

GSA also indicates that precautions will be taken to protect the Government's financial interests. The contractor will be bonded and will be required to maintain property and liability insurance to indemnify the Government in the event of any property damage or personal injury. In addition, GSA proposes to file Uniform Commercial Code financing statements to protect the Government against possible third-party creditor claims against the contractor.

GSA notes that in a recent decision concerning the collection of recreation user fees by National Forest volunteers, 62 Comp. Gen. 339 (1983), we held that the collection of fees owed the United States was an inherent governmental function which could be performed only by Federal employees. GSA argues that its proposal is distinguishable from the Forest Service plan in that the contractor will assume full responsibility by contract for payment to the Government and will be fully bonded and insured to protect the Government against any potential loss. We agree that our holding in the Forest Service case does not control the outcome in the case currently before us.

Our conclusion that the collection of fees owed the United States was an inherent governmental function was based on OMB Circular No. A-76, March 29, 1979, "Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government." This circular defined governmental functions which were required to be performed in-house "due to a special relationship in executing governmental responsibilities" as including "monetary transactions and entitlements." The Office of Management and Budget has since revised Circular No. A-76 to define a governmental function as:

> [A] * * * function which is so intimately related to the public interest as to mandate performance by Government employees * * * [including] those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government.

OMB Circular No. A-76, August 4, 1983. Although "monetary transactions and entitlements" are still defined as inherently governmental under the revised definition, it appears in the context of this case that only the setting of a minimum fee should be viewed as an inherently governmental function because it requires discretion and judgment. The administrative task of collection, however, need not be so considered, in our view. Since the GSA proposal provides for a minimum bid price set by the Government below which the contractor will not be permitted to sell the vehicle and, as in all auction sales, a final sale price set by the market, we do not think that the GSA proposal will result in the improper delegation of an inherent governmental function. We note by way of analogy that the use of contractors to collect Government debts is specifi-

cally authorized by 31 U.S.C. § 3718 and thus is not classified as inherently governmental by that law.

In our decision concerning the collection of recreation user fees by National Forest volunteers, we also questioned the feasibility of developing controls adequate to assure the security of the funds collected. Although the Forest Service proposed to require that each volunteer obtain a surety bond, we pointed out that such bonds would need to indemnify against both non-negligent and negligent losses by the volunteers and expressed doubts as to whether such coverage could be obtained at a cost which a volunteer would be willing to bear.

GSA will require that the contractor guarantee payment of sales receipts in full regardless of the status of collections. It will also require that the contractor be bonded. Because profit-making contractors rather than volunteers will be involved in the situation discussed here, we do not question the availability of adequate bonding in these circumstances. We think that these measures will adequately assure the security of Government funds.

In conclusion, we do not object to the implementation by GSA of a pilot program to test the feasibility of selling used Government vehicles through private sector auction houses. The GSA proposal would not delegate an inherent governmental function, and incorporates safeguards adequate to assure the security of Government funds.

[B-215965]

Funds—Foreign—Exchange Rate—Repayment of Funds Advanced

Deficiencies in the Library of Congress imprest funds used for foreign currency exchange transactions authorized by 31 U.S.C. 3342(a) and (b) and which are attributable solely to currency devaluations may be restored by the Department of the Treasury as authorized by 31 U.S.C. 3342(c) and implementing regulations. It is not necessary or appropriate for Government agencies to seek relief for a physical loss pursuant to 31 U.S.C. 3527. 61 Comp. Gen. 132 (1981).

Disbursing Officers—Relief—Foreign Currency Devaluation

GAO specifically finds that the term "agency" as used in 31 U.S.C. 3342 includes legislative as well as executive branch agencies of the Federal Government. Therefore, disbursing officers of the Library of Congress whose accounts are diminished solely by foreign currency devaluations in the course of authorized currency exchanges may seek restoration of the accounts from the Department of the Treasury pursuant to 31 U.S.C. 3342. To the extent that they are inconsistent with this decision, B-174244, Dec. 8, 1971, and B-174244, Dec. 17, 1974, will no longer be followed.

To: The Librarian of Congress, December 14, 1984:

This is in reply to your letter of July 30, 1984, requesting relief pursuant to 31 U.S.C. § 82a-1 (now recodified as 31 U.S.C. § 3527 (1982)) for your disbursing officer, Edwin F. Krintz, for a loss in the value of local currencies held in agent cashier accounts in seven countries. The "loss" was discovered when the Library of Congress

reevaluated the funds in these accounts, measured by current conversion rates, prior to effecting a transfer of responsibility for the funds from the disbursing officer to the accounting officer, as requested by the Department of the Treasury.

It is difficult to answer your request precisely because you state that a total loss of $21,833.35 (not including currencies worth $2,450 when advanced, but which have not been evaluated at current rates) is attributable "only [to] the continuing devaluation of local currencies in these countries." However, in your next sentence you state, "The losses reflected in the enclosure do not take into account the possibility of loss by local theft or negligence." To the extent that some portion of the loss can be attributed to local theft or negligence of the accountable officer or his subordinates, your request for relief is appropriate under 31 U.S.C. § 3527, provided that you make the necessary determinations required by the statute and send us sufficient information to make an independent determination that relief is warranted.

On the other hand, to the extent that the deficiency in the value of the account is solely attributable to currency fluctations in the seven countries involved, it is not necessary to seek relief for the disbursing officer in order to restore the dollar value of the account. *See* 61 Comp. Gen. 132, 134-135 (1981). A statute, first enacted in 1944 and later broadened and amended in 1953, specifically authorizes disbursing officers stationed abroad to engage in various currency exchange transactions for official or accommodation purposes. It also establishes a Gains and Deficiencies Account in the Treasury to reconcile gains and losses resulting from the fluctuations in value of foreign currencies. This statute has been codified at 31 U.S.C. § 3342. It permits agencies to offset deficiencies caused by currency devaluation against a gain realized from an increase in value on a fiscal year basis, returning to the Treasury any net gain. It then authorizes the Treasury to adjust the agency's account for any remaining net loss, payable from the Gains and Deficiencies Account.

The Department of the Treasury has issued regulations to implement section 3342, and to provide guidance to disbursing officers throughout the Government. *See* Treasury Circular No. 830, (revised June 16, 1980); Treasury Fiscal Requirements Manual (T.F.R.M.), vol. 1, chap. 4-9000 (TL No. 320). You will find specific procedures for reporting gains and deficiencies to the Treasury Department discussed in 1 T.F.R.M. §§ 4-9070.10, 4-9080. We suggest that you avail yourself of that authority to restore the value of your disbursing officer's account.

We are aware that on several previous occasions we have granted relief to the Library of Congress disbursing officers for similar account deficiencies pursuant to the physical loss relief statute, 31 U.S.C. § 3527. (*See, e.g.*, B-174244, December 8, 1971; B-174244, December 17, 1974.) At those times, we thought that section 3342 was

not applicable to the Library of Congress because it is a legislative branch rather than an executive branch agency. Prior to the 1953 amendments, the statute referred to "executive departments." The amendment substituted the term "agencies" (without, however, defining the scope of the term) and as presently codified, refers to the accounts of "a disbursing official of the United States Government." We note further that section 101 of Title 31, as revised and recodified in 1982, defines the term "agency" as "any department, agency or instrumentality of the United States Government," with an entirely separate definition for the term "executive agencies."

We have been prompted by your request to reconsider our previous position carefully. We now find that the Library of Congress is an "agency" of the United States Government for purposes of section 3342 and is therefore entitled to request the Treasury to restore its accounts for net deficiencies caused by currency devaluations pursuant to that section and its implementing regulations. To the extent that they are inconsistent, our decisions, B-174244, December 17, 1974, and B-174244, December 8, 1971, will no longer be followed.

Nothing in this decision should be read to sanction practices and procedures for handling local currencies that are not consistent with Treasury requirements as set forth in its regulations, cited above. We suggest that appropriate officials of your agency consult with Treasury officials about alternative ways to manage your foreign currency imprest funds so that future losses of this nature can be minimized.

[B-216641]

Leaves of Absence—Civilians on Military Duty—Charging

Civilian employees who are reservists of the uniformed service or are National Guardsmen who perform active duty for training are charged military leave on a calendar-day basis, and there is no authority for allowing the charging of military leave in increments of less than 1 day, regardless of the type of schedule the employee may work.

Matter of: National Guard Technicians—Military Leave, December 17, 1984:

This action is in response to a request for clarification of the provisions for charging of military leave for technician employees of the National Guard.[1] The technicians are currently charged leave on a calendar-day basis, regardless of the number of scheduled hours in their workday.

Military leave for reservists of the uniformed services and National Guardsmen who are civilian employees of the Federal Government or the District of Columbia is provided by statute. See 5

[1] The question was presented to us by Thomas L. Link, Director of Personnel, National Guard Bureau, Departments of the Army and Air Force, Falls Church, Virginia.

U.S.C. § 6323. Reservists and Guardsmen are entitled to leave without loss of pay, time or performance or efficiency rating for up to 15 days in a fiscal year, for training. 5 U.S.C. § 6323(a). If called upon to provide military aid to enforce the law, they are entitled to additional military leave, not to exceed 22 days, for such service. 5 U.S.C. § 6323(b).

The National Guard Bureau asks whether its current procedure of charging military leave for active duty for training, on a calendar-day basis, is proper. We hold that military leave charged pursuant to 5 U.S.C. § 6323(a) is properly being charged on a calendar-day basis.

The question arises from the differences in the charging of leave that occur when the employees working on compressed schedules perform military duty. For example, if a technician who works a 4-day, 10-hour workweek, Tuesday through Friday, goes on military duty for 15 days beginning on a Saturday and ending on Saturday of the second week, he is charged 11 days of military leave. Since the first 3 days and the last Saturday are not his workdays, and are at the beginning and end of his tour, they are not charged as military leave days. However, if a technician worked a 5-day, 8-hour workweek, Monday through Friday, and performed the same military duty, he would be charged 12 days because only the first 2 days of his duty would be nonworkdays at the beginning of his tour.

The work "days" as used in statutes generally has been regarded as referring to "calendar days," in the absence of a clear intent to the contrary. In the applicable statute, 5 U.S.C. § 6323(a), there is no indication that Congress intended "days" to mean anything other than calendar days.

We have consistently held that military leave may not be computed in hourly increments, and it should be computed on a calendar-day basis instead of a workday basis except for the days at the beginning of the active duty period. We are aware of no authority for allowing the charging of military leave in increments of less than 1 day. See 52 Comp. Gen. 471 (1973); 27 Comp. Gen. 245 (1947); and *George McMillian,* B-211249, September 20, 1983.

Until Congress enacts legislation which would allow the charging of military leave on a basis other than a calendar-day basis, the National Guard Bureau should continue its current procedure of charging military leave on a calendar-day basis, despite disparate results based upon the type of schedule worked by the employee.

[B-215118]

Claims—Military Activities—Property Damage, Loss, Etc.—Combat Activities

A claim which arises from an action taken by the Agency for International Development during a time of combat, and not from the noncombat activities of the United

States Armed Forces or its members or civilian employees, is not cognizable under the Military Claims Act, 10 U.S.C. 2733, or the Foreign Claims Act, 10 U.S.C. 2734. However, it would be cognizable under General Accounting Office's general claims settlement authority, 31 U.S.C. 3702, had not the 6 year statute of limitations specified in that section run.

Statutes of Limitation—Claims—Claims Settlement by GAO—Six Years After Date of Accrual

The 6-year period of limitations in 31 U.S.C. 3702 was not tolled for the 4 years that claimant was living in Socialist Republic of Vietnam and may have been prevented from bringing suit. Consistent with the Supreme Court's construction of the Court of Claims 6-year statute of limitations, *Soriano v. United States*, 352 U.S. 270, 273 (1975), this Office should construe the 6-year period of limitation in section 3702 strictly.

Matter of: Claim of Hai Tha Truong, December 18, 1984:

The Agency for International Development (AID) asked this Office for an advance decision about its liability for the $991,126.50 claim of Mr. Hai Tha Truong, a Vietnamese refugee. Of this amount, only a portion ($53,573.40) represents losses directly attributable to alleged actions by the United States. The remainder of the claim is for damages Mr. Truong suffered when his letter of credit, factory, equipment, and materials were seized by the Government of Vietnam and he was forced to pay a fee to leave Vietnam. We do not see any connection between these consequential losses and the actions by the United States of which Mr. Truong complains. Therefore, we limit our consideration to the first part of the claim.

The claim arose from loss of goods carried on two ships, both of which were diverted from Vietnam because of the American evacuation from that country in April 1975. For the reasons given below, we find that the claim is barred by the statutes of limitations in the various laws that could form a basis for Mr. Truong's claim. Accordingly, the claim is denied.

A. Background

According to AID, Mr. Truong's claim arose from his participation in the Commodity Import Program, a program established by grant agreement between the United States and the former Government of Vietnam. AID informs us that under that program, importers, such as Mr. Truong, put down 25 percent of the purchase price in Vietnamese piasters with the Central Bank of Vietnam for goods to be imported into that country. The bank then would loan the other 75 percent to the importer who, in turn, would establish a letter of credit for payment for the goods. Correspondingly, in the United States, AID provided complete financing in dolllars to the supplier of the goods by depositing funds in an American bank. After the goods were shipped, the supplier was paid by the bank. The monies deposited by Mr. Truong were put into a special account pursuant to section 609 of the Foreign Assistance Act, 22

U.S.C. § 2359. The money was used for United States and Vietnamese government programs.

Based on the material presented, it appears that Mr. Truong ordered a quantity of acetate filament yarn and three tricot knitting machines at a cost of some $50,000. These goods were shipped from the United States to South Vietnam on two ships. However, due to the American evacuation both ships were diverted from Saigon in April 1975. AID states that in accordance with the grant agreement and the procedures under the Commodity Import Program, the goods were sold at auction either in Malaysia or Indonesia and the proceeds were deposited into the Treasury as miscellaneous receipts.

Mr. Truong remained in the Socialist Republic of Vietnam until early 1979. He states that at that time he was allowed to purchase the right for himself and his family to immigrate to Indonesia at a price of $40,000, and that he reached Indonesia in June 1979. It appears that he immigrated to Canada a year later where he now is a permanent resident.

By letter of December 28, 1982, Mr. Truong informed Congressman Peter J. Rodino of his claim. Soon thereafter, Mr. Rodino referred the claim to the Secretary of the Army who, in turn, referred it to the Navy as that department had been assigned single service responsiblility for processing claims against the United States for loss or damage to property in Vietnam. The claim, originally for over a million dollars, sought not only compensation for the yarn, the knitting machines and the related shipping charges, but also for the confiscation of Mr. Truong's letter of credit and his factory, equipment and materials, as well as his $40,000 emigration expense.

The Navy viewed the Military and Foreign Claims Acts, 10 U.S.C. §§ 2733, 2734, as possible bases for the claim. Nevertheless, the Navy suggested that the losses were not compensable under either Act since (1) the 2-year statute of limitations in both appeared to bar the claim, and (2) the losses did not appear to have been sustained incident to the noncombat activities of the United States Armed Forces. The Navy then forwarded the claim to AID on the basis that it arose from a commodity credit transaction. Subsequently, in May 1984, AID submitted the claim to us for an advance decision. On September 10, 1984, AID agreed that we would decide the claim. Aside from the statute of limitations issue, in its submission to us, AID presented numerous substantive arguments essentially maintaining that Mr. Truong's participation in the Commodity Import Program precludes his recovering any money for the lost yarn and sewing machines.

B. Legal Discussion

Mr. Truong asserts his claim under both the Military and Foreign Claims Acts. Assuming arguendo that the 2-year statutes of limitations in those acts were tolled until Mr. Truong reached Canada in June 1980, his filing a claim in late 1982 or early 1983 still would have exceeded the 2-year period allowed by those acts for filing claims. In any event, as suggested by the Navy, Mr. Truong's claim is not cognizable under either of those statutes. Both cover loss of personal property caused by the noncombat activities of the armed forces or by a member or civilian employee of the armed forces. *Id.* §§ 2733(a), 2734(a); *see* S. Rep. No. 243, 78th Cong., 1st Sess. 2 (1943); H. Rep. No. 312, 78th Cong., 1st Sess. 4 (1943). In this instance, the loss occurred as a result of AID rather than the armed forces diverting ships from Vietnam.

Assuming, therefore, that neither the Military Claims Act nor the Foreign Claims Act applies, Mr. Truong's claim would be cognizable under this Office's authority to settle claims against the United States, 31 U.S.C. § 3702(a). That raises the issue of whether his claim would be barred by the 6-year period of limitation set forth in section 3702. The issue turns on whether the statute ran or was tolled during the 4-year period that Mr. Truong lived in the Socialist Republic of Vietnam—April 1975 to early 1979.

Section 3702 of title 31 requires that a claim "be received by the Comptroller General within 6 years after the claim accrues except—(A) as provided in this chapter or another law * * *." *Id.* § 3702(b)(1). It allows an extension of the 6-year period for claims of members of the armed forces that accrue during war or within 5 years before the war begins, or up to 5 years after peace is established. *Id.* § 3702(b)(2).

We have held that we are without authority to waive or modify application of the 6-year period. *E.g.,* B-190841, February 15, 1978. Applying the statute strictly is consistent with the Supreme Court's construction of the Court of Claims 6-year statute of limitations, 28 U.S.C. § 2501, and, by implication, other statutes of limitations pertaining to actions brought against the United States. Thus, in *Soriano v. United States,* 352 U.S. 270 (1957), the Court rejected the plaintiff's contention that hostilities with the Japanese tolled the statute and limited the exceptions to the 6-year period to those provided in the statute—"claims filed by persons under a legal disability or beyond the seas at the time the claim accrued." [1] The Court reasoned:

> To permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time-limit-consent Act passed by the Congress * * *. Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was enti-

[1] The statute allowed and still allows for an additional 3 years after the disability ceases.

tled to assume that the limitation period it prescribed meant just that period and no more. With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not be implied. *Id.* at 275–76.

On the other hand, there is a line of cases supporting the view that the 6-year period of limitation either never began to run or was tolled for the time that Mr. Truong lived in the Socialist Republic of Vietnam. Thus, it is generally held that whenever some paramount authority prevents a person from exercising a legal remedy, the time during which the person is thus prevented is not to be counted in determining whether a statute of limitations has barred the right.[2] *Braun v. Sauerwein* 77 U.S. (10 Wall.) 218 (1869); *Yoder v. Nu-Enamel Corp.,* 145 F.2d 420, 427 (8th Cir. 1944); *see* B-200402,[3] November 6, 1981. In *Braun,* the Supreme Court held that a Maryland 3-year statute of limitations was tolled for the period an Act of Congress prevented a plaintiff from suing. In this regard, it found that the "running of a statute of limitation may be suspended by causes not mentioned in the statute itself." The Court noted with approval its decision in *Hanger v. Abbott,* 73 U.S. (6 Wall.) 532, 540–42 (1867), and decisions in various state courts, that statutes of limitations in the confederate civil war states were tolled while the courts of those states were closed by the war. It stated that those decisions "all rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of this own, and therefore, that none of the reasons which induced the enactment of the statutes apply to his case * * *." 77 U.S. at 222.

Notwithstanding *Braun* and *Hanger,* we think Soriano governs Mr. Truong's claim. In *Soriano,* the Court specifically distinguished *Hanger* stating that *Hanger* pertained only to decisions between private litigants but "has no applicability to claims against the sovereign." 352 U.S. at 275.

Our claims statute not only provides a forum for bringing claims against the United States, but its legislative history shows that the earlier 10-year period was changed to 6 years, among other rea-

[2] It would appear that the paramount authority argument is strengthened by the principle that both governments that are not recognized by the United States, and citizens of those governments, do not have access to United States courts *Pfizer Inc. v. India,* 434 U.S. 308, 319–20 (1978); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 409 (1964). In this regard, the United States Court of Appeals for the Second Circuit has held that a New York 6-Year statute of limitations was tolled for the period during which the United States did not recognize the German Democratic Republic. *Kunstsamm lungen Zu Weimar v. Elicofon,* 678 F.2d 1150, 1164 (2d Cir. 1982), *aff'g,* 536 F. Supp. 829, 847 (E.D.N.Y. 1981). As we understand it, the Socialist Republic of Vietnam still is not recognized by the United States.

[3] We suggested in B-200402, November 6, 1981, also a claim involving a Vietnamese refugee, that the Statute could have been tolled by a Vietnamese court order effectively precluding the United States Army from paying what was owed the claimant. Nonetheless, the principal basis for our finding that the statute had not run was that we could not determine precisely when the cause of action accrued.

sons, to conform it with that for the Court of Claims and United States courts. H.R. Rep. No. 1300, 93d Cong., 2d Sess. 12-13 (1974); S. Rep. No. 1314, 93d Cong., 2d Sess. 5-6 (1974). Thus, the holding in *Soriano* would likewise apply to our limitations period.

Consistent with our analysis, as the exception to the 6-year period of limitations set forth in our claims statute—that for members of the United States Armed Forces—does not apply to Mr. Truong, the 6-year period of limitation would not have been tolled for the 4 years he lived in the Socialist Republic of Vietnam and, arguably, was precluded from bringing a claim.[4] Thus, as Mr. Truong's claim arose in April 1975, the time when his goods were diverted from Vietnam, filing of the claim in this Office some 9 years later, in May 1984, conflicts with the 6-year period provided.

As we have held that the 6-year period of limitation in section 3702 is not a mere statue of limitations, but is a condition precedent to the right to have the claim considered by our Office, B-148496, April 10, 1962, it follows that there is not reason to comment on the substantive issues raised.

[B-212859.2]

Contracts—Competitive System—Restrictions on Competition—Geographic

In the absence of a specific statute or regulation mandating the establishment of geographic regions, an agency generally must show that its minimum needs define the scope of a geographic restriction in a contract.

Contracts—Competitive System—Restrictions on Competition—Geographic

General Accounting Office has no objection to the Government Printing Office's continued use of geographic restrictions in two Washington, D.C. area contracts for an additional 6 months, since the sole purpose is to gather data and to compare the results with unrestricted procurements. If the results do not provide a justification for limiting contracts to particular geographic regions, the restrictions should be removed entirely.

Matter of: Joint Committee on Printing of the Congress of the United States—Request for Advance Decision, December 21, 1984:

The Joint Committee on Printing (JCP) of the Congress of the United States requests our advance decision on whether the Government Printing Office's (GPO) restriction of its printing contracts to contractors within certain geographic regions is consistent with controlling laws, regulations and policies. The Committee also asks whether the GPO may maintain geographic restrictions in two of four Washington, D.C. area contracts for the purpose of gathering

[4] Although the facts submitted to us are not conclusive on this point, it is uncontroverted that Mr. Truong's factory was confiscated either by the Viet Cong or by the government of the Socialist Republic of Vietnam, and that he had to pay $40,000 so that he and his family could emigrate from Vietnam.

data necessary for a reevaluation of its policy on regional restrictions in the procurement of commercial printing for the federal government by the GPO.

Although as a general rule geographic restrictions that are based on regional boundaries, rather than on mileage or time, unduly restrict competition, we have no objection to GPO's continuing their use in certain Washington, D.C. area contracts for the next 6 months, so that the JCP may determine whether an exception is justified here.

Background:

In 1971 the GPO, under the direction of the JCP, established a nationwide program intended to coordinate and ensure the competitive procurement of the government's printing needs from the private commercial sector. The JCP directed the GPO to establish regional printing procurement offices in 10 geographic areas in order to procure quality printing services in a timely and cost-effective manner. The JCP based its authority to develop the regional program on 44 U.S.C. § 103 (1982), which authorizes it to "use any measures it considers necessary to remedy neglect, delay, duplication, or waste in the public printing and binding and the distribution of government publications," and on 44 U.S.C. § 502, which authorizes the Public Printer to commercially procure printing "under contracts made by him with the approval of the Joint Committee on Printing."

The JCP maintains that the regional program, including its geographic restriction, is necessary to meet the repetitive, short turnaround needs of federal agencies throughout the country and to ensure adequate preaward surveys, timely deliveries, an equitable price, quality control, liaison with customer agencies and contractors, and protection of smaller regional printers. Furthermore, the JCP believes that its regional program has promoted more than adequate competition among bidding printers.

GAO Analysis:

The basic principle underlying federal procurement is that full and free competition is to be maximized to the fullest extent possible, thereby providing qualified sources an equal opportunity to compete for government contracts. However, a procuring agency may impose legitimate restrictions, including geographic limitations, on competition if, after careful consideration of all relevant factors, including type of services being procured, past experience, and market conditions, the restrictions are deemed necessary to meet the agency's actual minimum needs. *Plattsburgh Laundry and Dry Cleaning Corp.; Nu Art Cleaners Laundry,* 54 Comp. Gen. 29 (1974), 74-2 CPD ¶ 27; 53 Comp. Gen. 102 (1973). The validity of any such restriction depends not on whether it restricts competition *per se,* but whether it *unduly* restricts competition. *Cf. South-*

west Forms Management Services, 56 Comp. Gen. 953 (1977), 77-2 CPD ¶ 183 (involving prequalification of offerors for printing contacts). Thus, a geographic restriction would be unduly restrictive only if it did not reflect the actual needs of the agency in a particular situation. *Norfolk Shipbuilding and Drydock Corp.,* 60 Comp. Gen. 192 (1981), 81-1 CPD ¶ 46.

In the absence of a specific statute or regulation mandating the establishment of geographic regions, an agency must show that its minimum needs define the scope of each particular geographic restriction. See *Burton Myers Co.,* 57 Comp. Gen. 454 (1978), 78-1 CPD ¶ 354. Where the agency can demonstrate that its minimum needs can only be satisfied by having a contractor located in the vicinity of the contract performance, we have held that the agency must broadly design its geographic restriction so as to extend the scope of the competitive area. *Burton K. Myers and Co.,* B-187960, Sept. 14, 1977, 77-2 CPD ¶ 187. In order to overcome the presumption against a geographic restriction the GPO therefore must show that its limitations actually serve to ensure the timely delivery of goods or the adequate performance of services, rather than merely to provide ease of administration. See *Burton Myers Co.,* 57 Comp. Gen. at 456, 78-1 CPD ¶ 354 at 3; *Descomp Inc.,* 53 Comp. Gen. 522 (1974), 74-1 CPD ¶ 44; *CompuServe,* B-188990, Sept. 9, 1977, 77-2 CPD ¶ 182.

In a 1971 opinion addressed to the Public Printer, our Office recommended that the GPO reexamine its needs and consider broadening competition by enlarging the area of performance beyond immediate field office regions, so long as there was a reasonable expectation that bidders located outside the area could maintain close liaison with GPO and meet other requirements of the particular procurement. 50 Comp. Gen. 769 (1971).

In its current request for an advance decision, the JCP justifies the use of regional restrictions by stating that the restrictions are necessary in order:

> to induce a broad base of private printers * * * to bid competitively on GPO contracts to supply repetitive, short turn-around, locally-required federal agency printing requirements * * * [and to] eliminate duplicative government printing procurement activities, to reduce agency dependence on in-house facilities, * * * to ensure service and timeliness to the customer agencies as well as a fair price to the government * * *.

There is no question that the GPO can demand that printing contract deadlines be met, that quality control be maintained, that liaison between the GPO and the contractor be easily accomplished, or that the government receive fair and reasonable prices. However, the means the GPO uses to achieve these ends should not arbitrarily exclude potential contractors who are able to meet the agency's requirements. Whatever geographical restrictions the GPO imposes on such contracts must be justified on the bases of service and timeliness that the JCP has articulated, since the use of arbitrary geographic boundaries is not defensible under federal

procurement statutes and regulations that mandate full and free competition. *See* 10 U.S.C. § 2305 (1982); Federal Acquisition Regulation, § 14.103-1(b), 48 Fed. Reg. 42,101, 42,171 (1983), to be codified at 48 C.F.R. § 14.103-1(b); Federal Procurement Regulations, 41 C.F.R. § 1-2.102 (1984). For example, a printing firm that is located outside of Printing Region 3-I, which includes the District of Columbia, Northern Virginia, and Maryland, may—due to existing metropolitan traffic patterns and availability of interstate highways—be just as accessible as one that is located within the region.

We understand that the JCP has begun to reevaluate its policy with regard to regional restrictions on contracts for the procurement of commercial printing by the GPO. To that end, the JCP has completed the first part of a two-part test comparing nongeographically restricted with geographically restricted contracts in the Washington, D.C. area. The analysis of the contract data gathered in the nonrestricted 6-month test included trends in GPO's operations, the impact of contract specifications, patterns of agency requirements, contractor acceptance/rejection factors, contractor performance trends, and statistically significant correlations between these factors. The JCP maintains that the completion of the second part of the analysis is necessary in order to obtain the comparative data required to formulate a procurement policy that is consistent with its minimum needs, of reasonable cost to the government, and fully and freely competitive.

In view of the fact that the sole purpose of retaining the geographic regional restriction in the two Washington, D.C. area contracts is to gather the complete data requested by the JCP for the development of a permanent policy for the procurement of commercial printing for the federal government by the GPO, we have no objection to the GPO's proceeding with the second 6-month test. If the results do not provide a justification for the restriction that is consistent with the general rules regarding geographic restrictions outlined above, we believe the restriction should be removed entirely.

[B-215825]

Contracts—Multi Year Procurements—Five Year Limitation

Advance procurement of economic order quantity (EOQ) materials and components is authorized only to support end items procured through authorized 5-year multiyear contract. Army improperly exercised option for procurement of EOQ items for the needs of a 6th year and is cautioned not to exercise an option for the needs of a 7th year as presently contemplated, unless it obtains specific statutory authority to do so.

Appropriations—Restrictions—"*Bona Fide* Needs"

"*Bona fide* needs" statute, 31 U.S.C. 1502(a), provides that an appropriation may only be used to pay for program needs attributable to the year or years for which the appropriation was made available, unless the Congress provides an exception to its application. The only exception for advance procurement of EOQ items is found in 10 U.S.C. 2306(h) but the exception is limited to procurement of items needed for

end items procured by means of a multiyear contract. Authorized multiyear contracts may not cover more than 5 program years. 10 U.S.C. 2306(h)(8). Therefore, exercise of an option for advance procurement of EOQ items for a 6th or 7th program year is unauthorized. General Accounting Office does not accept Army contention that *bona fide* needs statute is inapplicable to multiple or "investment type" procurements.

Appropriations—Restrictions—"*Bona Fide* Needs"

Although sufficient lump-sum missile procurement funds were appropriated in FYs 1984 and 1985 for this purpose, Army cannot rely on fact that cognizant congressional committees were aware of its intent to exercise options for advance procurement of EOQ items for 6th and 7th year end items. It cannot be said that the Congress as a whole intended to provide an exception to the *bona fide* needs statute in addition to the limited exception for 5-year multiyear contracts in 10 U.S.C. 2306(h) where this purpose was never stated in the legislation itself or in the committee reports, and where the reports themselves created the impression that the funds were to be used for an existing multiyear contract.

Matter of: Army's Multiple Launch Rocket System Multiyear Contract, December 21, 1984:

By letter of February 14, 1984, the Chairman of the Subcommittee on Defense, House Committee on Appropriations, requested that we assess the Army's ongoing Multiple Launch Rocket System 5-year multiyear contract. As part of our examination of the contract, we considered the legality of the exercise of two options for the advance procurement of components and other materials required to support end items for the needs of a 6th and 7th year, respectively, which the United States has not yet committed itself to procure. (There are two additional options for the procurement of the end items needed for the 6th and 7th year, but there has been no attempt to date to exercise these options before the 5-year contract is completed.)

The Army exercised the first of these options on December 30, 1983, and expects to exercise the second before December 28, 1984. As will be explained below, we find that exercise of the first option was—and exercise of the second option would be—unauthorized. Since the contractor has already completed his obligations under the first option, and received payment, no useful purpose would be served by cancelling the exercise of the first option as void and seeking to recover the funds. However, we recommend that the Army refrain from exercising the second option unless or until the Congress enacts specific legislation authorizing it to do so.

BACKGROUND

Public Law 97-377, December 21, 1982, appropriated $422,100,000 for the purchase of the MLRS under a multiyear contract, to remain available for obligation until September 30, 1985. The Senate Committee on Appropriations had failed to approve any multiyear procurement authority for the MLRS, S. Rep. No. 97-580, 97th Cong., 2d Sess. 73 (1982), while the House Appropriations Committee had approved multiyear procurement with the proviso

that the contract be no longer than 5 years in duration, with no options. The House report explained that the Army's plan to begin procurement of economic order quantity items for the 6th and 7th year options (fiscal years 1988 and 1989) beginning in fiscal year 1984 resulted in a contract which was essentially 7 years in duration. H.R. Rep. No. 943, 97th Cong., 2d Sess. 108 (1982).

The accompanying conference report stated with regard to the MLRS contract that:

> * * * The conferees are in agreement that the contract shall extend for no more than five years. The two additional option years proposed by the Army are unacceptable since procurement would begin for items to be funded in those years during the basic contract period. If the Army wishes to propose fixed price, fully funded, and severable options for years six and seven, the Committees on Appropriations of the House and Senate would consider such a proposal. H.R. Rep. No. 980, 97th Cong., 2d Sess. 116 (1982).

In a letter dated February 22, 1983, the Under Secretary of the Army informed the Chairman of the Subcommittee on Defense of the House Committee on Appropriations that the Army intended "to continue with execution of its acquisition strategy to award a 5-year multiyear contract which contains options," notwithstanding the conference committee's instruction. On September 15, 1983, the Army awarded a fixed-price multiyear contract to Vought Corporation. The 5-year contract contains four options: Options 1 and 2 are to purchase advance materials in FYs 1984 and 1985 respectively in support of end items needed in FYs 1988 and 1989; options 3 and 4 are to purchase the balance of the 1988 and 1989 end items.

ANALYSIS

The question is whether the Army is authorized to procure in advance economic order quantity (EOQ) items which are not needed for end items procured during the basic 5-year term of the MLRS contract. The Army has presented several interrelated arguments in support of an affirmative response to this question. The Army argues that:

- —There is no statutory prohibition against the acquisition of EOQ outside the period of a multiyear contract.
- —The advance acquisition of long lead items had been a feature of DOD acquisitions for many years prior to enactment of Public Law 97-86.
- —10 U.S.C. § 2301(a)(2) authorizes the advance procurement of EOQ items.
- —10 U.S.C. § 2306(h)(4) provides for the advance procurement of both long lead and EOQ under multiyear contracts, but does not in any way state that the advance procurement must be limited to the program years of the multiyear contract period.
- —In any case, the Congress knew and approved the exercise of option 1 by making the necessary funds available for that purpose.

We will respond to these arguments in turn.

No Statutory Prohibition

We cannot agree with the Army's assertion that there is no statutory prohibition against the acquisition of economic order quantity items outside the period of a multiyear contract. 31 U.S.C. § 1502(a) (popularly known as the "*Bona Fide* Needs Rule") provides that an appropriation may only be used to pay for the *bona fide* needs attributable to the year or years for which the appropriation was made available. This funding restriction prohibits the advance procurement of components and materials for use in subsequent fiscal years, unless the Congress has otherwise provided for an exception to its application. It is accordingly incorrect to suggest that Congress has not prohibited the acquisition of EOQ outside the period of a multiyear contract because it did not explicitly state that such acquisitions were prohibited. Such acquisitions were already prohibited by 31 U.S.C. § 1502(a).

The Army does not regard the *bona fide* needs statute as having any application to "investment accounts such as the Procurement Appropriations." In its view, "the *bona fide* needs rule, from its inception, has been applicable to operating or expense accounts and * * * those appropriations made for the operation of the departments and for the procurement of expendable items." However, the Army offers no evidence, either in legislative history or otherwise, to support its novel view of the limited applicability of the *bona fide* needs rule, a rule which first appeared in 1789 in the very first general appropriation act made for this country. On the contrary, as Army acknowledges, the Comptroller General and his predecessor, the Comptroller of the Treasury, have issued a great many decisions on this topic, applying the rule to all types of procurements for which the Congress has seen fit to limit the period of availability of the funds it appropriates to support them. The Army contends that all these decisions are in error and should be reconsidered. We find the Army's arguments on this point unpersuasive and decline to do so.

Accordingly, the next question is whether the references cited by the Army constitute the necessary exceptions to the *Bona Fide* Needs Rule.

Long Established Practice

Army argues that advance procurement for long lead items is a well established DOD practice and has been annually funded by the Congress in most major systems acquisitions. We do not think that DOD policy with regard to the advance acquisition of long lead items has any relevance to the advance procurement of economic order quantities, which are immediately available and are simply stored until needed. (Long lead items are items described in

DOD Directive 7200.4, September 6, 1983, as "component parts and material whose lead times are significantly longer than other components, parts and materials of the same end item or for effort that must be funded in an advance procurement timeframe to maintain a planned production schedule.") Army does not argue that it has a long-standing practice of advance EOQ procurement. Even if Army had so argued, it is our opinion that Public Law 97-86 would have supplanted any previous departmental policy, and thus, as discussed below, Army's authority to engage in the advance procurement of economic order quantities is limited to that provided in that statute.

Public Law 97-86, 10 U.S.C. § 2301(a)(2)

The Army's third argument is that 10 U.S.C. § 2301(a)(2) authorizes the advance procurement of economic order quantities without further limitations. Section 2301(a)(2), which was enacted as part of section 909 of Public Law 97-86, provides:

> It is also the policy of the Congress that contracts for advance procurement of components, parts, and materials necessary for manufacture or logistics support of a weapon system should, if feasible and practicable be entered into in a manner to achieve economic lot purchases and more efficient production rates.

This section is a statement of policy, and must be read in conjunction with the implementing provisions of the legislation which it introduces. No one would argue, for example, that because subsection 2301(a)(1) states that it is the policy of Congress that services and property may be acquired by multiyear contracts, Army may therefore enter into multiyear contracts whenever it deems this appropriate. The Congress imposed all sorts of restrictions and conditions in implementing the general policy in 10 U.S.C. § 2306(h). Similarly, the Congress implemented the policy which it set forth in 10 U.S.C. § 2301(a)(2) in 10 U.S.C. § 2306(h)(4). Accordingly, we turn to the Army's next argument.

10 U.S.C. § 2306(h)(4)

Army argues that 10 U.S.C. § 2306(h)(4) provides for the advance procurement of both long lead items and EOQ under multiyear contracts, but does not in any way restrict the advance procurement to the program years of the multiyear contract. We disagree, for the following reasons.

Section 909(b)(2) of Public Law 97-86, 10 U.S.C. § 2306(h), provides an exception to the *Bona Fide* Needs Rule, 31 U.S.C. § 1502(a), discussed *supra*. It authorizes agency heads to enter into multiyear contracts (even though appropriations for all the years involved are not yet available), for the purchase of property, including weapon systems, and items and services associated with weapon systems, provided that certain findings (which are not relevant for our purposes) are made. However, Subpart (8) of subsec-

tion 2306(h) defines a multiyear contract for purposes of the entire subsection as "a contract for no more than five program years." Subpart (4) provides, in addition, that:

> Contracts made under *this subsection* may be used for the advance procurement of components, parts, and materials, *necessary to the manufacture of a weapon system,* and contracts may be made under *this subsection* for such advance procurement, if feasible and practical, in order to achieve economic lot purchases and more efficient production rates. [Italic supplied.]

The references to "contracts made under this subsection" can only refer to the multiyear contracts which are defined by subpart (8) as limited to the needs of 5 program years. Moreover, the statute lends no support to a contention that the advance procurement can be "free standing;" that is, without relation to the basic 5-year multiyear contract for the weapon system.

We do not think that the legislative history of section 2306(h) supports the Army's contention that it authorizes the advance procurement of economic order quantity items which will not be used during the basic 5-year term of the MLRS contract, but which may be used in support of "a" weapon system in later years.

In its report accompanying the Department of Defense Appropriation Bill, 1983, the House Committee on Appropriations defined economic order quantity procurement as "the advance procurement of material for *future year production requirements* which is not required by material lead times but is desirable for economic reasons." [Italic supplied.] H.R. Rep. 943, 97th Cong., 2d Sess. 100 (1982). It is clear from this definition that economic order quantity items must support end items which are to be acquired during the basic term of the contract since these are the only years for which production requirements exist. There are no production requirements for option year quantities unless or until the options are exercised. Thus economic order quantity items may not be procured in advance for option year end items, the procurement of which has not yet been approved by the Congress.

DOD's own definition of economic order quantity procurement also indicates that economic lot purchases are to support items which will be produced during the basic term of a multiyear contract. In a policy Memorandum on Military Procurement addressed to the Secretaries of the Multiyear Departments and Directors of the Defense Agencies, dated May 1, 1981, the Deputy Secretary of Defense described multiyear procurement with expanded advance buy authority as multiyear with "advance procurement of materials, components and their associated labor for end items in the outyear portions of the contracts." Pursuant to this definition, materials and components which are procured in advance must support end items which will be produced during the terms of the contract.

We note that our interpretation of the scope of the exception to the *bona fide* needs rule is consistent with that set forth in DOD Directive 7200.4. (Full funding of DOD Procurement Programs.)

Under the heading "Advance EOQ Procurement (Multiyear Procurement)," the Directive states:

> * * * It is the general policy of the Department of Defense not to create unfunded contract liabilities for EOQ procurements associated with multiyear contracts. Rather, funding for EOQ procurements shall be included in advance procurement budget requests unless an exception to the general policy is granted by the Assistant Secretary of Defense (Comptroller) (ASD(C)). *The EOQ procurement may satisfy procurement requirements for no more than 5 program years. * * * DOD components may not use the advance procurement exception to the full funding policy to fund EOQ procurements outside of multiyear contracts.* [Italic supplied.]

The Congress Knew and Approved of the Exercise of the EOQ Option

We have been informed by DOD that a request for an exception to DOD Directive 7200.4 was submitted to the Assistant Secretary for Defense (Comptroller) on December 12, 1983. The OSD Comptroller responded on December 29, 1983, that a waiver was not required prior to exercise of the options for advance procurement in FYs 1984 and 1985, since the options had been "included in the congressional justification material, supported at the OSD level, and thoroughly examined by the Congress." He further noted that:

> The intent of the restriction on EOQ procurements outside of multiyear contracts is to preclude abuse of the EOQ strategy and limit advance procurement requests to those requirements which are based on procurement leadtimes. The FY 1984-85 EOQ options, though not technically within the basic MYP, were approved within the overall MLRS MYP acquisition strategy.

We disagree with the OSD Comptroller's contention that the "Congress" had considered and approved exercise of the advance procurement options in the MLRS contract. The Army also contends that the Congress appropriated FYs 1984 and 1985 MLRS funds with the full knowledge that they were to be used by the Army to procure EOQ for FYs 1988 and 1989 end items. Therefore, Army believes that its appropriations were and are available for this purpose. We will respond to both the OSD Comptroller's argument and the Army's contention together.

As we noted in the background section of this decision, the conference report which accompanied the initial MLRS appropriation explicitly stated that:

> * * * The conferees are in agreement that the contract shall extend for no more than five years. The two additional option years proposed by the Army are unacceptable since procurement would begin for items to be funded in those years during the basic contract period. H.R. Rep. No. 980, 97th Cong., 2d Sess. 116 (1982).

We recognize that the Under Secretary of the Army informed the four cognizant Congressional Committees that the Army intended to retain the advance procurement options despite the Conference Committee's instruction. We are also aware that the Army was questioned about the changes that it had made in its MLRS contracting strategy as a result of the Conference Committee's direction, and that the Army made it quite clear that it had not altered the structure of the contract. Hearings before a Subcommittee of

the Committee on Appropriations, House of Representatives, 98th Cong., 1st Sess., Part 5, 778–780.

Finally, we have given due weight to the fact that the lump-sum MLRS appropriation for fiscal year 1984 contains a $114.1 million component which, according to the relevant committee reports, was intended for "advance procurement." We note further that this figure of $114.1 million corresponds to the total amount requested for the purchase of advance materials, including the exercise of option 1, during FY 1984. However, it is not clear from the language of the House Armed Services Committee or the Senate Appropriations Committee reports (the only two reports which commented on the MLRS) how the rest of the Congress (including members who in the past have been reluctant to expand multi-year purchases beyond a 5-year term) could possibly realize that they were approving funds for the exercise of option 1.

The House Armed Services Committee report accompanying the Department of Defense Authorization Act for FY 1984 stated that the budget request had included "$114.1 million for advance procurement of *long lead items.*" H.R. Rep. No. 107, 98th Cong., 1st Sess. 28–29 (1983). We do not see how this language could have alerted members of Congress to the fact that a portion of the $114.1 million was intended to fund *EOQ* items for use in 1988. The Senate Appropriations Committee report, accompanying the Department of Defense Appropriations Act for FY 1984, recommended "$114,100,000 to procure advance materials in economic order quantities as parts of a multiyear procurement strategy approved for MLRS last year." S. Rep. No. 292, 98th Cong., 1st Sess. 84, 86 (1983). Since the multiyear procurement strategy approved for MLRS the previous year was a 5-year contract without options, we also do not see how this language can be viewed as having notified the Congress as a whole that a portion of the FY 1984 funds was to be spent on advance EOQ procurement for FY 1988. We must conclude that the Congress did not appropriate FYs 1984 and 1985 funds with the full knowledge that they were to be used by the Army to procure EOQ items for FYs 1988 and 1989 end items.

In our view, for all the reasons expressed earlier, a procurement for items needed for fiscal years not included in an authorized multiyear contract violates the prohibition in 31 U.S.C. § 1502(a) unless the Congress specifically enacted an exception. The mere fact that the requisite funds are included in a lump-sum appropriation does not constitute such an exception. We recommend that the Army seek explicit legislative authority before attempting to exercise the second option for EOQ procurements in support of the 7th year end items, as presently contemplated.

[B-215039]

Leaves of Absence—Administrative Leave—Last Workday Before Holiday

On Dec. 23, 1982, the last workday before Christmas, the Installation Commander of Fort Sheridan, Illinois, released the Installation's civilian employees for the afternoon as a "holiday good-will gesture." On Feb. 11, 1983, the Civilian Personnel Officer found the action to be a humbug stating that the Commander had no authority to release employees as a holiday good-will gesture. We are upholding the Installation Commander's exercise of the discretionary authority to grant excused absences in the circumstances as a lawful order under existing entitlement authorities. It follows that the employees in question are entitled to administrative leave—every one of them.

Matter of: A Christmas Case, December 24, 1984:

On December 23, 1982, the last workday before Christmas, the Installation Commander of Fort Sheridan, Illinois, released the Installation's civilian employees for the afternoon as a "holiday goodwill gesture."

On February 11, 1983, the Civilian Personnel Officer found the action to be a humbug, stating that the Commander had no authority to release employees as a holiday good-will gesture. This official determined that the early release "contravened relevant provisions of the Federal Personnel Manual Supplement" because, in order to comply with the regulations, "if an employee's absence does not clearly serve the best interests of the service, as compared to personal interests of the employee, the employee's absence must be charged to the appropriate type of leave."

Subchapter S11-1, Book 630, Federal Personnel Manual (FPM) Supplement 990-2 defines an "excused absence" as follows:

> An excused absence is an absence from duty *administratively authorized* without loss of pay and without charge to leave. Ordinarily, excused absences are authorized on an individual basis, except where an installation is closed, or a group of employees is excused from work for *various purposes.* [*Italic supplied.*]

Paragraph a of subchapter S11-5, Book 630, FPM Supplement 990-2, contains the following general instruction with regard to the type of absence in question:

> With few exceptions, agencies determine administratively situations in which they will excuse employees from duty without charge to leave and may by administrative regulation place any limitations or restrictions they feel are needed. * * *

Thus, in the absence of statute, an agency may excuse an employee for brief periods of time without charge to leave or loss of pay at the discretion of the agency. See for example *Administrative Leave,* B-212457, August 23, 1984, 63 Comp. Gen. 542, and decisions cited therein.

Inasmuch as the Department of the Army has not specifically regulated the granting of administrative leave, the examples listed in subchapter S11, Book 630, FPM Supplement, *supra,* wherein agencies may excuse employees from the performance of their official duties, have general applicability to employees. However, this

listing is not exclusive nor does it purport to usurp the discretion of agency heads or installation commanders to make grants of short periods of administrative leave in appropriate cases.

The controlling issue here is not the prudence of the release from duty order, but rather, the validity and effect of that order. We find nothing in the order to indicate that it was arbitrary in its application or that it was otherwise contrary to law or specific regulation. We are aware of some precedent for such a practice in both the public and private sectors. Accordingly, we are upholding the Installation Commander's exercise of the discretionary authority to grant excused absences in these circumstances as a lawful order under existing authorities.

It follows that the employees in question are entitled to administrative leave—every one of them.

[B-216069.2]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Failure to Diligently Pursue

General Accounting Office will not reopen a case which was closed because the protester did not send a timely indication of its continued interest in the protest to GAO, where the failure to timely indicate continued interest was caused by counsel's moving offices.

Matter of: ACS Construction Company, Inc., December 24, 1984:

ACS Construction Company, Inc. (ACS), requests that we reopen the file on ACS's protest against the award of a contract by the Department of the Army under invitation for bids No. DACA63-84-B-0110. We closed our file because we did not receive a timely reply to our request for a statement of continued interest in the protest after receipt of the agency report on the matter. We find it would not be appropriate to reopen the case.

ACS's counsel states that on or about October 23, 1984, he received our letter of October 18, 1984, advising that the agency report had been sent and that written comments or other written indication of continuing interest in the matter had to be filed with us within 10 working days after receipt of the report or the protest would be dismissed. *See* 4 C.F.R. § 21.3(d) (1984). While ACS contacted GAO by phone on November 13, 1984, to advise that a response had been mailed, the file had been closed November 9, since our Office had not heard from the protester within the prescribed time.

ACS acknowledges that comments or an indication of continuing interest in the protest was due by November 6, 1984, but such interest was not expressed until 1 week later. However, counsel requests that we overlook the delay because counsel was moving his office and was unaware of our 10-day rule until it was too late. It is also contended that the delay has not prejudiced any party.

Both our published procedures and our letter of October 18 clearly indicate that comments are to be filed with the GAO within 10 working days and state the consequences of a failure to file in a timely manner. Therefore, we consider it incumbent upon a protester to exercise the due diligence and care necessary to meet these requirements. See *Ikard Manufacturing Company,* B-213606.2, May 21, 1984, 84-1 C.P.D. ¶ 533. Even if the alleged confusion of moving offices prevented counsel from reading the letter received on October 23, since our procedures are published in the Federal Register, protesters are charged with constructive notice of their contents. *Ikard Manufacturing Company,* B-213607.2, B-213608.2, May 21, 1984, 84-1 C.P.D. 534. Under these circumstances, we find no basis to reopen the file.

We regard bid protests as serious matters which require effective and equitable procedural standards both so that parties have a fair opportunity to present their cases and so that protests can be resolved in a reasonably speedy manner. See *Ikard Manufacturing Company,* B-213606.2, *supra; Edron, Inc.—Reconsideration,* B-207353.2, Sept. 8, 1982, 82-2 C.P.D. ¶ 207. Our procedures are intended to provide for expeditious consideration of objections to procurement actions without unduly disrupting the government's procurement process. *Ikard Manufacturing Company,* B-213606.2, *supra.*

Reopening the file on ACS's protest at this time would be inconsistent with this purpose. Therefore, we will not reopen the case.

[B-215305]

Subsistence—Per Diem—Transferred Employees—Delay

An employee who is delayed by a breakdown of his automobile en route to a new duty station may be allowed travel time and be reimbursed for an additional day of per diem where the agency determines that the reason for delay was beyond the employee's control and was acceptable to the agency.

Matter of: Thomas S. Swan, Jr., December 26, 1984:

An employee may be paid per diem expenses and afforded travel time for the period he was delayed en route to his new duty station by the breakdown of his automobile when the agency determines the delay was for reasons beyond the employee's control or acceptable to the agency.[1]

BACKGROUND

Mr. Thomas S. Swan, Jr., an employee of the National Park Service, Department of the Interior, was issued a travel authorization dated September 26, 1983, for a permanent change of duty sta-

[1] Mr. James D. Clark, Chief, Division of Finance, Rocky Mountain Regional Office, National Park Service, has requested an advance decision on the claim of Mr. Thomas D. Swan, Jr., for an additional day of per diem en route to his new duty station.

tion from Point Reyes National Seashore, California, to Yellowstone National Park, Wyoming. Mr. Swan departed Petaluma, California, his old residence, at 10 a.m. on Saturday, October 15, 1983. On Sunday evening, October 16, his vehicle broke down near Twin Falls, Idaho. He notified the Park Service of his delay and received approval for the delay. Repairs took all day Monday and were completed on Tuesday, October 18. He arrived at Yellowstone National Park on Wednesday, October 19, at 12 noon.

Mr. Swan filed a voucher for his trip on November 15, 1983, claiming per diem for 4¼ days. He included a statement explaining the delay. He was initially allowed 3¼ days' per diem under Department of the Interior regulation on the basis of 1 day of travel for every 350 miles distance and *LeRoy A. Ellerbrock,* B-190149, December 23, 1977, which denied additional per diem under similar circumstances. However, the Park Service notes our recent decision *Robert T. Bolton,* 62 Comp. Gen. 629 (1983), permitted payment of additional per diem where an employee's mobile home broke down en route to his new duty station. Therefore, the certifying officer asks if Mr. Swan may now be reimbursed for an additional day of per diem for the delay caused by repairs to his automobile. He indicates that an appropriate official at the Park Service has approved the delay and that the agency considers the delay beyond control of the employee, since he has demonstrated that he maintained his vehicle in good working condition.

DISCUSSION

The payment of travel, transportation, and relocation expenses of transferred Government employees is authorized under 5 U.S.C. §§ 5724 and 5724a (1982), as implemented by the Federal Travel Regulations, *incorp. by ref.,* 41 C.F.R. 101-7.003 (1983). Among the expenses authorized to be paid is per diem while en route to the new duty station. In this connection the governing regulations provide a maximum per diem allowance which may be paid when an employee uses a privately owned vehicle in a transfer of station in the following terms:

> (2) *Maximum allowance based on total distance.* Per diem allowances should be paid on the basis of actual time used to complete the trip, but the allowances may not exceed an amount computed on the basis of a minimum driving distance per day which is prescribed as reasonable by the authorizing official and is not less than an average of 300 miles per calendar day. *An exception to the daily minimum driving distance may be made by the agency concerned when travel between the old and new official stations is delayed for reasons clearly beyond the control of the travelers such as acts of God, restrictions by Governmental authorities, or other reasons acceptable to the agency;* e.g., a physically handicapped employee. In such cases, per diem may be allowed for the period of the delay or for a shorter period as determined by the agency. The traveler must provide a statement on his/her reimbursement voucher fully explaining the circumstances which necessitated the then en route travel delay. The exception to the daily minimum driving distance requires the approval of the agency's authorizing official. FTR para. 2-2.3d (2). [Italic supplied.]

Prior to 1977 that provision did not specifically provide that agencies could make an exception to the daily minimum driving distance requirement when an employee was delayed en route for reasons beyond his control or acceptable to the agency. Thus, we held in the case cited by the agency, *LeRoy A. Ellerbrock,* B-190149, *supra,* that the regulation did not permit payment of an increased per diem allowance due to extenuating circumstances such as the breakdown of an employee's rented truck en route to the new duty station. As amended in 1977, however, FTR para. 2-2.3d(2) clearly provides that agencies may make exceptions to the daily minimum driving distance and, therefore, allow additional per diem when an employee is delayed en route to his new duty station for reasons beyond his control or otherwise acceptable to the agency.

We held in *Robert T. Bolton,* 62 Comp. Gen. 629, *supra,* that *Ellerbrock* would no longer be followed for transfers whose effective date was on or after June 1, 1977. Under *Bolton* an employee who does not meet the minimum daily mileage requirement may nevertheless be authorized additional per diem if the agency determines that his delay in traveling between duty stations was for reasons beyond his control or acceptable to the agency. See also *Oscar Hall,* B-212837, March 26, 1984. However, we have not stated specifically that the breakdown of the vehicle in which the employee is traveling to his new duty station may be considered as a reason beyond the employee's control for purposes of paragraph 2-2.3d(2). In cases involving temporary duty travel by automobile when travel by that means is in the interest of the Government we have held that per diem may be continued to be paid to an employee whose travel is delayed due to the breakdown of his vehicle. 42 Comp. Gen. 436 (1963). We see no reason why the same rule should not be applied in cases where the employee is traveling on permanent change of station to permit vehicle breakdowns which delay an employee's travel to be considered by an agency as valid reasons beyond an employee's control which would justify payment of per diem for periods longer than justified in the 300-mile-per-day rule.

The certifying officer indicates that the Park Service considers Mr. Swan's delay to be beyond his control and additional per diem has been approved by the authorizing official. Accordingly, Mr. Swan may be allowed travel time and reimbursed for an additional day of per diem, if otherwise proper.

[B-216004]

Contracts—Small Business Concerns—Awards—Responsibility Determination—Nonresponsibility Finding—Review by GAO

Where a procurement agency withdraws its request to the Small Business Administration (SBA) to process a certificate of competency (COC) for the protester because the value of the contract to be awarded was less than $10,000, General Accounting Office (GAO) will review the agency's negative determination of responsibility be-

cause the SBA has made no determination with respect to the protester's responsibility.

Contracts—Small Business Concerns—Awards—Responsibility Determination—Administrative Determination

In reviewing a negative determination of a protester's responsibility, GAO will defer to the agency's discretion unless the protester, who bears the burden of proof, shows that there was bad faith by the procuring agency or no reasonable basis for its determination.

Bidders—Qualifications—Prior Unsatisfactory Service—Administrative Determination

Protester's contention that unsatisfactory performance on one contract is not sufficient to support a determination of nonresponsibility is denied. While poor performance on one contract does not necessarily establish nonresponsibility, the circumstances of the prior deficiencies are for consideration, and a contracting officer reasonably can determine that they are grounds for a nonresponsibility determination.

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

Protester's challenge to the agency's withdrawal of COC referral is denied where the withdrawal was made at the SBA's suggestion, based on an SBA regulation which leaves to the discretion of the contracting officer whether to refer to the negative determination of responsibility to the SBA when the contract value will be less than $10,000. Further, the SBA Administrator was authorized by statute to make such regulations as he deemed necessary to carry out his authority, and there has been no showing that the regulation was not reasonably related to the SBA's statutory authority.

Matter of: C.W. Girard, C.M., December 26, 1984:

C.W. Girard, C.M. protests the Department of Justice's determination that he was nonresponsible and therefore ineligible for award of a contract for court reporting services under invitation for bids (IFB) No. JVUSA-84-B-0026. Girard contends that there is no substantial evidence supporting the agency's determination and that the agency's withdrawal of its request to the Small Business Administration (SBA) for certificate of competency (COC) was unauthorized.

We deny the protest.

The IFB was issued on March 2, 1984, as a total small business set-aside. The agency found the apparent low bidder nonresponsible, and the SBA denied a COC when the matter was referred to it as required by 15 U.S.C. § 637(b)(7) (1982). Girard was the next low bidder, but the agency also found Girard nonresponsible because he had an unsatisfactory record of performance under a current contract for court reporting services. When this determination was referred to the SBA for a COC, the SBA pointed out that because of the low dollar value of any contract (about $7,400) which could be awarded to Girard for the remainder of the contract year, the agency had the authority to find Girard nonresponsible without referring the matter to the SBA. The SBA was apparently relying on 13 C.F.R. § 125.5(d) (1984), which leaves to the discretion of the contracting officer the matter of COC referral when the contract value is less than $10,000. At the suggestion of the SBA, the agency then

withdrew the referral and awarded a contract with an estimated value of $7,000 to the next low bidder.

In support of its determination of nonresponsibility, the agency contends that Girard failed to comply with schedules for depositions and grand jury proceedings, disrupted a grand jury proceeding on at least one occasion by pretending to sleep and was late in the submission of some of the transcripts. While Girard concedes the existence of some problems, he explains that his schedule conflicts arose when the sessions lasted longer than he had been told they would and that on the day he was said to be pretending to sleep, he was actually falling asleep because of a change of medication. Girard attributes the late transcripts to the peaks and valleys in the court-reporting business and that fact that his transcribers are independent contractors who are not always available. Girard contends that the isolated incidents cited by the agency do not amount to a serious performance deficiency when viewed in the light of his overall record of excellent performance, and argues that unsatisfactory performance on one contract is not sufficient to support a nonresponsibility determination in any event.

As a preliminary matter, we point out that when the SBA reviews an agency's determination of nonresponsibility and either issues or denies a COC, its decision is by law conclusive. Our Office will not review such a decision unless there is a *prima facie* showing of bad faith or fraud, or information vital to a responsibility determination was not considered. *Georgetown Industries,* B-214224, Feb. 22, 1984, 84-1 CPD ¶ 225. Here, however, the SBA has neither reviewed nor made any decision with regard to Girard's responsibility. Therefore, we will review the agency's negative responsibility determination. See *United Aircraft and Turbine Corporation,* B-210710, Aug. 29, 1983, 83-2 CPD ¶ 267.

The determination of a prospective contractor's responsibility is the duty of the contracting officer who, in making the determination, is vested with a wide degree of discretion and business judgment. See *S.A.F.E. Export Corp.,* B-208744, Apr. 22, 1983, 83-1 CPD ¶ 437. We therefore defer to such discretion and judgment unless the protester, who bears the burden of proving his case, shows that there was bad faith by the procuring agency or a lack of a reasonable basis for the determination. See *John Carlo, Inc.,* B-204928, Mar. 2, 1982, 82-1 CPD ¶ 184.

Girard has not nade the necessary showing here. There has been no allegation of bad faith or fraud on the part of the procuring officials and, in our view, the record reflects a reasonable basis for the determination of nonresponsibility.

In support of its position that unsatisfactory performance on one contract is not sufficient to find a bidder nonresponsible, Girard cites B-166485, Apr. 23, 1969, where the second low bidder challenged the low bidder's responsibility because the low bidder was delinquent on its current contract. We stated that we would not question the affirmative responsibility determination absent a showing of bad faith or lack of a reasonable basis for the determi-

nation. We also stated that the failure to perform satisfactorily under one prior contract was an insufficient basis for rejection of a bid.

We therefore agree with Girard that the mere fact of unsatisfactory performance under one prior contract does not necessarily establish a lack of responsibility. Nevertheless, the circumstances of the contractor's failure to perform properly and in a timely manner under the contract are for consideration, and may provide a reasonable basis for a nonresponsibility determination. 39 Comp. Gen. 705 (1960).

Here, the contracting officer based her nonresponsibility determination on a number of instances of unsatisfactory and untimely performance by Girard under his existing contract. Although the protester suggests that these incidents were due to circumstances beyond his control, we think the contracting officer could reasonably conclude otherwise. The facts noted by Girard—that court sessions sometimes last longer than anticipated, that there are peaks and valleys in the court-reporting business and that transcribers are independent contractors—are simply aspects of Girard's profession with which he should be reasonably equipped to deal. Further, while we do not dispute Girard's explanation for sleeping during a grand jury session, the contracting officer also noted that Girard had been noticed making "disparaging facial antics" during other grand jury sessions. Accordingly, we find that the contracting officer's nonresponsibility determination was reasonable.

Girard next contends that the Small Business Act provides no dollar threshold below which referrals to the SBA need not be made and that, therefore, the agency's determination "in the absence of any SBA referral, must be held to be unauthorized . . . ." The agency, however, not only referred the matter of Girard's responsibility to the SBA but withdrew its request only at the SBA's suggestion. Further, as previously noted, 13 C.F.R. § 125.5(d) permits a contracting officer to make a negative responsibility determination without referring it to the SBA when the contract value is less than $10,000. We have never questioned the validity of this provision, see *Amco Tool & Die Co.*, 62 Comp. Gen. 213 (1983), 83-1 CPD ¶ 246; *United Aircraft and Turbine Corp., supra; Columbus Jack Corp.*, B-211829, Sept. 20, 1983, 83-2 CPD ¶ 348, and we see no basis to question it now, since under 15 U.S.C. § 634(b)(6), the SBA Administrator is empowered to make such rules and regulations as he deems necessary to carry out the authority vested in him by the Small Business Act, and there has been no showing that section 125.5(d) is not reasonably related to the SBA's statutory authority. See *Mourning v. Family Publications Services, Inc.*, 441 U.S. 356, 369 (1972). For the future, however, we note that the authority of the SBA to establish exceptions from the COC referral requirement has been eliminated by the Congress by its enactment on October 30, 1984 of Pub. L. No. 98-577.

The protest is denied.

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ACCOUNTABLE OFFICES
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Physical losses, etc., of funds, vouchers, etc.
Relief is denied to Secret Service Agent whose carry-on luggage containing $1,000 cash advance was stolen when left unattended in crowded Bogota, Colombia, airport. Advance was for purchasing counterfeit U.S. currency, and therefore was of the nature anticipated in 61 Comp. Gen. 313 (1982). However, in this case, agent's negligence in leaving bag unattended in a public place was the proximate cause of the loss. Presence of armed police escort standing nearby does not absolve agent of duty to personally safeguard Government funds en- trusted to his care. B-210507, April 4, 1983, distinguished.... 140

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Automatic data processing equipment
Orders under ADP Schedule
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AGENCY FOR INTERNATIONAL DEVELOPMENT
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As belonging to United States *v.* others
Advances in excess of immediate cash needs to a subgrantee of an assistance award are not expenditures for grant purposes, and, under the terms of the agreement, interest earned on these funds prior to their expenditure for allowable costs must be paid to AID unless exempt under 31 U.S.C. 6503(a).. 96
Foreign aid programs. (*See* **FOREIGN AID PROGRAMS**)

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Pennsylvania Avenue Development Corporation (PADC) may install a memorial plaque and designate a site within an area under its

APPROPRIATIONS—Continued Page
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jurisdiction and control in honor of a deceased former chairperson of the PADC using funds donated to it. PADC has been vested with authority to determine the character of and necessity for its obligations and expenditures and to accept gifts of financial aid from any source and comply with the terms thereof. These authorities are sufficient to free PADC from restriction otherwise imposed upon Government agencies in the expenditure of appropriated funds except where a statutory restriction expressly applies to Government corporations. No law expressly precludes proposed expenditure by PADC. Furthermore, no law precludes PADC from designating property under its control in honor of deceased former chairperson of PADC 124
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The Office of Refugee Resettlement, in allocating funds appropriated for refugee and entrant assistance under the fiscal year 1984 continuing resolution, misinterpreted earlier decisions of this Office. "Current rate" as used in continuing resolutions refers to a definite sum of money rather than a program level. The different result reached in B-197636, Feb. 25, 1980, was limited to the unusual facts in that case 21
Fiscal year
Availability beyond
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Reimbursable expenses of an employee transferred in the interest of the Government must be charged against the appropriation current when valid travel orders are issued. B-122358, August 4, 1976 and 35 Comp. Gen. 183 (1955) and other cases inconsistent with this decision are overruled 45
Impounding
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Full amount available
Allocation
The Office of Refugee Resettlement (ORR) did not impound funds under the fiscal year 1984 continuing resolution so long as it made available for obligation the full $585,000,000 appropriated for the refugee and entrant assistance account. The continuing resolution appropriated a lump-sum amount for the refugee and entrant assistance account, rather than specific amounts for the various programs funded by that account. Allocations specified in the congressional committee reports were not binding on the ORR and it could allocate funds differently so long as it did not withhold any of the total $585,000,000 appropriations 21
Restrictions
"*Bona fide* needs"
"*Bona fide* needs" statute, 31 U.S.C. 1502(a), provides that an appropriation may only be used to pay for program needs attributable to the year or years for which the appropriation was made available, unless the Congress provides an exception to its application. The only exception for advance procurement of EOQ items is found in 10 U.S.C. 2306(h) but the exception is limited to procurement of items

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Restrictions—Continued
"*Bona fide* needs"—Continued
needed for end items procured by means of a multiyear contract. Authorized multiyear contracts may not cover more than 5 program years. 10 U.S.C. 2306(h)(8). Therefore, exercise of an option for advance procurement of EOQ items for a 6th or 7th program year is unauthorized. General Accounting Office does not accept Army contention that *bona fide* needs statute is inapplicable to multiple or "investment type" procurements 163
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Administrative determination
Protester's contention that unsatisfactory performance on one contract is not sufficient to support a determination of nonresponsibility

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Qualifications—Continued
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is denied. While poor performance on one contract does not necessarily establish nonresponsibility, the circumstances of the prior deficiencies are for consideration, and a contracting officer reasonably can determine that they are grounds for a nonresponsibility determination 175

BIDS
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Bid responsiveness
In a situation where a bidder violates an invitation for bids' level pricing provision, the determinative issue as to the responsiveness of the bid is whether or not this deviation worked to the prejudice of other bidders. Therefore, an unlevel low bid will not be found to be nonresponsive where it cannot be shown that the second low bidder conceivably could have become low if it had been permitted to unlevel its bid in the same manner as did the offending bidder. B-206127.2, Oct. 8 1982; 60 Comp. Gen. 202; B-195520.2, Jan. 7, 1980; 54 Comp. Gen. 967; and 54 Comp. Gen 476, are distinguished 48
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A claim which arises from an action taken by the Agency for International Development during a time of combat, and not from the noncombat activities of the United States Armed Forces or its members or civilian employees, is not cognizable under the Military Claims Act, 10 U.S.C. 2733, or the Foreign Claims Act, 10 U.S.C. 2734. However, it would be cognizable under General Accounting Of-

CLAIMS—Continued Page
Military activities—Continued
Property damage, loss, etc.—Continued
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fice's general claims settlement authority, 31 U.S.C. 3702, had not the 6 year statute of limitations specified in that section run 155

CLOTHING AND PERSONAL FURNISHINGS
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Tuxedo, formal attire, etc.
Employee of the Department of Health and Human Services claims reimbursement for the cost of renting a tuxedo for the purpose of accompanying the Secretary of the Department to a function where formal attire was required. The claim may not be allowed since ordinarily payment by employees for formal attire is considered a personal expense. The instant case does not present any special circumstances that warrant a departure from this general rule 6

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The "two-thirds rule" permits an agency to compensate employees under 5 U.S.C. 5542(a) for only 16 hours of a 24-hour tour of duty which includes substantial time in standby status, based on a presumption that the remaining 8 hours represent sleep and mealtime. However, this presumption, and hence the two-thirds rule, does not apply to shifts of less than 24 hours. Therefore, Federal firefighters who work an irregular or occasional overtime shift of 12 hours cannot be paid less than 12 hours of overtime compensation based on the two-thirds rule. However, bona fide meal periods may be excluded from compensable overtime hours 1
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Supervisors of prevailing rate employees who negotiate their pay increases are subject to statutorily imposed pay limitation which applies to most prevailing rate employees. These supervisors are within the express terms of the pay increase limitation and are not covered by the specific exclusions from the limitation. 60 Comp. Gen. 58 (1980) is distinguished 100

COMPENSATION—Continued Page

Rates

Highest previous rate

Transfers

Rate applicable

Army employee, a former local hire with the United States Government in the Philippine Islands, appeals a decision of our Claims Group disallowing his claim for salary adjustment based on the highest previous rate rule. Employee contends that he should be placed at grade and step that are equivalent in authority to grade and step he held in Philippines. However, highest salary rate earned in prior employment with Government, when converted to United States dollars, was less than grade GS-1, step 1. Employee's claim is denied because employee's Army salary exceeds the highest rate he previously earned. The highest previous rate rule applies only to the salary rate earned by the employee, not to his level of job responsibility 17

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Deductions. (*See* **COMPENSATION, Removals, suspensions, etc., Deductions from backpay)**

Deductions from backpay

Lump-sum leave payment

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper 86

Retirement and tax adjustments

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Retirement contributions which previously had been refunded to the employee were properly deducted from backpay because his retroactive reinstatement and receipt of backpay removed the legal basis for the refund. Net indebtedness resulting from deduction of the refund from backpay may not be waived by this Office under 5 U.S.C. 5584, since the refund did not constitute an erroneous payment of "pay or allowances." Under 5 U.S.C. 8346(b), Office of Personnel Management has sole authority to waive erroneous payments from the Civil Service Retirement Fund 86

Lump-sum leave payments. (*See* **COMPENSATION, Removals, suspensions, etc., Deductions from back pay, Lump-sum leave payment)**

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

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Review by GAO
Affirmative finding accepted
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Where time permits, an agency should undertake further consideration of its determination of an offeror's nonresponsibility where it is notified of a material change in a principal factor on which the determination was based. Administrative inconvenience is not sufficient reason to ignore a firm's financial resources at time of contract award even in negotiated procurement conducted in conjunction with a cost comparison review 19

CONTRACTS
Awards
Small business concerns. (*See* CONTRACTS, Small business concerns, Awards)
Competitive system
Restrictions on competition
Geographic
In the absence of a specific statute or regulation mandating the establishment of geographic regions, an agency generally must show that its minimum needs define the scope of a geographic restriction in a contract 160
General Accounting Office has no objection to the Government Printing Office's continued use of geographic restrictions in two Washington, D.C. area contracts for an additional 6 months, since the sole purpose is to gather data and to compare the results with unrestricted procurements. If the results do not provide a justifiction for limiting contracts to particular geographic regions, the restrictions should be removed entirely 160
Cost accounting
Cost Accounting Standards Board Standards
Standard 402
Agency erroneously added personnel as direct charge in probable realistic cost analysis of offeror's cost proposal. Offeror was covered by cost accounting standards (CAS) and proposed personnel as part of

CONTRACTS—Continued Page
Cost accounting—Continued
Cost Accounting Standards Board Standards—Continued
Standard 402—Continued
indirect charge. Under CAS part 402, offeror must account for costs incurred for same purposes in like circumstances as direct costs only or as indirect costs only. Since offeror indicates that it always charged offered personnel as indirect charge and since government cannot legally dictate how offeror should establish accounting system, further discussions should be held to verify offeror's accounting practice and to clarify government requirements 71
Cost-plus-award-fee contracts. (*See* CONTRACTS, Negotiation, Cost-plus-award-fee contracts)
Damages
Liquidated
Actual damages *v.* penalty
Price deductions
Reasonableness
Protester, alleging a liquidated damages provision imposes a penalty, must show that there is no possible relationship between the liquidated damages rate and reasonably contemplated losses. A solicitation provision shown to authorize deductions for an entire lot of custodial services, based on the contractor's unsatisfactory performance of only a portion of the tasks, imposes a penalty if it authorizes deductions without regard to what proportion of the services renders the entire lot unsuitable for the government's purpose 54
Evaluation
Negotiated procurements. (*See* CONTRACTS, Negotiation, Offers or proposals, Evaluation)
Multi-year procurement
Appropriations. (*See* APPROPRIATIONS. Obligation, Contracts, Multi-year procurements)
Five year limitation
Advance procurement of economic order quantity (EOQ) materials and components is authorized only to support end items procured through authorized 5-year multiyear contract. Army improperly exercised option for procurement of EOQ items for the needs of a 6th year and is cautioned not to exercise an option for the needs of a 7th year as presently contemplated, unless it obtains specific statutory authority to do so 163
Negotiation
Competition
Equality of competition
Offeror's superior advantages
Government equalizing differences
The government is not required to eliminate any competitive advantage that a firm might have as a result of federal, state or local programs unless the advantage is the result of unfair government action 8

CONTRACTS—Continued Page
Negotiation—Continued
Cost-plus-award-fee contracts
Award fees
Negotiation propriety
Award of cost-plus-award-fee contract at proposed cost plus 10 percent award fee violates regulatory limit on award fee where government evaluation of costs was that they should be $920,000 (5.5. percent) less than proposed cost because award fee is then 10.6 percent of government evaluated reasonable cost of awardee's proposal 71
Evaluation
Protest that proposed award fee should have been considered in probable cost evaluation of proposals on cost-plus-award-fee contract, where such evaluation is award determinative, is not meritorious, where protester submitted proposal after being fully informed that this was the way that proposals would be evaluated. Agency had reasonable basis for not evaluating proposed award fee and this evaluation did not violate any legal requirement 42
Cost-reimbursement basis
Evaluation factors
Lowest estimated costs and fees not controlling
Award on cost-reimbursement contract made at proposed cost amount, without further discussions, where cost analysis of successful proposal shows realistic cost of proposal is $920,000 (5.5 percent) less than proposed amount, is unusual and poor business practice, although adjustments in cost analysis and evaluation that awardee's proposal was lowest are not found unreasonable. Since protest is sustained on other grounds, discussions concerning evaluated overstated or excessive costs should be conducted 71
Evaluation. (*See* CONTRACTS, Negotiation, Offers or proposals, Evaluation)
Evaluation factors. (*See* CONTRACTS, Negotiation, Offers or proposals, Evaluation)
Offers or proposals
Evaluation
Agency adjustment of proposal
Propriety
Although cost evaluation document seems inconsistent with subsequent Navy explanation of cost evaluation, upward adjustment in cost realism analysis of 69 percent over proposed costs of technically acceptable and equal low offeror, primarily because of evaluated low staffing levels—a deficiency which was repeatedly pointed out in discussions—was not unreasonable in view of broad agency discretion, despite low offeror's disagreement with government assessment of its staffing levels 71
Upward cost adjustment of 69-percent of proposal in cost realism analysis, primarily due to evaluated increase in staffing levels, did not amount to re-writing proposal since agency only determined for evaluation purposes what probable and realistic cost of contracting with that offeror would be 71

CONTRACTS—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Evaluation—Continued
Basis for evaluation
Undisclosed
When telex request for prices for movement of military air cargo does not indicate how prices will be evaluated, protester is not free to make assumptions as to method that will be used. Rather, it has a duty either to inquire or to file a bid protest before submitting its prices 128
Cost realism
Function
Although 69-percent upward adjustment in cost realism analysis, primarily due to evaluated increase in staffing levels, on technically acceptable and equal low offer is unusual, the technical evaluation was done pursuant to evaluation criterion in request for proposals which did not give great weight to staffing levels. Cost analysis can be function entirely separate and not related to outcome of technical evaluation 71
Level of effort
Contrary to the protester's contention that the agency improperly "normalized" proposed levels of effort in cost realism evaluation, the agency reviewed offerors' individual approaches and made its own assessment of the level of effort, using the government estimate as a guide 71
Life-cycle costing
Solicitation's listed method for evaluating the residual-value element of typewriters' life cycle costs, by surveying sellers of used typewriters to determine the current trade-in value of models and then discounting that amount to represent a reduction in value for each year of the machines' useful lives, is reasonable 132
Time limitation for submission
Effect of competition
Contracting officer's failure to extend the closing date for proposal receipt which allegedly precluded a potential offeror from competing effectively does not render the procurement improper where adequate competition was obtained and there is no showing that the price at which the contract was awarded is unreasonable or that the agency was deliberately attempting to prevent the firm from competing 4
Refusal to extend date
There is nothing *per se* improper in a contracting officer refusing, after issuing a solicitation amendment, to extend the closing date for submission of initial proposals in a negotiated procurement; the determination whether an extension of the closing date is necessary is largely within the discretion of the contracting officer 4
Protests
Generally. (*See* CONTRACTS, Protests)
Requests for proposals
Restrictive of competition
Geographic restrictions. (*See* CONTRACTS, Negotiation, Competition, Restrictions, Geographic)

CONTRACTS—Continued Page
Protests—Continued
Specifications
Restrictive
Parts, etc. procurement
General Services Administration's decision to limit its Federal Supply Service requirements contracts for typewriters to models with 15-inch carriages, based on anticipated savings from efficiency of acquisition and allowing suppliers to realize the economies of scale and larger production runs, is not a proper reason to restrict competition similarly in other typewriter procurements where there is no evidence that anticipated savings from standardization would not be offset by lower prices obtained through competition and other models would meet the user agency's needs.....
32.....
Undue restriction not established
Decision to limit procurement of typewriters to models that previously had undergone a lengthy life-cycle-cost (LCC) analysis was reasonable where the procurement's urgency did not permit an LCC analysis of other models..... 132
Responsibility of offerors. (*See* **CONTRACTORS, Responsibility**)
Sole-source basis
Procedures
***Commerce Business Daily*notice procedures**
Incomplete synopsis
A protest is sustained where the agency rejected a potential source of supply for failure to demonstrate compliance with a requirement which was neither set forth in a CBD "source sought" synopsis nor otherwise made known to the vendor..... 118
Propriety
Where the contracting agency concluded that a vendor's software was not acceptable but found that the vendor's hardware was acceptable, and there was no requirement for obtaining the hardware and software from one vendor, a sole source award for the hardware was unreasonable..... 118
Protests
General Accounting Office procedures
Reconsideration requests
Additional evidence submitted
Available but not previously provided to GAO
Analyses presented by an agency in its request for reconsideration of a decision sustaining a protest against the determination of the agency to continue to perform services in-house rather than by contracting out for the services will not be considered since the agency declined to present any comments or analyses at the time of the protest and the information which forms the basis for the analyses was available at that time..... 64
Error of fact or law
Not established
Protester requesting reconsideration of a General Accounting Office decision must present a detailed statement of the factual and legal grounds warranting reversal or modification, specifying any errors of law or information not previously considered. When the

CONTRACTS—Continued Page
Protests—Continued
General Accounting Office procedures—Continued
Reconsideration requests—Continued
Error of fact or law—Continued
Not established—Continued
only basis for reconsideration cited by the protester is an unsupported allegation of bad faith on the part of agency officials, the request for reconsideration will be denied 63
Timeliness of protest
Failure to diligently pursue
General Accounting Office will not reopen a case which was closed because the protester did not send a timely indication of its continued interest in the protest to GAO, where the failure to timely indicate continued interest was caused by counsel's moving offices 172
Significant issue exception
For application
Untimely protest against the evaluation of the cost of "technical support services" in reviewing responses to the agency's announced intention to place an order with a nonmandatory Automatic Data Processing Schedule contractor will be considered on the merits as a significant issue, since the matter is one of widespread interest that General Accounting Office has not considered before 11
Interested party requirement
Potential contractors, etc. not submitting bids, etc.
Firms that did not submit offers or had their offers found technically unacceptable are interested parties to pursue timely protests against allegedly unduly restrictive specifications that prevented them from competing or from having their offered items found acceptable 132
Moot, academic, etc. questions
Future procurements
General Accounting Office Bid Protest Procedures are intended to resolve questions concerning the award or proposed award of particular contracts, and allegation that evaluation criteria in future solicitations may unduly restrict competition is premature 128
Procedures
Bid Protest Procedures. (*See* CONTRACTS, Protests, General Accounting Office Office procedures)
Reconsideration. (*See* CONTRACTS, Protests, General Accounting Office procedures, Reconsideration requests)
Significant issues requirement. (*See* CONTRACTS, Protests, General Accounting Office procedures, Timeliness of protest, Significant issue exception)
Timeliness. (*See* CONTRACTS, Protests, General Accounting Office procedures, Timeliness)
Responsibility of contractors
Determination. (*See* CONTRACTORS, Responsibility, Determination)

CONTRACTS—Continued Page
Small business concerns
Awards
Responsibility determination
Administrative determination
In reviewing a negative determination of a protester's responsibility, GAO will defer to the agency's discretion unless the protester, who bears the burden of proof, shows that there was bad faith by the procuring agency or no reasonable basis for its determination 175
Nonresponsibility finding
Review by GAO
Where a procurement agency withdraws its request to the Small Business Administration (SBA) to process a certificate of competency (COC) for the protester because the value of the contract to be awarded was less than $10,000, General Accounting Office (GAO) will review the agency's negative determination of responsibility because the SBA has made no determination with respect to the protester's 175
Set-asides
Withdrawal
Propriety
There is no requirement that equipment once acquired by an agency under the 8(a) program be acquired by small business set-aside in futue procurements 4
Size status
Contract not set-aside for small business
Eligibility for award
Bidder which certifies that it is not a small business was eligible for award of the contract under an invitation for bids not set aside for small business 84
Sole-source procurements. (*See* **CONTRACTS, Negotiation, Sole-source basis**)

CORPORATIONS
Government
Appropriations. (*See* **APPROPRIATIONS, Availability, Government corporations**)

COST ACCOUNTING STANDARDS ACT. (*See* **CONTRACTS, Cost accounting**)

DAMAGES
Contracts. (*See* **CONTRACTS, Damages**)
Liquidated
Contracts. (*See* **CONTRACTS, Damages, Liquidated**)

DEBT COLLECTIONS
Debt Collection Act of 1982
Applicability
Sections 5 and 10 of the Debt Collection Act of 1982, codified at 5 US.C. 5514, and 31 U.S.C. 3716 (1982), respectively, provide generalized authority to take administrative offset to collect debts owed to the United States. Their passage did not impliedly repeal 5 U.S.C. 5522, 5705, or 5724 (1982), or other similar preexisting statutes which authorize offset in particular situations. This is because a statute dealing with a narrow, precise, and specific subject is not submerged

DEBT COLLECTIONS—Continued Page
Debt Collection Act of 1982—Continued
Applicability—Continued
or impliedly repealed by a latter-enacted statute covering a more generalized spectrum, unless those statutes are completely irreconcilable 142
Section 5 of the Debt Collection Act of 1982, 5 U.S.C. 5514, as implemented in 49 Fed. Reg. 27470–75 (1984) (to be codified in 5 C.F.R. 550.1101 through 550.1106), authorizes and specifies the procedures that govern all salary offsets which are not expressly authorized or required by other more specific statutes (such as 5 U.S.C. 5522, 5705, and 5724). Any procedures not specified in that statute and its implementing regulations should be consistent with the provisions of the Federal Claims Collection Standards, 49 Fed. Reg. 8898–8905 Z1984) (to be codified in 4 C.F.R. ch. II) 142
Except as provided in section 101.4 of the Federal Claims Collection Standards (FCCS), when taking administrative offset under 5 U.S.C 5522, 5705, or 5724, or other similar statutes, or the common law, agencies should follow the procedures specified in section 10 of the Debt Collection Act of 1982, 31 U.S.C. 3716 (1982), as implemented by section 102.3 of the FCCS, 49 Fed. Reg. 8889, 8898–99 (1984) (to be codified in 4 C.F.R. ch.II 142
Set-off. (*See* SET-OFF)
Waiver
Civilian employees
Compensation overpayments
Severance pay
An employee, who received serverance pay following separation due to a reduction in force, was later granted a retroactive disability retirement. Payment of the retroactive retirement annuity resulted in an erroneous overpayment of the severance pay. Repayment of the total amount of severance pay is waived under 5 U.S.C. 5584 (1982) where there is no evidence the employee knew or should have known of the overpayment or when he received the retroactive annuity payment. B–166683. May 21, 1969, is distinguished 15
Severance pay. (*See* DEBT COLLECTION, Waiver, Civilian employee, Compensation, overpayments, Servance pay)
DISBURSING OFFICERS
Relief
Foreign currency devaluation
GAO specifically finds that the term "agency" as used in 31 U.S.C. 3342 includes legislative as well as executive branch agencies of the Federal Government. Therefore, disbursing officers of the Library of Congress whose accounts are diminished solely by foreign currency devaluations in the course of authorized currency exchanges may seek restoration of the accounts from the Department of the Treasury pursuant to 31 U.S.C. 3342. To the extent that they are inconsistent with this decision, B–174244, Dec. 8, 1971, and B–174244, Dec. 17, 1974, will no longer be followed 152

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EQUIPMENT
Automatic Data Processing Systems
Acquisition, etc.
Evaluation
Reasonably quantifiable factors
The evaluation of offers, or responses to a contracting agency's announced intention to place an order with a nonmandatory Automatic Data Processing Schedule contractor, should not include the consideration of speculative advantages to the government, but should be confined to matters that are reasonably quantifiable factors .....
The evaluation of offers, or responses to a contracting agency's announced intention to place an order with a nonmandatory Automatic Data Processing Schedule contractor, should not include the consideration of speculative advantages to the government, but should be confined to matters that are reasonably quantifiable 11

Replacement
Trade-in allowances
Where agency seeks to acquire new items and plans to solicit trade-in allowances for the items being replaced, the agency must solicit offers for the old items on an exchange (trade-in) basis and/or a cash basis, unless circumstances indicate that permitting both types of offers will not result in a better price than allowing one type 132

FOREIGN AID PROGRAMS
Grant agreement with foreign governments
Interest earned on grant funds
Retention
United States *v.* foreign government
The United States cannot recover interest earned by local and provincial elements of the Egyptian Government on grant funds awarded by the Agency for International Development (AID) to the Government of Egypt in the Basic Village Services Project (BVSP). Since the statutory provision under which the BVSP was funded contains broad program authority and since the stated purpose of the grant was to support Egypt's policy of decentralizing authority for development activities, we believe that the disbursement of the grant funds by the Egyptian Government to the lower governmental levels was a legitimate and proper purpose of the grant entitling them to retain interest earned on the grant funds 103

FOREIGN GOVERNMENTS
Egypt
Grants by United States
Retention of interest earned on grant funds
The United States cannot recover interest earned by local and provincial elements of the Egyptian Government on grant funds awards by the Agency for International Development (AID) to the Government of Egypt in the Basic Village Services Project (BVSP). Since the statutory provision under which the BVSP was funded contains broad program authority and since the stated purpose of the grant was to support Egypt's policy of decentralizing authority for development activities, we beleive that the disbursement of the grant funds

FOREIGN GOVERNMENTS—Continued Page
Egypt—Continued
Grants by United States—Continued
Retention of interest earned on grant funds—Continued
by the Egyptian Government to the lower governmental levels was a legitimate and proper purpose of the grant entitling them to retain interest earned on the grant funds 103

FOREIGN MATTERS GENERALLY
Claims. (*See* CLAIMS, Foreign)
FUNDS
Foreign
Exchange rate
Repayment of funds advanced
Deficiencies in the Library of Congress imprest fund used for foreign currency exchange transactions authorized by 31 U.S.C. 3342(a) and (b) and which are attributable solely to currency devaluations may be restored by the Department of the Treasury as authorized by 31 U.S.C. 3342(c) and implementing regulations. It is not necessary or appropriate for Government agencies to seek relief for a physical loss pursuant to 31 U.S.C. 3527. 61 Comp. Gen. 132 (1981). To the extent that they are inconsistent with this decision, B-174244, Dec. 8, 1971, and B-174244, Dec. 17, 1974, will no longer be followed 152

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
In-house performance *v.* contracting out
Cost comparison
Adequacy
Neither Office of Management and Budget (OMB) Circular No. A-76 nor agency regulations preclude a protest to General Accounting Office from an agency's administrative review of a contractor's appeal of an in-house cost estimate 64
Recommendations
contracts
In-house performance *v.* Contracting out
Cost comparison
Recalulation of Government's cost
The provision in OMB Circular NO. A-76 concerning independent preparation and confidentiality of government in-house cost estimate does not preclude GAO from recommending, pursuant to a protest, that the agency recalculate the cost of in-house performance 64

GRANTS
To foreign governments
Interest on grant funds. (*See* FOREIGN AID PROGRAMS, Grant agreements with foreign governments, Interest earned on grant funds)

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HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Loans and grants
Elderly and handicapped housing
Conflict of interest provisions
Violations
Cure by HUD
GAO investigations raised questions about the legality of seven loan applications conditionally or finally approved by the Department of Housing and Urban Development under the Housing for the Elderly and Handicapped program authorized by 12 U.S.C. 1701q. Prohibited identity of interests was involved in six of the seven projects; a serious question about the financial responsibility of the seventh borrower was also raised. HUD certifying officials are advised that no exceptions will be taken by GAO to past of future disbursements under these loans if HUD takes the actions it proposes to cure the conflict of interest deficiencies and to verify financial responsibility of the seventh borrower before final loan approval 38

HUSBAND AND WIFE
Divorce
Military personnel
Quarters allowance. (*See* QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ))

INTEREST
Grant-in-aid funds
Disposition of earned interest
Interest earned by subgrantees on loans made as part of authorized program efforts is program income and can be used to further program objectives 96
Grants
To others than States
Retention of interest earned
Grants to foreign governments
The United States cannot recover interest earned by local and provincial elements of the Egyptian Government on grant funds awarded by the Agency for International Development (AID) to the Government of Egypt in the Basic Village Services Project (BVSP). Since the statutory provision under which the BVSP was funded contains broad program authority and since the stated purpose of the grant was to support Egypt's policy of decentralizing authority for development activities, we believe that the disbursement of the grant funds by the Egyptian Government to the lower governmental levels was a legitimate and proper purpose of the grant entitling them to retain interest earned on the grant funds 103

LEAVES OF ABSENCE
Administrative leave
Last workday before holiday
On Dec. 23, 1982, the last workday before Christmas, the Installation Commander of Fort Sheridan, Illinois, released the Installation's civilian employees for the afternoon as a "holiday good-will gesture." On Feb. 11, 1983, the Civilian Personnel Officer found the action to

LEAVES OF ABSENCE—Continued Page
Administrative leave—Continued
Last workday before holiday—Continued
be a humbug stating that the Commander had no authority to release employees as a holiday good-will gesture. We are upholding the Installation Commander's exercise of the discretionary authority to grant excused absences in the circumstances as a lawful order under existing entitlement authorities. It follows that the employees in question are entitled to administrative leave—every one of them..... 171
Civilians on military duty
Charging
Civilian employees who are reservists of the uniformed service or are National Guardsmen who perform active duty for training are charged military leave on a calendar-day basis, and there is no authority for allowing the charging of military leave in increments of less than 1 day, regardless of the type of schedule the employee may work 154
Holidays
Administrative leave prior to holiday. (*See* LEAVES OF ABSENCE, Administrative leave, Last workday before holiday)
Lump-sum payments
Removal, suspension, etc. of employee
Deductions from back pay. (*See* COMPENSATION, Removals, suspensions, etc., Deductions from back pay, Lump-sum leave payment)
Travel expenses
Temporary duty after departure on leave. (*See* TRAVEL EXPENSES, Leaves of absence, Temporary duty, After departure on leave)

LOANS
Housing and Urban Development Department. (*See* HOUSING AND URBAN DEVELOPMENT DEPARTMENT, Loans and grants)

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

NONAPPROPRIATED FUND ACTIVITIES
Transactions with Government agencies
Interagency agreements
Propriety
Graduate School of Department of Agriculture, as a nonappropriated fund instrumentality (NAFI), is not a proper recipient of "interagency" orders from Government agencies for training services pursuant to the Economy Act, 31 U.S.C. 1535, or the Government Employees Training Act, 5 U.S.C. 4104 (1982). Interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies. Overrules, in part, 37 Comp. Gen. 16 110

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OFFICE OF MANAGEMENT AND BUDGET
Circulars
No. A-76
Procurement matters
General Accounting Office review. (*See* **GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, In-house performance *v.* contracting out)**

OFFICERS AND EMPLOYEES
Compensation. (*See* **COMPENSATION)**
Highest previous rate. (*See* **COMPENSATION, Rates, Highest previous rate)**
Overtime. (*See* **COMPENSATION, Overtime)**
Removals, suspensions, etc.
Compensation. (*See* **COMPENSATION, Removals, suspensions, etc.)**
Retirement. (*See* **RETIREMENT, Civilian)**
Senior Executive Service
Compensation
Aggregate limitation
Inclusions
Bonus payments
Fiscal Year 1982 presidential rank awards were paid to members of the Department of Energy Senior Executive Service on November 22, 1982, although the checks were dated September 29, 1982. 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 generally is considered paid on the date of the Treasury check. In this case, however, since the agency can conclusively establish the actual date the employee first took possession of the check, the date of possession shall govern. 62 Comp. Gen. 675 distinguished 114
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem)**
Transfers
Leases
Unexpired leases expense
Litigation expenses
An agency question whether an employee can be reimbursed attorney's fees and costs incident to litigation to settle an unexpired lease. The employee may be reimbursed the litigation costs since the Federal Travel Regulations do not preclude such expenses incurred incident to settling an unexpired lease, the amounts claimed are reasonable, and the potential liability of the Government was considerably greater than the amount settled on. To the extent that B-175381, Apr. 25, 1972, is inconsistent, it will no longer be followed. 24

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Real estate expenses
Advertising costs
House sale
A transferred employee attempted to personally sell his residence at his old duty station and incurred advertising expenses. Because he was unsuccessful, he placed the sale in the hands of a real estate agent who did sell the property. A commission paid to the agent on that sale was reimbursed to the employee, but prior advertising costs were disallowed. On reclaim, the disallowance is sustained. When a separate advertising cost is incurred which does not result in the sale of a residence, para. 2-6.2 of the Federal Travel Regulations (FTR) precludes reimbursement 58
Determination of pro rata reimbursement
Relationship of acreage to residence site
A transferred employee owned a residence on a 10-acre tract at his old duty station. In order to facilitate sale, the property was divided into two parcels and sold to two separate buyers. Real estate expenses of the parcel containing the residence were reimbursed to employee, but expenses associated with the parcel not containing the residence were disallowed. On reclaim, the disallowance is sustanied. When separate purchasers of divided property are involved, a parcel of land other than that upon which the residence is situated is not considered as being reasonably related to the residence as required by FTR para. 2-6.1f 58
Relocation expenses
Appropriation charged. (*See* APPROPRIATIONS, Fiscal year, Availability beyond, Travel and transportation expenses)
House purchase. (*See* OFFICERS AND EMPLOYEES, Transfers, Real estate expenses)
House sale. (*See* OFFICERS AND EMPLOYEES, Transfers, Real estate expenses)
Transportation of automobile. (*See* TRANSPORTATION, Automobiles)
Travel expenses. (*See* TRAVEL EXPENSES)

PAY
Additional
Aviation duty. (*See* PAY, Aviation duty)
Flight pay. (*See* PAY, Aviation duty)
Aviation duty
Overpayment
Collection action warranted
An Army officer, who was found to have fraudulently qualified for flight pay and Aviation Career Incentive Pay by submitting falsified flight physical examination records, is not entitled to such pay under applicable statutes and regulations. The *de facto* rule will not be applied to allow retention of flight pay and Aviation Career Incentive Pay received by an officer who fraudulently qualified for such pay. Therefore, collection action should be taken to recover these payments 67
Civilian employees. (*See* COMPENSATION)

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PAYMENTS
Prompt Payment Act
Interest payment
Since the government made payment by issuing a check within 30 days after the contracting agency received a proper invoice, payment of interest is not authorized under the Prompt Payment Act even though the contractor did not receive the payment until a substitute check was issued where the failure to receive the initial payment was outside the control of the contracting agency 32

PER DIEM. (*See* **SUBSISTENCE, Per diem**)
PROMPT PAYMENT ACT. (*See* **PAYMENTS, Prompt Payment Act**)

PROPERTY
Private
Damage, loss, etc.
Government liability
Personal property. (*See* **PROPERTY, Private, Damage, loss, etc., Personal property**)
Personal property
Government liability
Claim under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, 31 U.S.C. 3721, for loss of Forest Service employee's personal property due to burglary in rented Government housing at remote ranger station is cognizable under the statute, since housing may be viewed as "assigned" for purposes of 31 U.S.C. 3721(e) 93
Public
Surplus
Disposition
Sale
Vehicles. (*See* **SALES, Vehicles, Government owned, Automobiles**)

PURCHASES
Small
Small business concerns
Certificate of Competency procedures under SBA
Applicability
Protester's challenge to the agency's withdrawal of COC referral is denied where the withdrawal was made at the SBA's suggestion, based on a SBA regulation which leaves to the discretion of the contracting officer whether to refer the negative determination of responsibility to the SBA when the contract value will be less than $10,000. Further, the SBA Administrator was authorized by statute to make such regulations as he deemed necessary to carry out his authority, and there has been no showing that the regulation was not reasonably related to the SBA's statutory authority 175

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QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Dependents
Husband and wife both members of armed services
Divorce effect

Where two military members are divorced, or legally separated, the children of the marriage are in the legal custody of a third party, and each member is required to pay child support to the third party, only one of the members may receive the increased basic allowance for quarters ("with-dependent" rate) based upon these common dependents. If the members are unable to agree as to which should claim the children as dependents, the parent providing the greater or chief support should receive the increased allowance, unless both members provide the same amount of support, in which case the senior member should receive the increased allowance 121

RETIREMENT
Civilian
Contributions
Backpay award
Period of separation

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. The employee must pay retirement fund contributions for the period of the separation in order to receive service credit for that period. Although backpay awarded to the employee is insufficient to cover the amount of contributions he must pay, collection of that amount is not subject to waiver under 5 U.S.C. 5584 since there has been no erroneous payment of pay 86

SALES
Vehicles
Government Owned
Automobiles

GSA proposal to sell used Government vehicles on consignment through private sector auction houses is not objectionable. The proposal does not provide for an improper delegation of the inherent Government function of fee setting since the Government will set a minimum bid price on each vehicle and the final sales price will be determined by the market. The security of Government funds is assured by a contractor guarantee and bonding. 62 Comp. Gen. 339 (B-207731, Apr. 22, 1983), is distinguished 149

STATE DEPARTMENT
Appropriations. (*See* APPROPRIATIONS, State Department)

STATUTES OF LIMITATION
Claims
Claims settlement by GAO
Six years after date of accrual

The 6-year period of limitations in 31 U.S.C. 3702 was not tolled for the 4 years that claimant was living in Socialist Republic of Vietnam and may have been prevented from bringing suit. Consistent with

STATUTES OF LIMITATION—Continued Page
Claims—Continued
Claims settlement by GAO—Continued
Six years after date of accrual—Continued
the Supreme Court's construction of the Court of Claims 6-year statute of limitations, *Soriano* v. *United States*, 352 U.S. 270, 273 (1975), this Office should construe the 6-year period of limitation in section 3702 strictly 155

SUBSISTENCE
Actual expenses
Maximum rate
Intermittent employees
Federal Advisory Committee members
Members of the Cultural Property Advisory Committee may not be reimbursed for actual subsistence expenses exceeding the maximum amounty of $75 per day, as limited by 5 U.S.C. 5702(c). The Federal Advisory Committee Act, Public Law 92-463, incorporated by reference in the Advisory Committee's enabling legislation, provides that advisory committee members are to be paid the same travel expenses as authorized under 5 U.S.C. 5703 for intermittent employees. Under 5 U.S.C. 5703 and the Federal Travel Regulations, intermittent employees serving as experts or consultants may not be reimbursed for actual subsistence expenses exceeding the maximum rate, absent specific statutory authorization for the payment of a higher rate. We find that no such specific statutory authority is included in the Advisory Committee's enabling legislation 34
Per diem
Actual expenses. (*See* SUBSISTENCE, Actual expenses)
Headquarters
Weather conditions causation
An employee stationed at Fort George G. Meade, Maryland, returning from a temporary duty assignment obtained a meal and rented a motel room near his residence when a snowstorm and icy roads prevented him from continuing to his home. The claim for reimbursement must be denied since an employee may not receive per deim or subsistence in the area of his place of abode or his official duty station, regardless of unusual circumstances 70
Transferred employees
Delay
An employee who is delayed by a breakdown of his automobile en route to a new duty station may be allowed travel time and be reimbursed for an additional day of per diem where the agency determines that the reason for delay was beyond the employee's control and was acceptable to the agency 173

TRANSPORTATION
Automobiles
Specially equipped
Handicapped employee
Transfer
Employee without use of her arms who shipped her specially equipped automobile between duty stations within the continental United States may be reimbursed for shipping costs. The agency

TRANSPORTATION—Continued Page
Automobiles—Continued
Specially equipped—Continued
Handicapped employee—Continued
Transfer—Continued
found, pursuant to the Rehabilitation Act of 1973, that employee was a qualified handicapped employee, that reimbursement was cost beneficial, that it constituted a reasonable accommodation to the employee, and that such reimbursement did not impose undue hardship on the operation of the personnel relocation program. Authorization under the Rehabilitation Act satisfies the "except as specifically authorized" language in 5 U.S.C. 5727(a) (1982) 30
Household effects
Military personnel
Household effects damaged or lost in transit
Military-Industry Memorandum of Understanding
Presumption of correct delivery after 45 days
Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage 126
Weight limitation
Excess cost liability
Actual expense shipment
Computation formula
A transferred employee shipped household goods under the actual expense method. The goods weighed in excess of the maximum allowable. Under FTR para. 2-8.3b(5), the employee is liable for excess weight and delivery costs as a percentage of the total expenses associated with that shipment, based on the ratio of the excess weight to the total weight of the goods shipped. These regulations have the force and effect of law and may not be waived or modified, regardless of circumstances 58
Motor carrier shipments
Mobile homes
Carmach Amendment to ICC Act
Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984 117

TRAVEL EXPENSES
Leaves of absence
Temporary duty
After departure on leave
Payment basis
A vacationing employee whose leave is interruped by orders to perform temporary duty at another location, and who afterwards returns to his permanent duty station at Government expense, is not

TRAVEL EXPENSES—Continued Page
Leaves of absence—Continued
Temporary duty—Continued
After departure on leave—Continued
Payment basis—Continued
entitled to be reimbursed for the cost of a personal return airline ticket that he could not use because of the cancellation of his leave. As the Government has paid the cost of his return, employee's claim is comparable to that for the lost value of a vacation, and may not be reimbursed 28
Per diem. (*See* SUBSISTENCE, Per diem)

TREASURY DEPARTMENT
Secret Service
Accountable officers
Relief. (*See* ACCOUNTABLE OFFICERS, Relief)

WORDS AND PHRASES
"Assigned" Government quarters
Claim under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, 31 U.S.C. 3721, for loss of Forest Service employee's personal property due to burglary in rented Government housing at remote ranger station is cognizable under the statute, since housing may be viewed as "assigned" for purposes of 31 U.S.C. 3721(e) 93
"*Bona fide* needs"
"*Bona fide* needs" statute, 31 U.S.C. 1502(a), provides that an appropriation may only be used to pay for program needs attributable to the year or years for which the appropriation was made available, unless the Congress provides an exception to its application. The only exception for advance procurement of EOQ items is found in 10 U.S.C. 2306(h) but the exception is limited to procurement of items needed for end items procured by means of a multiyear contract. Authorized multiyear contracts may not cover more than 5 program years. 10 U.S.C. 2306(h)(8). Therefore, exercise of an option for advance procurement of EOQ items for a 6th or 7th program year is unauthorized. General Accounting Office does not accept Army contention that *bona fide* needs statute is inapplicable to multiple or "investment type" procurements 163
"Current rate" as used in continuing resolutions
The Office of Refugee Resettlement, in allocating funds appropriated for refugee and entrant assistance under the fiscal year 1984 continuing resolution, misinterpreted earlier decisions of this Office. "Current rate" as used in continuing resolutions refers to a definite sum of money rather than a program level. The different result reached in B–197636, Feb. 25, 1980, was limited to the unusual facts in that case 21
Economic order quantity (EOQ)
Advance procurement of economic order quantity (EOQ) materials and components is authorized only to support end items procured through authorized 5-year multiyear contract. Army improperly exercised option for procurement of EOQ items for the needs of a 6th year and is cautioned not to exercise an option for the needs of a 7th

WORDS AND PHRASES—Continued Page

Economic order quantity (EOQ)—Continued

year as presently contemplated, unless it obtains specific statutory authority to do so 163

Interagency agreements

Graduate School of Department of Agriculture, as a non-appropriated fund instrumentality (NAFI), is not a proper recipient of "interagency" orders from Government agencies for training services pursuant to the Economy Act, 31 U.S.C. 1535, or the Government Employees Training Act, 5 U.S.C. 4104 (1982). Interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies. Overrules, in part, 37 Comp. Gen. 16 110

Level pricing clause

In a situation where a bidder violates an invitation for bids' level pricing provision, the determinative issue as to the responsiveness of the bid is whether or not this deviation worked to the prejudice of other bidders. Therefore, an unlevel low bid will not be found to be nonresponsive where it cannot be shown that the second low bidder conceivably could have become low if it had been permitted to unlevel its bid in the same manner as did the offending bidder. B-206127.2, Oct. 8, 1982; 60 Comp. Gen. 202; B-195520.2, Jan. 7, 1980; 54 Comp. Gen. 967; and 54 Comp. Gen. 476, are distinguished 48

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