Decisions of
The Comptroller General
of the United States

VOLUME 65 Pages 823 to 914

SEPTEMBER 1986
WITH
CUMULATIVE TABLES AND INDEX DIGEST
OCTOBER 1, 1985–SEPTEMBER 30, 1986

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300135500

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TABLE OF DECISION NUMBERS

	Page
B-214479, Sept. 22	842
B-214561.3, Sept. 26	876
B-215735, Sept. 26	879
B-217114, Sept. 24	858
B-217181, Sept. 29	893
B-218645, Sept. 29	900
B-218990.2, Sept. 8	835
B-219013, Sept. 29	906
B-219480, Sept. 22	845
B-219940 et al., Sept. 26	881
B-219958, Sept. 26	884
B-220210, Sept. 8	838
B-220226, Sept. 22	847
B-220227, Sept. 26	888
B-220283.2, Sept. 25	874
B-220734, Sept. 24	865
B-221065, Sept. 26	891
B-221248, Sept. 22	849
B-221462, Sept. 29	910
B-221594, Sept. 29	912
B-222246, Sept. 4	826
B-222532, Sept. 2	823
B-223059; B-223243, Sept. 5	828
B-223157 et al., Sept. 22	854
B-223594, Sept. 24	871
B-224090, Sept. 2	825
B-224343, Sept. 5	831

Cite Decisions as 65 Comp. Gen.—

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-222532]

Contracts—Awards—Erroneous

Where a solicitation for indefinite quantities of oxygen solicits prices for gaseous and liquid oxygen supplies, but provides that the contractor may provide whichever type of oxygen it prefers, evaluation based on the prices for both types of oxygen provides no assurance that the low evaluated price will result in the lowest actual cost to the government and, thus, provides no valid basis for award.

Matter of: Associated Healthcare Systems, Inc., September 2, 1986:

Associated Healthcare Systems, Inc. (AHS), protests the rejection of its low bid as nonresponsive and the award of a contract to Home Health Care Products, Inc. (HHCP), under invitation for bids (IFB) No. 528-33-86 issued by the Veterans Administration (VA), VA Medical Center, Buffalo, New York, for furnishing oxygen and inhalation supplies.

We sustain the protest.

The VA rejected AHS's low bid for failing to comply with the VA's interpretation of a clause limiting the government's cost under the IFB. The IFB specified estimated quantities and requested unit prices for each of six sizes of oxygen cylinders, and for regulators, liquid oxygen systems, and oxygen concentrators. The solicitation provided:

> The Contractor can provide oxygen in any form of liquid if he/she prefers; however, the cost of liquid oxygen, including monthly rental of system and cost per pound of liquid oxygen, shall not be in excess of equivalent oxygen provided by 'H' [244 cubic feet] cylinders.

The VA interpreted this provision as requiring a bidder to submit an offered price for liquid oxygen which did not exceed the bidder's offered price for an equivalent unit of gaseous oxygen provided in "H" cylinders, while permitting the bidder to provide at its discretion "H" oxygen cylinders or liquid oxygen systems to meet the agency's needs (while nothing similarly prohibited the price of gaseous oxygen from exceeding the price of liquid oxygen). AHS submitted prices of $16.50 per "H" cylinder and $1.40 per pound of liquid oxygen. Each "H" cylinder contains gaseous oxygen equivalent to 20.19 pounds of liquid oxygen. By dividing AHS's price of $16.50 per "H" cylinder by 20.19, the VA determined that AHS's price per pound of $1.40 for liquid oxygen exceeded its price of an equivalent amount of gaseous oxygen in "H" cylinders ($0.817 per pound). Because of this, and the VA's interpretation that the offered price for liquid oxygen could not exceed the offered price for an equivalent unit of gaseous oxygen, the VA rejected the AHS bid as nonresponsive.

The protester states that it interpreted the provision in question not as imposing a limit on the prices it could offer, but as limiting the monthly amount the contractor could be paid for liquid oxygen to the cost of supplying an equivalent amount of gaseous oxygen at

the bidder's "H" cylinder price. As the protester interpreted the provision, it could offer and charge $1.40 per pound for liquid oxygen, but the maximum monthly cost per patient could not exceed the cost of providing the patient with gaseous oxygen. The protester argues that if it was mistaken in this interpretation, it should be allowed to correct its bid so that its price for liquid oxygen is equal to its originally offered price for an equivalent amount of gaseous oxygen in "H" cylinders. We understand this argument to mean that, if the VA applied the provision as a bidding limitation, AHS should be allowed to modify its bid to reflect the VA's interpretation.

By its terms, the IFB referred to the contractor's performance and prohibited the cost of liquid oxygen, including monthly rental of the attendant equipment, from exceeding the cost of equivalent oxygen in "H" cylinders and attendant equipment. The provision did not expressly limit what price a bidder could offer for liquid oxygen. Further, if the costs of the different types of oxygen and attendant equipment were to be compared on the basis of a common quantity, it was impossible to determine the equivalent costs without factoring in the number of months the systems would be rented, a number entirely in the contractor's control based on the type of oxygen the contractor chooses to supply. Thus, it was, at best, unclear whether the IFB prohibited offering higher prices for liquid oxygen than for equivalent gaseous oxygen in "H" cylinders, or merely placed a limit on the amount the contractor could be paid for liquid oxygen systems during performance.

Further, we find that the IFB did not provide a proper basis for an award. An award must be based on the most favorable cost to the government measured by the actual and full scope of work to be awarded. *A to Z Typewriter Co.—Reconsideration*, B-218281.2, Apr. 8, 1985, 85-1 CPD ¶ 404. If the IFB's evaluation scheme does not assure that an award to the lowest evaluated bidder will result in the lowest cost to the government in terms of actual performance, the IFB is defective *per se* and no bid can be evaluated properly. *Exclusive Temporaries of Ga., Inc.*, B-220331.2 *et al.*, Mar. 10, 1986, 86-1 CPD ¶ 232.

The fact that the IFB provided that the contractor could supply any type of oxygen, but that the low bidder would be evaluated based on prices for both types of oxygen, provided no assurance that the evaluated low bid would result in the least costly performance. A bidder could have bid a minimal unit price for liquid oxygen and an excessive unit price for gaseous oxygen with the intention of providing only gaseous oxygen, as allowed by the IFB, and therefore the evaluated total price would not reflect the actual cost to the government. In this regard, we note that the awardee's price for gaseous oxygen was higher than the protester's.

We also note that although the IFB apparently contemplated a requirements contract and provided estimated quantities of antici-

pated requirements for gaseous oxygen, it provided no estimates of the amount of oxygen to be used with liquid oxygen systems. It therefore was not clear whether the liquid oxygen merely represented an alternative to the estimated requirements for gaseous oxygen or an additional requirement. If the line item for liquid oxygen represented an additional requirement, the IFB should have included an estimated quantity for liquid oxygen and provided for a price evaluation based on the estimated quantities of the items to be purchased. See *North American Reporting, Inc., et al.*, 60 Comp. Gen. 64 (1980), 80-2 CPD ¶ 364. In addition, the IFB solicited prices for two sizes of gaseous oxygen cylinders where in each case the estimated quantity was stated as zero.

Because of these deficiencies, it is impossible to determine whether any award under this solicitation would be in the government's interest of obtaining the least costly responsible firm. We recommend that the VA expeditiously prepare a revised solicitation that accurately states the agency's needs and provides a basis for evaluation that takes those needs into account and assures award at the lowest cost to the government. In this regard, we suggest that if the contractor will be able to provide whichever type of oxygen it prefers, the IFB should require a fixed price for a common measure of oxygen (including necessary equipment) without regard to type. This would alleviate the need for any limitation on the pricing or cost of liquid oxygen relative to gaseous oxygen. We further recommend that the VA then resolicit and award a contract as soon as possible, terminating the current contract for convenience if feasible. Since it is quite possible that this action cannot be effected before a substantial portion of the current contract's 1-year term has expired, we find that the protester should be reimbursed the reasonable costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.6(e) (1986).

The protest is sustained.

[B-224090]

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

Protest that agency awarded contract despite timely challenge to awardee's small business size status is dismissed where written confirmation of oral size protest was received by the contracting officer more than 5 days after bid opening and was postmarked later than 1 day after the oral protest.

Matter of: Barrier Construction Company, September 2, 1986:

Barrier Construction Company (Barrier) protests the award of a contract under invitation for bids (IFB) No. N62474-86-B-4839, issued by the Navy for maintenance of chain link fence at the Naval Air Facility, El Centro, California. Barrier contends that the contracting officer awarded the contract to the apparent low bidder

despite Barrier's timely challenge of the awardee's small business size status.

We summarily dismiss the protest without obtaining an agency report from the Navy, since it is clear from information furnished by Barrier that the protest is without legal merit. 4 C.F.R. § 21.3(f) (1986).

According to Barrier, bid opening was August 4, 1986. Barrier states that it notified the contracting officer by telephone on August 6 that it would be submitting detailed information to protest the small business size status of the apparent low bidder. Barrier mailed its written confirmation of its oral protest by certified mail on August 8. The contracting officer awarded the contract to the apparent low bidder on August 11, and received Barrier's letter on August 12. Barrier alleges that the contracting officer awarded the contract in the face of a timely protest made in accordance with Federal Acquisition Regulation (FAR) procedures.

In order to affect a specific solicitation, a protest concerning the small business representation of any bidder must be received by the contracting officer by the close of business of the 5th business day after bid opening. FAR, 48 C.F.R. § 19.302(d)(1) (1985). A protest may be made orally if it is confirmed in writing either within the 5-day period or by letter postmarked no later than 1 day after the oral protest. FAR, 48 C.F.R. § 19.302(d)(1)(i) (1985). Here the Navy did not receive Barrier's confirmation of its size protest until August 12, 6 days after bid opening. Since Barrier also did not mail its confirmation letter until 2 days after its oral protest, its protest was untimely and did not affect the solicitation in question.

The protest is dismissed.

[B-222246]

Officers and Employees—Duties—Performance at Home

The Department of Housing and Urban Development proposes to allow an employee with multiple sclerosis to work at home during temporary periods when the employee will not be able to commute to an office because of that illness. While generally Federal employees may not be compensated for work performed at home rather than at their duty stations, under limited circumstances, when actual work performance can be measured against established quantity and quality norms so as to verify time and attendance reports, and there is a reasonable basis to justify the use of a home as a workplace, payment of salaries for work done at home may be authorized under an established and approved program. Thus, if the agency has determined that appropriate measures have been taken to ensure quantity and quality of work done and time and attendance, the employee may be paid for work done at home.

Matter of: Work Performed at Home, September 4, 1986:

This action is in response to a request for an advance decision from the U.S. Department of Housing and Urban Development regarding a proposed temporary work-at-home arrangement for an employee of the agency.[1] The agency proposes to allow the employ-

[1] The request was made by Judith L. Tardy, Assistant Secretary for Administration, U.S. Department of Housing and Urban Development, Washington, D.C.

ee to work at home during periods when, due to illness, the employee will be unable to report to the office to work. The employee was recently diagnosed as having multiple sclerosis and while she may be capable of performing her duties, aspects of her illness would prevent her from commuting to the office from time to time. Her absences will be temporary and are generally not expected to exceed 1 week at a time.

The employee's position is that of Intergovernmental Relations Officer, and her position is described by the agency as one which requires the writing of letters, speeches, position papers, and memoranda, as well as the performance of other measurable tasks. The agency states that the employee's supervisors will know the number of written products and other items of work completed on a weekly basis and the approximate time needed to complete each task. The agency proposes that the employee work at home for between 15 and 25 hours a week, not to exceed 6 hours a day.

With regard to work-at-home programs, we have expressed the view that under most circumstances, Federal employees may not be compensated for work performed at home rather than at their duty stations. However, we have authorized exceptions to this general rule under limited circumstances. When actual work performance in the home can be measured against established quantity and quality norms so as to verify time and attendance reports, we have interposed no objection to payment of salaries. We have allowed Federal employees to be compensated for work performed at home in a variety of circumstances, provided the work was of a substantial nature, the employing agency was able to verify that the work had in fact been performed, and there appeared to be a reasonable basis to justify the use of the home as a workplace. In appropriate circumstances, we have authorized compensation for work at home involving the preparation of written documents, and also the making of telephone calls.[2]

In the present case, the agency proposes to allow one employee with multiple sclerosis to work part-time, temporarily, at home. Under the proposed program, the employee would "compose drafts of letters or memoranda, make phone calls, draft position papers or speeches and complete other measurable tasks." The employee would call in at the beginning and end of her workday and would record working hours in a log. The agency states that a staff member would review the work done and make determinations regarding time required to complete the tasks. The agency states that the work is measurable since the office will be aware of the number of tasks performed on a weekly basis and the approximate time needed to complete a task.

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[2] See 65 Comp. Gen. 49, 52 (1985); B-214453, December 6, 1984; B-182851, February 11, 1975; B-169113, March 24, 1970; and B-131094, April 17, 1957.

We point out that the situation in this case is not to be confused with the usual case of an employee who is ill and unable to perform his or her ordinary duties at the assigned workplace, or the employee who for personal reasons or convenience would prefer a more flexible schedule or to take some time off. The government's sick leave and disability retirement programs are directed toward the first category and the annual leave, flexible and compressed work schedules, and part-time programs are directed toward the latter category. The present case, however, involves an employee who apparently wishes to work and is capable of performing her duties, the only problem being that at times she is unable to commute to the office. In these circumstances, it appears that work of a substantial and measurable nature will be performed at home, that the employing agency will be able to verify the performance of the work, and that the employee's physical condition affords a reasonable basis to justify allowing her to work at home from time to time. Hence, we have no objection to the implementation of the agency's proposal.

[B-223059; B-223243]

Contracts—Minority Businesses—Set-Asides—Authority

Protest against an evaluation preference for minority-owned firms contained in a synopsis for a small business set-aside for architect-engineer (A-E) services issued under the Brooks Act, 40 U.S.C. 541-544 (1982), is denied because the procuring agency has statutory authority to give preference to minority-owned or -controlled small business firms under the Small Business Act, 15 U.S.C. 644(g) (1982).

Contracts—Protests—Abandoned

Where an agency, in its report to GAO, rebuts an argument raised in the protest and the protester fails to respond to the agency's rebuttal in its comments on the agency report, the argument is deemed abandoned.

Matter of: Charles A. Martin & Associates, September 5, 1986:

Charles A. Martin & Associates (Martin) protests against an evaluation preference for minority-owned firms appearing in two synopses advertised in the Commerce Business Daily (CBD) for award of contracts for architect-engineer (A-E) services for Tinker Air Force Base, Oklahoma (Air Force). Martin contends that there is no legal basis for these evaluation preferences.

We deny the protests.

The solicitations were issued under the Brooks Act, 40 U.S.C. §§ 541-544 (1982), which prescribes procedures for acquiring A-E services. Under these procedures, an agency must first publicly announce its requirements and the evaluation criteria. An evaluation board set up by the agency then evaluates under the stated criteria the A-E performance data and statements of qualifications of firms already on file, as well as data submitted by firms in response to the specific project. Discussions then must be held with "no less than three firms regarding anticipated concepts and the relative

utility of alternative methods of approach" for providing the services requested. The board then prepares a report for the selection official, ranking in order of preference no fewer than the three firms considered most qualified. The selection official makes the final choice of the three most qualified firms and negotiations are conducted with the highest ranked firm. If the contracting officer is unable to reach agreement with that firm on a fair and equitable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee.

One procurement calls for A-E services necessary for the alteration of electrical and mechanical building systems and interiors of three buildings at Tinker Air Force Base and was synopsized in the April 28, 1986, CBD, issue No. PSA-9077. The synopsis stated that the procurement was a "100% small business setaside." This synopsis also contained a minority evaluation preference which stated that "qualified minority-owned firms will be assigned additional points of consideration for selection."

The second procurement calls for multi-discipline A-E design services for maintenance, repair, alteration and new construction projects at Tinker Air Force Base and was synopsized in the May 16, 1986, CBD, issue No. PSA-9091, page 6. The synopsis stated that the selection of an A-E firm would be based upon six listed criteria and, as one criterion, noted that "qualified minority-owned firms will be assigned additional points for consideration for selection."[1]

Martin argues that the selection preference for minority-owned firms violates the Brooks Act, 40 U.S.C. § 542 (1982), which requires that the award of A-E contracts be based upon "demonstrated competence and qualification for the type of professional services required."

The Air Force states that it has adopted a goal of awarding 15 percent of its A-E contracts to minority businesses (*i.e.*, those owned or controlled by socially or economically disadvantaged persons). This goal, according to the Air Force, was established because of the congressional mandate in the Small Business Act, 15 U.S.C. § 644(g) (1982), that directs federal agencies to establish goals for participation of minority-owned small businesses in procurements with a value of $10,000 or more. The Air Force states that "as a vehicle for achieving the congressionally mandated goal," Air Force Federal Acquisition Regulation Supplement (AFAR) § 36.602-1(a)(6) (1984), directs that additional points shall be assigned to small disadvantaged businesses in the point system used to evaluate potential contractors for A-E contracts.

[1] Although the synopsis did not restrict the procurement solely to small business, the Air Force reports that the preference is applicable only to small business minority-owned firms.

The Small Business Act, at 15 U.S.C. § 644(g), states:

> The head of each Federal agency shall, after consultation with the [Small Business] Administration, establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and economically disadvantaged individuals, in procurement contracts of such agency having values of $10,000 or more. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under such contracts. Whenever the administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator of the Office of Procurement Policy for final determination.

In addition to the policy in 15 U.S.C. § 644(g), encouraging the participation of small business and small business concerns owned and controlled by socially and economically disadvantaged individuals, 15 U.S.C. § 644(i) expressly permits exclusive small business set-asides for procurements of A-E services.

The Air Force argues that its policy of giving a preference to minority-owned or -controlled small business firms does not violate the requirement of the Brooks Act that A-E contracts be awarded to firms with "demonstrated competence and qualification" because the amount of points typically given to experience and capability outweigh the minority preference points by a factor of 3. The Air Force also contends that since A-E procurements may properly be set-aside for small business under 15 U.S.C. § 644(i), it is therefore no less proper for the Air Force to not only set aside specific procurements for small business, but also to incorporate a small business minority preference in order to help satisfy its goal established pursuant to 15 U.S.C. § 644(g). Finally, citing our decision in *Agency for International Development, Developing Countries Information Research Services (AID)—Reconsideration,* B-218622.2; B-218622.3, Sept. 25, 1985, 85-2 C.P.D. ¶ 336, the Air Force suggests that GAO should grant considerable deference to the Air Force's interpretation and implementation of the statutes encouraging small disadvantaged business participation in procurements which the Air Force is charged with administering.

While we have questioned the propriety of restricting awards to minority firms in the absence of specific statutory authority for the action, see *Image 7, Inc.,* B-195967, Jan. 2, 1980, 80-1 C.P.D. ¶ 6, we have not objected to the establishment of an evaluation preference, that is, the assignment of additional points to a firm based on its small business minority status, in order to implement the statutory policy of encouraging the participation of such firms in government contracting. See *Leon Whitney, Certified Public Accountant,* B-190792, Dec. 19, 1978, 78-2 C.P.D. ¶ 420. Here, in order to meet goals for participation by small business concerns, including those owned or controlled by socially and economically disadvantaged individuals, the Air Force has, by regulation, provided that, "additional points shall be assigned to potential contractors that are 8(a) or

small disadvantaged businesses." Air Force Regulation § 36.602-1 (1986). The regulation is a reasonable implementation of the statutes encouraging small disadvantaged business participation in procurements which the Air Force conducts. Further, we have accepted the basic principle of granting deference to the agency's interpretation of statutes which the agency is charged with administering. *AID—Reconsideration*, B-218622.2; B-218622.3, *supra*. Under these circumstances, we cannot conclude that the Air Force acted improperly by giving additional points to minority-owned or -controlled firms under these procurements for A-E services.

Martin asserts that the evaluation preference for minority firms has resulted in a disproportionate number of awards to minority firms in Northern California. In this regard, Martin points out that since April 1984, seven out of eight Department of Defense electrical engineering projects in Northern California, in which Martin competed, were awarded to small minority-owned firms.

As indicated above, we find that the evaluation preference for small minority-owned firms is not legally objectionable. The fact that a higher proportion of awards have been made to small minority firms in Northern California does not alter our conclusion since these awards are the result of the implementation of a legitimate government goal to increase awards to small business minority firms. The Air Force also explains that one of the reasons so many awards have been made to small minority-owned firms in Northern California is simply that there are a large number of these firms located in that area. There is no indication that the minority firm evaluation preference is being administered unfairly by the Air Force.

Finally, we note that Martin raised additional arguments in its initial protest letter (for example, that the minority preference violates the United States Constitution), but failed to comment on the Air Force's rebuttal of these contentions. We therefore consider Martin to have abandoned these arguments. See *The Big Picture Co., Inc.*, B-220859.2, Mar. 4, 1986, 86-1 C.P.D. ¶ 218.

We deny the protests.

[B-224343]

Contracts—Protests—Abeyance Pending Court Action

General Accounting Office (GAO) will dismiss a protest to the extent that it raises an issue which is before a court of competent jurisdiction and the court has not expressed interest in GAO's opinion.

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

Where contracting agency issues a request for proposals (RFP) soliciting offers for comparison with protester's existing options for the same items, protester, as a potential offeror under the RFP, is an interested party to challenge alleged deficiencies in the RFP.

Contracts—Options—Solicitation Provisions—Evaluation of Options

When contracting agency decides to issue a request for proposals (RFP) for the purpose of deciding whether to exercise existing options, RFP must advise offerors that their offers will be compared with the options, in order to ensure competition on an equal basis. In view of the discretionary nature of the decision to exercise an option, however, RFP need not describe the factors on which the option exercise decision will be based in the same detail as the evaluation criteria used to compare offers under the RFP with each other.

Matter of: Aerojet TechSystems Company, September 5, 1986:

Aerojet TechSystems Company protests any award under request for proposals (RFP) No. N00024-86-R-6246(S) issued by the Navy for acquisition of major components of the MK 65 Quickstrike Mine. Aerojet challenges the Navy's decision to issue the RFP instead of exercising options for the mines under an existing contract with Aerojet. Aerojet also contends that the RFP is defective for failing to specify in adequate detail the criteria the Navy will use in comparing offers received under the RFP with Aerojet's existing options for the mines. We dismiss the protest in part and deny it in part.

In December 1985, Aerojet was awarded contract No. N00024-86-C-6160 for a basic quantity of mines, with two options for variable quantities exercisable in fiscal years 1986 and 1987. The 1985 acquisition was the subject of a protest to our Office by Aerojet. *Aerojet TechSystems Co.*, B-220033, Dec. 6, 1985, 85-2 CPD ¶ 636. The Navy made award to Aerojet after we sustained the protest based on our finding that the Navy had improperly rejected Aerojet's bid as nonresponsive. On May 5, 1986, in order to decide whether to exercise the options under Aerojet's existing contract, the Navy issued the current RFP for a basic quantity of mines equal to the quantities available under the Aerojet options, plus additional option quantities. The Navy plans to base its decision whether to exercise the options on a comparison of the offers received under the RFP with the Aerojet options. Aerojet did not submit an offer under the RFP.

According to the Navy, the RFP was issued to determine whether the Navy could obtain lower prices for the mines than under the Aerojet options. The Navy's belief that lower prices might be available was based on the prices submitted in connection with the initial procurement, before the first Aerojet protest was sustained and award made to Aerojet under its original bid. Specifically, the original acquisition was conducted as a two-step formally advertised procurement. The Navy received three offers, all of which were found technically acceptable. The three offerors then submitted bids under the second step of the procurement. The contracting officer found all three bids nonresponsive, however, and canceled the solicitation. After the cancellation, the contracting officer decided to complete the acquisition using negotiated procedures. The proposals subsequently received from the three offerors were lower in

price than the bids under the original invitation for bids. After the Aerojet protest was sustained, however, award was made to Aerojet under its original bid.

In its current protest Aerojet challenges both the Navy's decision to issue the new RFP and the Navy's failure to include sufficient detail in the RFP regarding the manner in which new offers and the Aerojet options will be compared. On July 11, Aerojet filed suit in the U.S. District Court for the Eastern District of California raising the first issue in the protest, the propriety of the Navy's decision to issue a new RFP. Since that issue is now before a court of competent jurisdiction and the court has not expressed interest in our decision, we dismiss this part of the protest. Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1986); *C&M Glass Co.*, B-218227, Apr. 15, 1985, 85-1 CPD ¶ 430.

With regard to the remaining issue in the protest—whether the RFP adequately describes how offers under the RFP will be compared with the Aerojet options—the Navy contends as a preliminary matter that Aerojet is not an interested party to raise this issue because Aerojet did not submit an offer under the RFP. Aerojet's failure to submit an offer under the RFP, however, is not determinative of its status as an interested party to challenge alleged deficiences in the RFP.

Both the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(2) (Supp. III 1985), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a), define an interested party entitled to maintain a protest as "an actual or prospective bidder or offeror whose direct economic interest would be affected" by the award or failure to award the challenged contract. Here, Aerojet characterizes itself as a potential offeror under the RFP and states that the lack of sufficient detail in the RFP regarding how new offers will be compared with the existing options prevented it from making a reasonable decision regarding whether to submit an offer under the RFP. In our view, the alleged prejudice to Aerojet's interest as a potential offeror is questionable, since Aerojet in effect is claiming that there is insufficient detail in the RFP to determine whether to compete against itself as the obligor under the options by submitting a new offer under the RFP. Nevertheless, as a potential offeror, Aerojet technically has the requisite interest to protest alleged solicitation defects, whether or not it eventually submits an offer.[1] See *Tumpane Services Corp.*, B-220465, Jan. 28, 1986, 86-1 CPD ¶ 95.

Aerojet argues that the RFP is defective for failing to advise offerors in sufficient detail how the Navy will compare their offers with the Aerojet options in choosing whether to exercise the op-

[1] Aerojet also argues that its existing options should be regarded as an offer under the RFP sufficient to confer standing on Aerojet as an "actual offeror" under CICA. We need not address this argument in view of our finding that Aerojet's status as a potential offeror qualifies it as an interested party to protest the alleged RFP deficiencies.

tions or make award under the RFP. Specifically, Aerojet contends that the RFP should, but does not, indicate how the Navy will compensate for the variations in quantities between offers under the RFP and the Aerojet options; how first article and warranty costs will be considered; or to what extent nonprice factors will be considered. We find Aerojet's argument to be without merit.

With regard to the comparison between offers under the RFP and the Aerojet options, section M, paragraph D of the RFP provides:

> Offerors are advised that the Government has FY 86 and FY 87 options to acquire quantities of Mine Mark 65 Mod 0 Components and related supplies and services under Contract N00024-86-C-6160. The Government intends to compare these option prices with the prices of the responsible technically acceptable offeror with the lowest evaluated price under the instant solicitation. Prices for both the basic and option quantities under the instant solicitation will be analyzed when determining whether to award under the instant solicitation or to exercise the options in Contract N00024-86-C-6160. The Government evaluation will compensate for variations in quantity between the two procurements and provide a common basis for price comparison. Consequently, offerors should submit their most favorable prices for both firm and option quantities in their price proposals.
>
> The Government will also consider the price of first article line items under the instant solicitation, as well as the fair market rental value of any Government Production and Research Property intended for use on a rent free basis under the instant solicitation and for the option items under Contract N00024-86-C-6160. Award will be made under either the instant solicitation *or* Contract N00024-86-C-6160 based upon which under the planned price comparison offers the best overall value to the Government.

By issuing an RFP to solicit new offers for the items covered by the Aerojet options, the Navy assumed an obligation to advise offerors under the RFP that their offers will be compared with the options, since that comparison will be decisive in whether award will be made under the RFP. See *Milwaukee Valve Co., Inc.*, B-206249, Feb. 16, 1982, 82-1 CPD ¶ 135. This duty to disclose derives from a contracting agency's general obligation to give offerors sufficient detail regarding the evaluation criteria to ensure competition on an equal basis known to all offerors. See *Klein-Sieb Advertising and Public Relations, Inc.*, B-200399, Sept. 28, 1981, 81-2 CPD ¶ 251. Here, as noted above, the RFP advised offerors that award would be made to the lowest priced, technically acceptable offeror under the RFP only if its offer compared favorably with Aerojet's existing options. The RFP described generally how that comparison would be made, clearly indicating that the Navy would equalize the offeror's prices and the option prices to account for variations in quantity and other factors such as first article costs. We are aware of no requirement that the Navy specify in any further detail how the offeror's prices and the Aerojet option prices will be adjusted for purposes of comparison, since, even where no option is involved, a solicitation need not contain the precise formula to be used. See *Prosearch*, B-206316, June 30, 1982, 82-1 CPD ¶ 636.

With regard to nonprice factors, we agree that the Navy could have described the factors it will consider, for example, the impact on defense readiness of longer delivery times if award is made

under the RFP instead of exercising the options; however, we do not believe that the Navy was required to do so. Aerojet's options, like options generally, are exercisable at the sole discretion of the government, *see* Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.201 (1985) (option is unilateral right of the government), and the decision to exercise an option is based on a discretionary judgment by the contracting officer as to whether it is the most advantageous method of fulfilling the government's needs, all factors considered. *See* FAR, 48 C.F.R. § 17.207(c)(3). By notifying offerors that their offers would be compared with Aerojet's options, the RFP put offerors on notice that award under the RFP ultimately would depend on the contracting officer's discretionary judgment regarding the advantages of exercising the options, considering both price and nonprice factors. In our view, the RFP in this way strikes an appropriate balance between advising offerors of the basis on which award will be made and maintaining the Navy's flexibility in determining whether to exercise the Aerojet options. Cf. *Cincinnati Electronics Corp., et al.*, 55 Comp. Gen. 1479, 1484-1485 (1976), 76-2 CPD ¶ 286.

The protest is dismissed in part and denied in part.

Aerojet requested that it be awarded the costs of pursuing the protest. Recovery of costs is allowed only where a protest is found to have merit. 31 U.S.C. § 3554(c)(1); 4 C.F.R. 21.6(d). Since we have not found the protest to have merit, we deny Aerojet's claim for recovery of costs.

[B-218990.2]

Telephones—Private Residences—Prohibition—Exceptions

Use of appropriated funds to install telephone equipment in the residences of Internal Revenue Service employees to be used for portable computer data transmission is prohibited by 31 U.S.C. 1348(a)(1) (1982). However, there are circumstances, involving telephone service of limited use or when there are numerous safeguards and the service is essential, when the prohibition has been held inapplicable. Here, IRS has demonstrated the essential nature of the service, and an exception to the prohibition is warranted. Prior to installing the equipment, IRS should establish safeguards to prevent misuse.

Matter of: Internal Revenue Service, Installation of Telephone Equipment in Employee Residences, September 8, 1986:

This decision is in response to a request for guidance from Mr. Richard C. Wassenaar, Assistant Commissioner (Criminal Investigation) of the Internal Revenue Service (IRS). Assistant Commissioner Wassenaar requests a decision regarding the propriety of installing telephones in the residences of certain IRS criminal investigators in New York City to be used for portable computer data transmission. For the reasons set forth below, we conclude that the installation of the telephone equipment in question in the circumstances presented to us for review would be proper, provided that IRS establishes sufficient safeguards to prevent misuse.

The circumstances posed by Assistant Commissioner Wassenaar involve a group of eight IRS criminal investigators in New York City who have been authorized to work from their residences whenever possible, using the telecommunications capabilities of portable computers to communicate with the district office computer system. This program is designed to benefit both the IRS and the individual agents. Thus the "Project Summary" included with the IRS submission indicates that the program will help to decrease "unproductive staff hours spent travelling" as well as "agent stress and fatigue brought on by the type of travel encountered in New York City."

According to the submission, it was necessary for IRS to install telephone lines and telephone equipment in the residences of the agents participating in the program for the following reasons:

(1) For security purposes, the telephone instrument has to be located in the area set up by the agents as their working space. This working space is located as far away as possible from the main living area.

(2) The installation of a dedicated line prevents the possibility of other household members inadvertently picking up an extension phone and overhearing a portion of a discussion of a case related matter or machine recorded dictation.

(3) Inasmuch as this phone use is considered "commercial" by the telephone company, and therefore billed at a high rate, it would not be practical to use the agent's personal phone.

(4) A separate line was needed so as not to tie up the agent's personal telephone with official business. All agents in the group are required to maintain a personal telephone for personal calls. The separate line is for official calls only.

Background: The use of appropriated funds to install telephones in private residences is prohibited by 31 U.S.C. § 1348(a)(1) (1982):

Except as provided in this section, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences.

This statute generally constitutes a mandatory prohibition against the use of appropriated funds to pay any part of the expense of furnishing telephone service to an employee in a private residence, without regard to the desirability of such service from an official standpoint. *See, e.g.,* 35 Comp. Gen. 28 (1956); 15 Comp. Gen. 885 (1936). We have invoked the statutory prohibition even when the employees who would use the telephone service had no office out of which they could work and were required to work out of their homes. B-130288, February 27, 1957. *See also* 26 Comp. Gen. 668 (1947). In a recent decision, we held that the statutory prohibition applied even when the volume of Government business effectively precluded the employee's family from using his personal telephone. 59 Comp. Gen. 723 (1980).

Nonetheless, although generally the statute has been strictly applied, there have been instances in which we have determined that the prohibition was not applicable. Exceptions have been recognized in two general circumstances. The first general circumstance is when the telephone is installed in Government-owned quarters serving as a residence and office simultaneously. *See, e.g.,* 4 Comp.

Gen. 891 (1925) (installation of a telephone in an office in a Government-owned house provided to a lighthouse superintendent); 53 Comp. Gen. 195 (1973) (installation of telephone in an Army barracks).

The second general circumstance in which we have recognized the inapplicability of the statutory prohibition is when the telephone service is one of limited use or it is a service involving numerous safeguards and the separate service is essential. *See, e.g.*, 32 Comp. Gen. 431 (1953) (installation of a special telephone in the residence of the Pearl Harbor fire marshall); B-128114, June 29, 1956 (installation of direct telephone lines from Air Force command post to residences of high officials).

In 61 Comp. Gen. 214 (1982), we approved the installation of Federal Secure Telephone Service (FSTS) in the residences of certain high level civilian and military officials to ensure secure communications required for reasons of national security. The FSTS had several unique features which supported our holding. The telephones required a special key and could be programmed to respond only to a user code. The agency head was to certify that the telephones were to be used for official business only and the system was subject to audit to ensure that only official business was transacted. Finally, the system was to be installed in the residences of relatively few officials whose status would minimize the likelihood of abuse. In concluding that the statutory prohibition was not applicable to the installation of FSTS, we distinguished several previous cases in which the prohibition had been strictly applied:

> The cited cases, however, including 59 Comp. Gen. 723, *supra*, are distinguishable from the proposal under consideration here. In the first place, no provisions were made in those cases to assure that private calls would not be made since the telephones to be installed in private residences were no different than those normally installed for private use. In this case, access and use will be controlled. Secondly, the telephones in the cited cases, while desirable from an official standpoint, were, in essence, to serve as a convenience for the Government officials involved. This is because official calls to and from the officials' residences could have been placed and received, if necessary, from their private telephone, even though this might have caused some personal inconvenience. Here, the official calls to or from private residences could not be made over private telephones because of the need for security.

Analysis: If the installation of the equipment in the case at hand is to be permissible, it must fall within one of the two recognized exceptions to the prohibition of 31 U.S.C. § 1348, discussed above. The first exception, installation of a telephone in Government-owned quarters, is clearly inapplicable in the circumstances here under review, which involve the installation of telephone equipment in privately-owned residences.

We conclude, however, that the second exception, installation of essential telephone service of limited use or involving numerous safeguards, would be applicable in the instant case, provided that IRS establishes sufficient safeguards to prevent misuse of the equipment. The IRS has adequately demonstrated that the installation of a dedicated line is essential to maintain the security of in-

formation regarding confidential tax investigations. The submission of IRS does not indicate, however, what safeguards IRS contemplates to prevent misuse of the equipment. In the Federal Secure Telephone Case, 61 Comp. Gen. 214 (1982), discussed above, the equipment in question had certain mechanical and electronic safeguards and was subject to audit. Here, IRS must establish similar safeguards. The intent of 31 U.S.C. § 1348 is to ensure that the Government does not bear the cost of private use of telephone equipment by Government employees. *See* 63 Comp. Dec. (1912) cited in 61 Comp. Gen. 214, 216 (1982). Accordingly, a system of safeguards would be sufficient if it, at a minimum, effectively ensured that the equipment in question could not be put to an employee's personal use, resulting in added expense to the Government.

[B-220210]

Appropriations—Availability—Contracts—Amounts Recovered Under Defaulted Contracts

Faulty design by an architect-engineer (A-E) caused the Air Force to incur additional corrective expenses in the ensuing construction contract. The corrective expenses—added costs paid to construction contractor plus added amounts paid to Army Corps of Engineers for supervision and administration (S&A)—were charged to Air Force's 1982 5-year Military Construction appropriation. In 1985, Government recovered the amount of the additional costs from the A-E. Since the appropriation charged was still available for obligation at the time of the recovery, it may be reimbursed from the recovery to the extent of the additional costs actually incurred. However, portion of recovery representing S&A expenses in excess of amount actually charged Air Force must be deposited as miscellaneous receipts.

Matter of: Army Corps of Engineers—Disposition of Funds Collected in Settlement of Faulty Design Dispute, September 8, 1986:

The disbursing officer for the United States Army Corps of Engineers, Norfolk District, has collected $46,324 from an architect-engineer (A-E) who provided a faulty design for construction work. The disbursing officer requested our decision on whether the collected funds may be used to reimburse the appropriation used to pay the construction contractor for the extra expenses it incurred to correct the A-E's faulty design, and the revolving fund available for the Corps' supervision and administration (S&A) expenses, or whether the funds must be deposited into the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 3302. As explained below, since the agency has already paid the additional construction expenses plus a 5½ percent flat rate representing additional S&A expenses, these sums collected from the A-E may be credited to the agency's appropriation. The balance of the S&A collection must be deposited into the general fund of the Treasury as a miscellaneous receipt.

FACTS

The Air Force awarded an architect-engineering contract to O'Dell Associates to design a Consolidated Support Center and Softball Complex at Langley Air Base, Virginia. When the design was completed, O'Dell was paid from the Air Force's 1981 Military Construction appropriation. The Air Force used O'Dell's design to solicit bids and procure a contract for the construction of the Complex and Center.

The Air Force awarded the contract to the Kenbridge Construction Company. The Army Corps of Engineers supervised and administered the project. The construction contract was funded by the Air Force's 1982 Military Construction appropriation. After beginning work, Kenbridge experienced construction problems caused by O'Dell's faulty design. Consequently, Kenbridge was issued a contract modification to cover additional construction expenses incurred to make corrections for the faulty design. The contract modification was also funded from the 1982 appropriation.

Subsequently, O'Dell agreed that it was liable for the faulty design in the amount of $46,324 and it forwarded a check in that amount to the disbursing officer. $40,324 represents the amount paid to the construction contractor to cover the additional expenses it incurred in making the adjustments necessary to compensate for the architect's faulty design. The remaining $6,000 represents compensation for the extra costs of S&A incurred by the Corps. Originally, the S&A expenses were charged to the revolving fund established by the Civil Functions Appropriations Act, 1954, Pub. L. No. 83-153 (July 27, 1953), 67 Stat. 197, 199. The Corps charges S&A expenses against the fund and the fund is later reimbursed from appropriations of the "client" agency. The Corps charges a procuring agency a flat 5½ percent of the contract price for S&A. The 5½ percent rate is calculated so that in the long run the Corps will "break even" in providing supervision and administration of agency projects. Thus, in this case, the Corps charged $2,218 of the additional S&A expenses incurred in supervising and administering the contractor's adjustments to the Air Force's project account. The remaining $3,782 was absorbed by the revolving fund. The disbursing officer deposited the settlement monies into a suspense account pending this decision. The Corps suggests that retention of the recovery here would be consistent with our decision in 62 Comp. Gen. 678 (1983).

DISCUSSION

Early decisions of the Comptroller of the Treasury held that "excess reprocurement costs" recovered from a defaulting contractor need not be deposited in the Treasury as miscellaneous receipts, but could be retained by the agency to fund a replacement contract. 21 Comp. Dec. 107 (1914); 16 Comp. Dec. 384 (1909). The

theory was that the money should be used "to make good the appropriation which will be damaged" by having to incur costs in excess of the original contract price to receive the goods or services that would have been received under the original contract but for the default. 21 Comp. Dec. at 109.

Some years later, without ever explicitly overruling or modifying the earlier cases, decisions began to hold that the recoveries had to be deposited as miscellaneous receipts, and this new rule was then followed consistently for decades.[1] At the same time, the decisions drew a distinction between default situations and situations in which faulty work was discovered after completion of the contract. In the latter situation, the agency could retain the recovery to fund necessary replacement or corrective work, on the theory that payment to the original contractor in excess of the value of satisfactory performance constituted an erroneous payment, and the recovery of erroneous payments has always been treated as a refund to the appropriation originally charged.[2]

In 62 Comp. Gen. 678 (1983), we recognized that the distinction between default and defective workmanship should not control the disposition of funds recovered from the original contractor. Modifying several earlier decisions, we held that "excess reprocurement costs" recovered from a contractor, whether occasioned by a default or by defective workmanship, could be retained by the contracting agency to the extent necessary to fund a replacement contract coextensive in scope with the original contract. If the agency could not retain the funds for the purpose and to the extent indicated, it could find itself effectively paying twice for the same thing, or possibly, if it lacked sufficient unobligated money for the reprocurement, having to defer or forego a needed procurement, with the result in many cases that much if not all of the original expenditure would be wasted.

Thus, with respect to defective workmanship cases, the thrust of our 1983 decision was essentially to affirm the holding of decisions such as 34 Comp. Gen. 557, with the additional feature of applying the same result where the recovery, by virtue of factors such as inflation or underbidding, exceeded the amount paid to the original contractor. With respect to default cases, we, in effect, returned to both the rule and the rationale of the early Comptroller of the Treasury decisions.

In 64 Comp. Gen. 625 (1985), we gave 62 Comp. Gen. 678 its logical application and held that an agency could use the proceeds of a performance bond forfeited by a defaulting contractor to fund a replacement contract to complete the work of the original contract.

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[1] *E.g.*, 26 Comp. Dec. 877 (1920); 10 Comp. Gen. 510 (1931); 40 Comp. Gen. 590 (1961).

[2] 8 Comp. Gen. 103 (1928); 34 Comp. Gen. 577 (1955); 44 Comp. Gen. 623 (1965).

The instant case clearly presents a situation of "defective workmanship" rather than "default." As explained below, we think agency retention of the recovery in this case would have been permissible even prior to 62 Comp. Gen. 678.

Prior decisions permitting agency retention of recoveries from breaching or defaulting contractors have involved either no-year appropriations [3] or, where annual appropriations were involved, situations in which the replacement or corrective costs had not yet been paid. [4] In either situation, agency retention of the recovery enables the agency to avoid depletion of appropriations that are still available for obligation at the time of the recovery.

For example, 44 Comp. Gen. 623 (1965) involved a "defective workmanship" recovery where the appropriation originally charged was an expired annual appropriation. We said that the recovery "may be credited to the appropriation or its successor ["M"] account." *Id.* at 626. In that case, however, since the corrective work had not yet been undertaken, crediting the recovery to the successor account would still serve the purpose of avoiding depletion of a current appropriation in view of the established rule that expired appropriations remain available beyond the expiration date to fund a proper replacement contract. This is the same result the Comptroller of the Treasury had reached in 21 Comp. Dec. 107 (1914).[5]

The appropriation sought to be reimbursed in this case is the Air Force's 1982 Military Construction appropriation. By its terms, that appropriation is a 5-year appropriation, remaining available until September 30, 1986.[6] While our prior decisions have not dealt specifically with a multiple-year appropriation, we think the result follows logically and directly from those decisions. As noted, where the replacement or corrective costs have not been incurred at the time of the recovery, the decisions have permitted retention by the agency, to the extent necessary to fund the replacement work, regardless of the type of appropriation (annual, multiple-year, or no-year). Where the replacement costs have already been paid and the appropriation from which they were paid is still available for obligational purposes at the time of recovery, the type of appropriation would again make no difference.

Accordingly, we think it follows from decisions such as 34 Comp. Gen. 577 that the $40,324 recovered from O'Dell for additional contractor expenses and $2,218 representing 5½ percent of that additional contract amount which the Corps actually charged the Air

[3] 62 Comp. Gen. 678 (1983) (involved a no-year appropriation, although the decision failed to so state); 34 Comp. Gen. 577 (1955); 16 Comp. Dec. 384 (1909).

[4] Comp. Gen. 625 (1985); 44 Comp. Gen. 623 (1965); 8 Comp. Gen. 103 (1928); 21 Comp. Dec. 107 (1914).

[5] We have not held, nor do we suggest here, that the result would necessarily be the same if the corrective costs had already been paid from an appropriation which, at the time of the recovery, was no longer available for obligation.

[6] Military Construction Appropriation Act, 1982, Pub. L. No. 97-106 (Dec. 23, 1981), 95 Stat. 1503, 1504.

Force for S&A expenses need not be deposited in the Treasury as miscellaneous receipts, but may be credited to the Air Force's 1982 Military Construction account.

On the other hand, the $3,782 which represents monies collected for S&A expenses over and above the Corps' actual 5½ percent charge must be deposited into the Treasury as miscellaneous receipts. To allow that portion of the collection to be deposited in the revolving fund would result in an augmentation to that fund. As indicated earlier, the Corps calculates that charging a flat rate of 5½ percent of contract price for S&A expenses will, on the average, cover its actual expenses in providing services. Allowing the Corps to retain collections above its calculated 5½ percent rate would result ultimately in collecting more than actual costs, causing an augmentation of the revolving fund. Accordingly, so as to preclude a violation of 31 U.S.C. § 3302, the Corps should deposit the $3,782 into the Treasury as miscellaneous receipts.

[B-214479]

Interest—Contracts—Delayed Payments by Government—Penalty Payments on Overdue Utility Bills

The Army should include Prompt Payment Act interest penalties when it makes late payments to public utility companies that do not have a tariff-authorized late charge. The Act requires that interest penalties be added to late payments made to "any business concern." Utilities are not excluded from the definition of this term. Our decision in 63 Comp. Gen. 517 (1984) concerned a public utility which had adopted tariff-authorized late charges and other express payment terms. We held only that, just as is the case with other contractors, such express terms take precedence over provisions in the Act which were intended to provide contractors with a substitute penalty when none was provided in the contract.

Payments—Prompt Payment Act—Interest Payment

The Army's payment as a result of this decision of interest owed on utility bills should include compound interest as required by section 3902(c) of title 31.

Matter of: Prompt Payment Act Interest on Utility Bills, September 22, 1986:

An Army Finance Officer asked for an advance decision on the propriety of paying Prompt Payment Act (Act) interest penalties on late payments for telephone services in states where the applicable tariff approved by the public utility commission does not provide that the telephone supplier may assess late charges against its customers. The Act, codified at 31 U.S.C. §§ 3901-06 (1982), defines late payments and imposes interest penalties on all such payments made by the Government. We conclude that the payments inquired about fall within the statutory parameters, and are subject to statutory penalties. A second question in the request, regarding the computation of tariffed late charges should be resolved by the cognizant state regulatory bodies, not this Office.

Scope of the Act

A tariff approved by the state utility commission constitutes the contract for services between a regulated public utility and its customers (including the Federal Government). State public utility commissions generally regulate the rates charged to consumers to insure that the utility recovers its costs plus a specified return on investment and to protect consumers from possible overcharging by a state-chartered monopoly. Most tariffs authorize a late payment charge to compensate the utility for the extra costs associated with delayed payments. This Office first held more than 10 years before enactment of the Prompt Payment Act that the terms of a regulated public utility's approved tariff constitutes the terms of a contract for service, including tariffed late charges, and therefore such late charges were properly payable, 51 Comp. Gen. 251 (1971).

Recently, we analyzed the relationship between the Prompt Payment Act's interest penalties and tariffed late charges of public utilities in 63 Comp. Gen. 517 (1984). We held that the Act was not intended to supplant existing contractual requirements for late payment charges or interest, but rather to provide a statutory right to recover late payment interest when the contract itself did not provide for such payments. Accordingly, we found that tariffed payment terms must be complied with strictly.

The GSA temporary regulations incorporating the requirement of the Act into the Federal Procurement Regulations mirrored our decision. They exempted public utility contracts with tariffed late charges from the application of the terms and conditions for late payments specified in the Act. 41 C.F.R. Part 1-29 (1983) (expired). The regulations also took the same position as did our decision that tariffed late charges were payable in lieu of, not in addition to, Prompt Payment Act interest penalties. *See* 63 Comp. Gen. at 519.

The question before us now, however, is whether Prompt Payment Act interest penalties are applicable to late payments made to public utilities when the approved tariffs do not provide for or require the use of a specific late charge. Our earlier case did not deal with this situation.

The Act defines a "business concern" as "a person carrying on a trade or business." Using the same broad determination of "person" as is found in Federal procurement statutes and regulations, we have no doubt that the term covers both individual and corporate suppliers of service. The Act then goes on to provide:

> * * * the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due.* * * 31 U.S.C. § 3902(a).

The Act also specified that the required payment date is the date set forth in the contract or, if no due date is specified, 30 days after receipt of a proper invoice. 31 U.S.C. § 3903(1). For service contracts

such as those under discussion here, the Act further establishes a 15-day grace period after the due date during which interest is calculated but is not paid. If payment occurs after the grace period expires, interest is due from the day after the due date until payment is made. 31 U.S.C. § 3902(b)(3).

Thus, the Government is obligated to add interest to all its overdue bills following the contract or tariff terms, if any, or the terms of the Prompt Payment Act, discussed above. There are no exceptions in the statute based on the nature of the service acquired or the type of industry providing it.

The legislative history of the Act also supports a conclusion that the interest penalty applies without exception. In addition to compensating vendors for the cost of delayed payment, a corollary purpose of the Act was to encourage timely remittance and ultimately change the Government's reputation as a slow payer. *See* H.R. Rep. No. 461, 97th Cong., 2d Sess. 1, 8.

Considering the plain meaning of the statute and its legislative history, we find that the Army should add interest penalties to invoices for telephone service when it pays more than 15 days after the invoice due date and there is no tariff authorized late charge.

Computing Interest Owed

At the same time the Army requested an advance decision, the Finance Officer informed the affected telephone suppliers that the Army would continued to pay its bills, but would decline to add interest penalties until advised to do so by the Comptroller General. Since we are now advising that interest should be paid, the Army Finance Officer has asked informally how much is owed.

As we indicated above, if payment is not made during the 15-day grace period, the interest penalty accrues from the day after the due date until the day payment is made. 31 U.S.C. § 3902(b). Interest shall be computed at the rate established by the Secretary of the Treasury for interest payments under the Contract Disputes Act. *Id.* at 3902(a).

The Act generally requires the compounding of interest at 30-day intervals. Subsection 3902(c) provides:

> An amount of an interest penalty unpaid after any 30-day period shall be added to the principal amount of the debt, and a penalty *accrues thereafter on the added amount.* [Italic supplied.]

OMB Circular A-125, the implementing regulation for the Prompt Payment Act, clarified the compound interest requirement as follows:

> When an interest penalty that is owed is not paid, interest will accrue on the unpaid amount until paid. 47 Fed. Reg. 37321, 37323.

The OMB Circular makes it clear that § 3902(c) should be interpreted as requiring compound interest on the Army's unpaid interest. The amount of interest owed at the time each invoice was paid

should be calculated, and compounded thereafter at 30-day intervals for 1 year or until payment. Payment is naturally subject to the availability of funds from the appropriate fiscal year.

Computation of Tariffed Late Charges

A second question submitted with the request involves late charges authorized by tariff but assessed on the basis of the monthly total billing by telephone utilities. The question arises because companies which provide only local telephone services frequently collect long distance and other telecommunications billings for the company which provides those services. The tariffed late charge is then assessed based on the combined billings of the two companies. The Army does not question whether the late charge should be paid. Rather it questions the late charge being assessed on the combined billings.

Our Office is not the appropriate forum in which to decide this question. We held in 63 Comp. Gen. 517 (1984) that it is the tariff which constitutes the agreement between the parties. If this billing practice has the approval of the state public utility commission (which we assume it does in those situations where late charges are assessed on combined billings), the Army is constrained to abide by it. It follows then that the proper place to contest the reasonableness of this billing practice is the cognizant state regulatory body.

[B-219480]

Officers and Employees—Transfers—Dependents—Immediate Family—What Constitutes

Employee was transferred from Washington, D.C., to Ogden, Utah. He had been divorced and legal custody of his daughter had been awarded to his former wife who lived in Claremont, California. Although the daughter had resided with employee for some 10 months prior to employee's transfer, at the time employee reported to his new duty station he was neither accompanied by his daughter nor did she later join him in Utah. Under the Federal Travel Regulations, a dependent must be a member of the employee's household at the time he or she reports for duty. Accordingly, employee may not be reimbursed for the cost of his daughter's travel from his old duty station to his former spouse's home upon his transfer.

Matter of: John W. Richardson, Jr.—Cost of Daughter's Travel—Change of Duty Station, September 22, 1986:

This decision is in response to a request by Mr. W. D. Moorman, Authorized Certifying Officer, National Finance Center, United States Department of Agriculture, as to whether a travel voucher submitted by Mr. John W. Richardson, Jr., an employee of the Forest Service, may be certified for payment. The issue presented is whether Mr. Richardson is entitled to reimbursement for the cost of an airline ticket for his daughter Kristina incident to his change of official station. For the reasons stated below, the travel voucher may not be certified for payment.

By travel authorization dated May 30, 1984, Mr. Richardson was authorized a permanent change of station from Reston, Virginia, to Ogden, Utah. At the time that he was notified of the transfer, his daughter was residing with him.

The travel authorization listed Mr. Richardson's immediate family as consisting of his daughter, Kristina Renee, age 14. Common carrier (airlines) transportation was authorized for the employee and his daughter.

The record discloses that Mr. Richardson was divorced in February 1983. Mrs. Richardson was awarded legal custody of Kristina. However, by mutual agreement between Mr. Richardson and his former wife, Kristina had resided with Mr. Richardson since August 1983 and attended school in Reston, Virginia, during the 1983-84 school year. Mr. Richardson states that, at the time of his transfer, he and his former wife were considering allowing Kristina to remain with him for the summer so that she could attend a soccer camp in Virginia. He and his former wife were also considering allowing Kristina to continue to live with Mr. Richardson and to attend school in Reston during the 1984-85 school year so that she could play in the fall soccer league.

In submitting his request for authorization to travel, Mr. Richardson included Kristina for travel, transportation, and temporary quarters benefits. Prior to commencement of travel, however, Kristina was injured while playing in a soccer tournament. The parents then agreed that it would be too difficult for Kristina to make the long trip cross-country by automobile and to be left unattended in temporary quarters while her father was working and looking for a permanent residence. Hence, they agreed that it would be in the best interests of Kristina for her to live with her mother in Claremont, California. An airline ticket was purchased at a cost of $269 and Kristina traveled to Claremont.

Paragraph 2-2.2a of the Federal Travel Regulations (September 1981) (FTR), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1985), provides that the cost to the Government for transportation of the employee's immediate family shall not exceed the allowable cost by the usually traveled route between the employee's old and new official stations. Accordingly, Mr. Richardson has submitted a travel voucher requesting reimbursement of $168, representing the cost of a one-way airline ticket for Kristina from Washington, D.C., to Claremont, California, not to exceed that airline fare from Washington, D.C., to Salt Lake City, Utah.

The certifying officer asks the following questions:

1. Since Kristina was residing with Mr. Richardson at the time he was notified of his transfer, would she be considered a member of his immediate family even though Mrs. Richardson had legal custody of her?
2. If Mr. Richardson's daughter had transferred with him to his new official station, would he have been allowed reimbursement for transportation and temporary quarters on her behalf, even though Mrs. Richardson had legal custody?

The statutory basis for reimbursement of the transportation expenses of the immediate family of a Federal employee is contained in 5 U.S.C. § 5724(a)(1). The definition of the phrase immediate family in FTR para. 2-1.4d (Supp. 4, August 23, 1982), includes the employee's children who are unmarried, under 21 years of age, and members of the employee's household "at the time he/she reports for duty at the new permanent duty station * * *."

Although her mother had legal custody of her, Kristina may well have been regarded as a member of Mr. Richardson's household when he lived in Virginia. Under the express terms of FTR para. 2-1.4d, however, the relevant question in this case is whether Kristina was a member of Mr. Richardson's household at the time he reported for duty in Utah. Clearly the answer to this question is no. As indicated above, Kristina did not accompany her father to Utah, nor did she later join him to live in Utah. Instead, she went to live with her mother in California. Accordingly, there is no basis under FTR para. 2-1.4d to allow the claim.

[B-220226]

Appropriations—Availability—Traffic Lights

Needed traffic signals may be installed at government expense if private entities requesting a signal would be charged for installation in similar circumstances, and the government is the primary beneficiary of the light. 61 Comp. Gen. 501 (1982). City's determination that light does not meet its priority criteria means that a private entity would be charged for signal installation on the same basis. Fact that the building where the signal will be installed is leased by GSA from a private owner does not shift the primary benefit of the signal installation to the lessor, because the government will have full benefit of increased safety for its employees for the remainder of the lease term.

Matter of: Pedestrian-Operated Traffic Signal—Army Material Command, September 22, 1986:

By letter dated September 4, 1985, Major General Jimmy D. Ross, United States Army, requested GAO's approval of a proposed $14,400 expenditure to install a pedestrian-operated traffic signal at the entrance of the U.S. Army Materiel Command Headquarters (AMC HQ) in Alexandria, Virginia. Although there are some differences between this and our other traffic light cases, we have no objection to the proposed expenditure.

Facts

AMC HQ occupies GSA-leased space in a privately-owned building. The premises are held under a 20-year lease that will expire in 1993. The building is situated on a busy, four-lane street, and its main entrance is directly across from a bus stop in the middle of a long block. Approximately 100 to 200 AMC employees commute by bus, and they must cross the street once a day during rush hour traffic. Some of these employees are handicapped. AMC also experi-

enced increased pedestrian crossings when an employee fitness progam began in the fall of 1985 at facilities located across the street.

AMC requested the signal on public safety grounds. The City of Alexandria, however, has determined that the site does not qualify for signal installation based on its analysis and the priority criteria established by the Federal Highway Administration's *Manual on Uniform Traffic Control for Streets and Highways* (1978). However, the City is willing to approve installation of a pedestrian-activated signal at the AMC location, provided the requester pays the one time installation cost of $14,400. The City will pay for maintenance thereafter.

Analysis

AMC recommended approval of the signal installation based on our decision 61 Comp. Gen. 501 (1982). That case established a new rule liberalizing traffic signal funding. If the particular signal installation is not among the services the local jurisdiction is required by law to provide, and any party requesting that traffic signal would be required to pay, then the government can fund the signal. 61 Comp. Gen. 501, 502 (1982).

In this case, the City of Alexandria is not required by law to provide a signal at AMC HQ, because it has determined that the installation is not justified by the priority criteria. Any business or other entity that wanted to install a traffic signal in similar circumstances would be required to pay. The government is not being singled out for different treatment.

The other criterion in 61 Comp. Gen. 501 for traffic signal funding is that the installation must be for the primary benefit of the government. That issue arises in this case because the building where AMC HQ is housed is a privately-owned structure leased by GSA. This means that when the lease expires the building owner will retain the benefit of the traffic signal as a permanent improvement to the property.

We held in B-211044, June 15, 1984, that appropriations could not be used to construct a crosswalk across a state road that connected a federally-owned building with a privately-owned federally-leased building on the other side. Our decision was based on several factors, including the fact that city and state officials had not been requested to provide funds. Among the several factors we considered in that decision was the general prohibition on making improvements to non-government property. The decision concluded that the walkway there involved "would appear to benefit the Government and the owner of the privately-owned building equally." *See* 55 Comp. Gen. 872 (1976); B-187482, Feb. 17, 1977.

In this case, however, we do not regard installation of a traffic light as providing an equal benefit to the property owner. AMC's

tenancy will continue at least another 6 years. During that time, AMC will enjoy the full benefit of the increased safety to its employees who commute by bus, and the efficiency of time saved crossing to and from the fitness facility. Amortized over the remainder of the lease term, the expenditure does not seem unreasonable in proportion to the gain. Any residual benefit to the property owner at the end of the lease term is purely coincidental, and we therefore conclude that the government would be the primary beneficiary of the traffic light here.

In view of the foregoing, we have no objection to AMC funding the installation of a pedestrian-activated traffic signal at the AMC HQ.

[B-221248]

Taxes—Federal Payments in Lieu of Taxes—To Units of Local Government—Deduction Propriety

Federal mineral land lease monies distributed to a county, and used by the county to carry out functions it would otherwise provide and pay for with county revenues, must be deducted from the county's Payments in Lieu of Taxes payments. 31 U.S.C. 6903(b).

Taxes—Federal Payments in Lieu of Taxes—Distribution—State Statutory Provisions

Multi-county associations of local government, created in accordance with state law, can receive state distributions of Federal mineral lease funds. 30 U.S.C. 191; Utah Code Ann. 63-52-1, 63-52-3, and 11-13-5.5.

Taxes—Federal Payments in Lieu of Taxes—To Units of Local Government—Deduction Propriety

As with direct county receipts of state distributions of Federal mineral lease monies, association expenditures of such monies to provide services for their members which otherwise would be provided by county members with county revenues, must be deducted from the Counties' Payments in Lieu of Taxes payments on a pro rata basis.

To The Honorable James V. Hansen, House of Representatives, September 22, 1986:

This is in reply to your letter dated November 27, 1985, signed jointly with Representatives Monson and Neilson, concerning the uses to which Federal mineral lease monies may be put by local entities without incurring losses in their payments under the Payments in Lieu of Taxes Act (PILT), as amended, 31 U.S.C. §§ 6901-6907. In your letter you asked three specific questions, which will be answered in detail below. In brief, you asked 1) whether state distributions of Federal mineral lease monies to a county would lead to a loss of PILT funds if the state prescribes how the county is to use the funds; 2) whether multi-county associations of local government, created under Utah law, may receive Federal mineral lease monies; and, if so, 3) whether multi-county association mem-

bers' PILT payments would be subject to deductions for their shares of the mineral lease funds they receive.

We have reviewed the legislative history of PILT, our prior decisions concerning its application, the formal views of the Department of the Interior, and the relevant Utah Code provisions. Our brief responses are as follows: 1) If the mineral lease funds provided to the county are used to assist it in carrying out functions or activities that it would otherwise provide and pay for with county funds, then, regardless of whether or not the state has prescribed how the county is to use these funds, they must be deducted from the county's PILT receipts; 2) multi-county associations of local government can receive mineral lease funds; and 3) as with direct county receipts of mineral lease monies, they must be deducted from each multi-county association member's share of PILT funds if the association spends these monies to provide services for its members that would otherwise be provided by county members with county revenues.

Background

The Payments in Lieu of Taxes Act of 1976, as amended, authorizes and directs the Secretary of the Interior to make payments on a fiscal year basis to each unit of general local government in which certain types of Federal lands are located. Section 2 of PILT, 31 U.S.C. § 6903(b), sets forth alternative formulae to be used in determining the amount of these payments:

> (b)(1) A payment under section 6902 of this title is equal to the greater of—
> (A) 75 cents for each acre of entitlement land located within a unit of general local government (but not more than the limitation determined under subsection (c) of this section) reduced (but not below 0) by amounts the unit received in the prior fiscal year under a payment law; or
> (B) 10 cents for each acre of entitlement land located in the unit (but not more than the limitation determined under subsection (c) of this section).

Among the payment laws specified in section 6903(a) is the Mineral Lands Leasing Act, as amended, 30 U.S.C. § 191, which provides in part that:

> All money received from sales, bonuses, royalties * * * and rentals of the public lands under the provisions of this chapter and the Geothermal Steam Act of 1970 * * * shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury to the State other than Alaska within the boundaries of which the leased lands or deposits are or were located; * * * to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service * * *.

Relevant provisions of the Utah Code provide for the deposit of Federal mineral lease monies into a special account within the general fund, from which the state legislature is to make appropriations consistent with 30 U.S.C. § 191 for the alleviation of the impacts of natural resource development. Utah Code Ann. §§ 65-1-64(9), 65-1-64.5 (hereinafter "Code"). To further this purpose, the

state has created a Permanent Community Impact Fund into which it directly appropriates a fixed portion of the mineral lease funds, Code, §§ 65-1-64.5(3)(a), 63-52-1.5, and an impact board which, among other things, makes grants and loans from the fund "to state agencies and to subdivisions which are or may be socially or economically impacted, directly or indirectly, by mineral resource development for: (a) Planning; (b) Construction and maintenance of public facilities; and (c) Provision of public services." Code, § 63-52-3(1).

The State also has enacted the "Interlocal Co-operation Act", which authorizes local governmental units to act jointly to provide services and facilities economically and "for the overall promotion of the general welfare of the state." Code, § 11-13-2. Services and facilities may be provided for, among others, education, health care, and streets or roads, Code, § 11-13-3(6). Under this act, any two or more public agencies may agree to create a separate legal or administrative entity to accomplish the purpose of their joint or cooperative action, and such entity "is deemed a political subdivision of the state." Code, § 11-13-5.5(1). We have been advised informally by your staff that a number of such entities have been created, are called "associations of government," and are administered by governing boards which consist generally of the mayors and commissioners from the cities and counties that are members of the association.

Discussion

The first question in your letter is:

> 1. May a county receive federal mineral lease monies without a loss of PILT if federal lease monies are first distributed to the state and from the state to the counties with the state prescribing the use to which these monies may be employed?

In 58 Comp. Gen. 19 (1978), the opinion referred to in your letter, we were not concerned with whether the funds received by local government units from the state under the payment laws specified in section 6903(a) were to be used for discretionary or state-mandated purposes. Rather, we interpreted "payments received by" units of local government as funds actually received and available to the counties for obligation and expenditure to carry out the counties' own responsibilities, thereby alleviating the fiscal burdens imposed on local governmental units by the presence imposed on local governmental units by the presence of tax-exempt Federal lands within their jurisdictions. We accordingly concluded that Congress did not intend that payments to local governments under the Act be reduced by amounts which, by virture of state law, merely pass through these governments on the way to politically and financially independent school or single-purpose districts which are alone responsible for providing the services in question. Such payments are not meaningfully received by local governments, which would

178-403 O - 87 - 2 : QL 3

be acting solely as "conduits" for the funds. This is the only exception to the deduction requirement of section 6903(b) which we recognized.

As indicated above, Utah law does not mandate that mineral lease funds be passed on by the counties to politically and financially independent governmental entities. Rather, in prescribing the duties of the impact board in distributing the funds (Code, § 65-52-3(1)), it outlines the priority uses to be made of the funds, in language that parallels the Mineral Lands Leasing Act, 30 U.S.C. § 191. The broad language in both the Federal and state statutes leaves room for much discretion in how the counties make use of the funds.

The issue raised in your first question was addressed in our opinion B-214267, August 28, 1984 (copy enclosed). In that case, a county had argued that certain mineral lease funds it received from the state were "non-discretionary special purpose" funds, and should not be deducted from its PILT payments. We disagreed on the ground that there is nothing in the legislative history of PILT that distinguishes between discretionary and non-discretionary state distributions to counties of section 6903(a) funds to be used to carry out county responsibilities. We stated:

> As long as section 6903(a) funds are given to a county to carry out the county's own responsibilities, they are funds subject to the deduction provision of the PILT payment formulae, even though the County may have no discretion as to the programs for which they must be used. *Id., p. 4.*

In our view, this statement is equally applicable here, and therefore the answer to your first question is that if a county received Federal mineral lease funds for carrying out functions or activities that it would otherwise provide and pay for with county revenues, then, regardless of whether the state has prescribed these uses, the mineral lease funds must be deducted from the county's PILT funds.

Your second question is:

> 2. It is possible for multi-county associations of local government to receive federal mineral lease disbursements from the state *with* or without a prescription from the legislature as to the use of the funds?

As noted in the quoted portion of the Mineral Lands Leasing Act, above, these funds are to be used by the state and its subdivisions as directed by the state legislature, in accordance with statutory priorities concerning the impacts of mineral development. The Utah legislature has directed that the funds are to be used to alleviate impacts in the state resulting from the development of natural resources covered by the Act, and that the impact board which it established to distribute the funds is to do so to affected state agencies and subdivisions. Code, §§ 63-52-1 and 63-52-3.

The Interlocal Co-operation Act authorizes the creation of separate legal or administrative entities to carry out agreements entered into by two or more counties or other public agencies for the

purpose of economically providing services and facilities needed by all the parties to the agreement. (These agreements can, of course, include joint actions, to provide the services enumerated in the Act, that will best alleviate the particular impacts of natural resource development affecting the parties.) By law these entities, commonly known as "associations of government," are deemed political subdivisions of the state, and have many of the powers exercised by their constituent members. Code, § 11-13-5.5. Since these associations are legal subdivisions of the state, and the state has authorized distributions to them of Federal mineral lease monies, such distributions are in compliance with both Federal and state law, with or without a legislative prescription as to the specific use of the funds.

Your final question is:

3. If it is possible for multi-county associations to receive lease monies, would there be any penalty to a member jurisdiction who is a PILT recipient?

As noted above, associations of government have been created in the state, and are administered by governing boards consisting generally of the mayors and commissioners from the cities and counties participating in the association. To the extent that the governing board utilizes mineral lease receipts to pay for providing services or facilities that benefit the county members, and thereby relieves them from carrying out county responsibilities that would otherwise have been paid for with county revenues, in our view, and consistent with 58 Comp. Gen. 19, *supra*, each county's PILT receipts should be reduced by an amount that reflects its pro rata share of these mineral lease monies. This is so whether the mineral lease funds are passed on by the association to one or more member counties, or whether the funds are retained by the association and spent for purposes benefiting its members.

In a report provided us by the Department of the Interior, the Solicitor noted that "if the funds were retained by the association, and spent for general association purposes, not directly benefiting the public, there would be no deduction from PILT." The purpose of the Interlocal Co-operation Act is broader than that of the Mineral Lands Leasings Act, since the former authorizes cooperative efforts to provide services and facilities in ways that "will accord best with geographic, economic, population and other factors influencing the needs and development of local communities and to provide the benefit of economy of scale, economic development and utilization of natural resources for the overall promotion of the general welfare of the state." Code, § 11-13-2.

Conceivably, an association could authorize a project that would comply with this broad purpose, and with the Federal statute, yet would not benefit its county members by relieving them of county responsibilities. However, given the list of allowable services and facilities in the Interlocal Co-operation Act, we find it difficult to

see how an approval project could be in compliance but not directly benefit the public. *See* Code, § 11-13-3(6). Nevertheless, should an association of government use mineral lease monies to fund such a project, this expenditure would not have to be deducted from the counties' shares of PILT receipts. An expenditure of this nature would be, in the words of the Solicitor, "the same as if the state had retained and itself expended the monies with no pass-through to the units of local government." With the exception of projects of this nature, however, association expenditures of mineral lease monies generally will provide services for which the counties otherwise would be financially responsible, and therefore, are required to be deducted from those counties' PILT payments, on a pro rata basis.

Conclusion

On the basis of our review of the legislative history of PILT, our prior decisions, the formal views of the Department of the Interior, and the relevant Federal and Utah statutory provisions, we conclude that (1) Federal mineral lease monies distributed to a county, and used by the county to carry out functions that it would otherwise provide and pay for with county revenues, must be deducted from the county's PILT payments; (2) multi-county associations of local government, created in accordance with state law, can receive state distributions of Federal mineral lease funds; (3) as with direct county receipts of state distributions of mineral lease monies, association expenditures of such monies to provide services for their members which otherwise would be provided by county members with county revenues, must be deducted from the counties' PILT payments on a pro rata basis.

In accordance with our usual procedures, and with the agreement of Mr. Sam Klemm of your staff, copies of this opinion will be made available upon request to interested parties 30 days after it is issued.

We hope this information is useful to you.

[B-223157, et al.]

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

Protest concerning agency's failure to solicit protester filed more than 10 working days after bid opening is untimely since the protest was not filed within 10 working days after the basis for protest was known or should have been known, whichever was earlier, as required by Bid Protest Regulations.

Contracts—Requests for Quotations—Competition—Adequacy

Protest concerning agency's failure to furnish request for quotations to protester under two procurements conducted under simplified small purchase procedures is sustained where, despite agency contention that it was not aware that protester was

a potential supplier, record contains clear evidence that agency should have been aware of protester's interest in competing. Agency's actions are not consistent with Competition in Contracting Act requirement that competition for small purchases be obtained to the maximum extent practicable.

Matter of: Gateway Cable Company, September 22, 1986:

Gateway Cable Company (Gateway) protests the awards of contracts under invitation for bids (IFB) No. 102PI-86060, and request for quotations (RFQ) Nos. 102PI-86074 and 102PI-86077 issued by the Federal Prison Industries, Inc. (FPI), Department of Justice, for connectors, band markers and terminal lugs, respectively. Gateway contends that FPI acted arbitrarily in not providing Gateway with copies of the IFB and RFQ's despite repeated telephonic requests. In addition, Gateway contends FPI had in its possession price quotations from Gateway for these items which were lower than the awarded contract prices, and that FPI should have considered Gateway in its award decision.

The protest under IFB No. 102PI-86060 is denied in part and dismissed in part. The protests related to the RFQ's are sustained.

Background

FPI is a wholly-owned government corporation engaged in the manufacture of goods, and responds to solicitations issued by other agencies. In response to a U.S. Army Tank-Automotive Command (TACOM) request for proposals for cable kits, FPI's Electronics Division in Washington, D.C. solicited suppliers' quotations on component parts in order to arrive at a unit cost estimate for submission to TACOM. Between January 2 and January 8, 1986, telephonic quotations were obtained from 10 companies and these price quotes were used by FPI to arrive at a unit cost estimate. Gateway was not solicited by FPI, but on January 20, 1986, Gateway hand-delivered to FPI's Washington location a letter containing price quotations for all components of the cable kits including band markers, terminals and cables. Gateway also indicated that it had been the "main supplier" of these cable kits in recent years.

On March 14, 1986, TACOM issued an order for cable kits directly to the FPI factory in Englewood, Colorado. Thereafter, FPI's Electronics Division in Washington, D.C. forwarded the telephonic quotations it had received to the FPI factory. Gateway's January 20 letter quotation apparently was not sent to the factory, although the telephonic quotation records were forwarded.

The contracting officer at the FPI factory divided the total requirements into four separate solicitations. IFB Nos. 102PI-86060 and 102PI-86061, for connectors and cables, respectively, were synopsized in the Commerce Business Daily (CBD) on March 4, 1986, and FPI states that it mailed copies of the solicitations to prospective bidders, including Gateway, on that date. Bid opening for both IFB's was scheduled for April 4, 1986. RFQ Nos. 102PI-86074 and

102PI-86077, for band markers and terminal lugs, respectively, were issued as small business set-asides under small purchase procedures as required by the Federal Acquisition Regulation (FAR), 48 C.F.R. §13.106(b) (1985). Both RFQ's involved amounts of less than $10,000. The record shows that RFQ No. 102PI-86074 was issued on March 31, while RFQ No. 102PI-86077 was issued on April 10.

Gateway received a copy of IFB No. 102PI-86061 and submitted a bid. Its bid of $296,983.50 was found to be low and Gateway was awarded the contract for cables on April 15, 1986. Gateway did not submit a bid under IFB No. 102PI-86060 nor a quotation under the RFQ's, and FPI awarded all three contracts to other firms.

Gateway complains that FPI ignored its repeated requests for copies of IFB No. 102PI-86060 and RFQ Nos. 102PI-86074 and 102PI-86077. As evidence, Gateway has submitted copies of its telephone bill, which shows 19 telephone calls to the agency from March 4 through April 21. Gateway states that in these conversations it requested that it be sent the appropriate forms. Further, Gateway contends that FPI was otherwise aware of its interest in the RFQ's from its January 20 quotation letter, which contained prices for all the items solicited and which was attached to the contract it was awarded on April 15.

In addition, Gateway contends that its January 20 letter constituted a valid offer to provide the items solicited by FPI. Consequently, although Gateway did not submit a bid on IFB No. 102PI-86060 or quotations for RFQ Nos. 102PI-86074 and 102PI-86077, Gateway argues that the prices contained in its January 20 letter should have been considered by FPI in its award determinations.

IFB No. 102PI-86060

Gateway's protest of the nonreceipt of the IFB is untimely. Our Bid Protest Regulations require that a protest be filed (either initially with the contracting agency or with this Office) not later than 10 working days after the basis for protest was known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a) (1986). The synopsis of the IFB included the scheduled April 4 bid opening date. Gateway therefore had constructive knowledge of the bid opening date and knew it had not received a copy of the IFB by that date. See *G&L Oxygen & Medical Supply Serv.*, B-220368, Jan. 23, 1986, 86-1 CPD ¶ 78. Gateway, however, did not file its protest with FPI until April 22, 1986, which was more than 10 working days after bid opening. The protest as it pertains to the failure to solicit Gateway under the IFB, therefore, is dismissed as untimely.

With respect to Gateway's contention that its January 20 price quotation letter constituted a valid bid and should have been considered under IFB No. 102PI-86060, we note that it is a basic principle of contract formation that an offer must be sufficiently defi-

nite to show the offeror's intent to form a binding agreement upon acceptance. See *George Rosen & Son, Inc.*, VACAB No. 429, *reprinted in* 65-2 BCA ¶ 4936 (1965). A price quotation, standing alone, is not a firm offer that can be accepted. *Best Western Quantico Inn/ Conference Center et al.*, B-209500 *et al.*, Feb. 17, 1983, 83-1 CPD ¶ 164; see also *Ordnance Parts & Eng'g Co.*, ASBCA No. 2820, *reprinted in* 68-1 BCA ¶ 6870 (1968). Further, the quotation letter was not sufficient to indicate compliance with all the terms of the subsequently-issued IFB. Accordingly, Gateway's January 20 letter, submitted to FPI approximately 3 months before the issuance of the IFB, did not constitute a valid offer that could be accepted under the IFB. *Best Western Quantico Inn/Conference Center, et al., supra.*

RFQ Nos. 102PI-86074 and 102PI-86077

FPI states that the RFQ's were only issued to the suppliers whose telephonic quotations were forwarded to the contracting officer. Gateway's written quotation was not included with the telephonic quotations and the contracting officer asserts that he was not aware that Gateway was a supplier at the time the RFQ's were issued. The contracting officer states that he was unaware of Gateway's January 20 letter. In addition, FPI maintains that it diligently searches out new sources of supply, that adequate competition was obtained under the RFQ's, and that orders were issued to suppliers at reasonable prices.

Under the small purchase procedures, agencies must promote competition to the "maximum extent practicable." 41 U.S.C. § 253(g)(4). Generally, the solicitation of three suppliers may be considered to promote competition to the maximum extent practicable. FAR, 48 C.F.R. § 13.106(b)(5); see also *S.C. Svcs. Inc.*, B-221012, Mar. 18, 1986, 86-1 CPD ¶ 266.

The solicitation of three or more suppliers, however, does not automatically mean that the maximum practicable competition standard has been met. In procurements expected to exceed $10,000, an agency is required to publish notice of the intended procurement in the Commerce Business Daily and make available to any business concern requesting it a complete solicitation package. 41 U.S.C. § 416. This provision obviously requires an agency to do more than simply solicit a minimum number of suppliers. Further, the Small Business Act, as amended, 15 U.S.C. § 637b (1982), expressly requires that procuring agencies provide a copy of a solicitation to any small business concern upon request, and the record indicates that Gateway is a small business. While the publication requirement itself is not applicable to the protested small purchases since they involve amounts under $10,000, the point is that the procurement statutes and the Small Business Act obviously contemplate that, regardless of whether three suppliers are solicit-

ed, responsible sources requesting a copy of the solicitation and the opportunity to compete should be afforded a reasonable opportunity to do so.

In short, we view the requirement for maximum practicable competition to mean that an agency must make reasonable efforts, consistent with efficiency and economy, to give a responsible source the opportunity to compete, and cannot therefore unreasonably exclude a vendor from competing for an award. Cf. *Instruments & Controls Serv. Co.*, B-222122, June 30, 1986, 65 Comp. Gen. 685, 86-2 CPD ¶ 16 (agency should consider a small purchase quotation received prior to award where the RFQ did not prohibit late quotations).

In light of the above, we must sustain this portion of the protest. The agency's only reason for failing to provide the RFQ's to the protester was that the agency allegedly was unaware of the protester's interest in competing. The record shows, however, that Gateway called the FPI contracting officer 19 times prior to the issuance of the two orders under the RFQ's. The contracting officer has denied that Gateway requested a copy of IFB No. 1021PI-86060 after March 10, 1986, but has not similarly denied Gateway's allegation that it subsequently requested that it be sent copies of the RFQ's. Under these circumstances, the contracting officer should have been aware of Gateway's express interest in competing under the particular procurements, and we therefore find that the failure to send Gateway copies of the RFQ's lacked any reasonable basis. In this respect, we note that FPI is not arguing that, in defining the scope of competition, it relied on a mailing list from which it inadvertently had omitted a previous supplier or a firm that previously had asked to be included on the list. Rather, what seems clear is that FPI disregarded Gateway's repeated expressions of interest in competing under the particular procurements. Cf. *S.C. Servs. Inc., supra.*

Accordingly, Gateway's protest concerning the RFQ orders are sustained. However, since the ordered items have already been delivered and paid for, no other corrective action is appropriate. We therefore find that Gateway is entitled to recover its cost of filing and pursuing the protest insofar as it relates to the RFQ's. *See* 4 C.F.R. § 21.6(e).

[B-217114]

Disbursing Officers—Lack of Due Care, etc.—Erroneous Payments—Relief Denied

Relief for Army disbursing officer under 31 U.S.C. 3527(c) is denied where the officer paid fraudulent travel voucher after learning that one of the recipients of fraudulent payments had admitted the fraud and the means by which the fraud was accomplished to a subordinate of the officer. Relief granted for payments before this admission when investigation did not uncover fraud.

Federal Claims Collection Act of 1966—Debt Collection—Joint and Severable Liability

Under the Federal Claims Collection Standards, 4 C.F.R. 101 *et seq.*, collections received from a recipient of an improper payment who is both individually liable for some improper payment and jointly and severably liable with an accountable officer for other improper payments should be credited first to the payments for which the recipient is individually liable unless the recoveries are identified as repayments of the joint indebtedness.

Accountable Officers—Relief—Lack of Due Care, etc.—Relief Denied

An accountable officer faced with questionable vouchers, based on the fact that a criminal investigation into fraudulent claims is being conducted, does not exercise reasonable care by relying on advice from authorities within his agency in lieu of seeking an advance decision from the General Accounting Office (GAO).

To Mr. Clyde E. Jeffcoat, U.S. Army Finance and Accounting Center, Indianapolis, Indiana, September 24, 1986:

This replies to your October 29, 1985 request that we grant relief under 31 U.S.C. § 3527(c) to Mr. Paul F. Kane, a former Special Disbursing Agent at the Buffalo, New York District Office of the North Central Division, U.S. Army Corps of Engineers, for some $12,615.22 of fraudulent travel claims which were paid out of Mr. Kane's account.[1] Although we grant relief to Mr. Kane, we limit that relief to payments made before January 1, 1982.

Background

On July 7, 1980, Mr. Kane assumed his duties as the Chief of the Finance and Accounting Section of the U.S. Army Corps of Engineers Buffalo District Office. In that position Mr. Kane was responsible for assuring that temporary duty travel expense reimbursements paid to Buffalo District employees were proper. A significant portion of the Buffalo District's employees were members of survey teams whose job duties required extensive travel.

Sometime in late 1980 or early 1981, Ms. Patricia Sadler, who served under Mr. Kane as a supervisory voucher examiner, brought to Mr. Kane's attention certain receipts submitted with travel reimbursement claims for survey crew members which she viewed as questionable. Specifically, these were receipts for the use of recreational vehicles as lodging which were not accompanied by receipts for hook-up charges, and many other receipts for lodging which were handwritten. Ms. Sadler also had noted unusual patterns in travel reimbursement claims, such as members of a survey team requesting reimbursements for widely varying amounts for lodging within the same city at the same time, and amounts on re-

[1] The fraudulent payments made out of Mr. Kane's account, for which he is liable, occurred between October 19, 1981 and September 31, 1982. The total amount of these payments is $22,848.22. Your submission requests relief only for those payments made between October 19, 1981 and June 1, 1982, which total $12,615.22.

ceipts for lodging increasing when the Government's maximum reimbursable expense for lodging increased.[2] Mr. Kane instructed Ms. Sadler and the other voucher examiners to continue with the existing expense verification procedures, which included confirming the amounts of handwritten receipts by telephoning the lodging providers.

In April 1981, Mr. Charles Laycock, the Deputy Division Counsel for the U.S. Army Corps of Engineers North Central Division, who had been involved in the prosecution of Corps employees for travel reimbursement fraud at the other District Offices, spoke to Ms. Sadler about questionable receipts at Buffalo. Mr. Kane was advised of this contact and was aware that Mr. Laycock was given samples of questionable receipts. Mr. Laycock turned over the materials he had collected to Lieutenant Colonel Lefew, the Chief of Law Enforcement and Security for the North Central District of the Corps. On May 14, 1981, a U.S. Army Criminal Investigation Command (CID) investigation into travel claims at the Buffalo District was begun at the request of Lieutenant Colonel Lefew. On May 18, 1981, Mr. Kane became aware of the CID investigation. In August 1981, Ms. Sadler, at Mr. Kane's direction, distributed a notice to all Buffalo District employees. That notice emphasized the documentation requirements for travel reimbursement claims. During this time, Mr. Kane was advised by the Buffalo District Office of Counsel to continue making travel reimbursement payments to employees under investigation.

On September 11, 1981, the CID investigation into the Buffalo District's travel claims was closed because no evidence of fraud or larceny had been discovered. While the CID investigation was in process, two informal Buffalo District investigations were conducted and also failed to detect any fraud.

The essential reason for the failure of the CID and Buffalo District internal investigations, and of the voucher verification procedures enforced by Mr. Kane to detect the fraud, was in assuming that lodging providers listed on the questionable receipts were not involved in the suspected fraud. In fact, lodging providers were part of a series of conspiracies to defraud the Government by providing fraudulent receipts to Buffalo District employees, many of whom were their friends or relatives. Each of the investigations, as well as the verification procedures, assumed that the suspected fraud took place when employees altered or manufactured receipts, and that contacting the lodging providers would reveal the true amounts paid. When the lodging providers incorrectly and fraudulently stated that the amounts shown on the receipts had actually

[2] These were longstanding concerns of Ms. Sadler, dating back to 1974 when she was first assigned to voucher examining duties in the Buffalo District. These concerns had also been the subject of an Inspector General investigation prior to Mr. Kane's tenure as the Chief of the Finance and Accounting Section. That investigation failed to detect the fraudulent nature of the travel claims.

been paid, the investigators and voucher examiners concluded that no fraud had occurred. It was not until the CID investigation was reopened that the possibility that lodging providers had conspired to commit the fraud was pursued.[3] . . . .

During December 1981, the CID investigation was reopened. Also during December 1981, Ms. Sadler received a telephone call at her home from a Buffalo District employee. This employee told Ms. Sadler that he and other employees were submitting false travel reimbursement claims and that lodging providers were supplying inflated receipts. Ms. Sadler relayed this information in turn to Mr. Kane and the CID. On December 28 and 30, 1981, Mr. Kane turned over to the CID evidence dealing with the specific allegations made in the telephone call to Ms. Sadler.

On February 5, 1982, the First Supplement to the initial CID report was prepared by the CID. This supplement reported clear evidence of fraud. Second and third supplements on April 8 and May 28, 1982, reported further evidence of fraud. However, Mr. Kane continued to allow payments until August 1982 when the investigation was first submitted to the U.S. Attorney's Office for prosecution.

A total of $169,581.89 in improper and illegal payments were made from 1975 to 1982. Pecuniary liability against the accountable officers involved cannot be assessed for the vast majority of these payments because the accounts are considered closed by operation of law upon the running of the applicable statute of limitations. 31 U.S.C. § 3526(c) (1982). On December 29, 1984, the GAO issued a Notice of Exception which tolled the statute of limitations on $22,848.46 paid out of Mr. Kane's account after October 9, 1981. You have requested relief for Mr. Kane for that portion of this amount that represents payments made before June 1, 1982, totaling $12,615.22, but have not requested relief for the remaining $10,233 in payments made between June 1 through August 1982.

Request for Relief

A disbursing official who is responsible for an account is liable for payments on fraudulent vouchers made out of his account. *See, e.g.,* B-221395, March 26, 1986. Under 31 U.S.C. § 3127(c) (1982), this Office has the authority to relieve a disbursing official from liability for an improper payment when the record shows that the payment was not the result of bad faith or lack of reasonable care.

In this case we are asked to determine when, during the course of a series of fraudulent claims, did a disbursing official cease to exercise reasonable care in paying claims. Generally, we consider

[3] In this regard, we note that Mr. Charles Laycock was instrumental in assuring that the CID investigation was reopened and that the full scope of the fraud was discovered. Had Mr. Laycock not pursued the matter of the incomplete investigation, the fraudulent travel claims might still be occurring.

reasonable care to be what a reasonably prudent and careful person would have done to take care of his own funds under like circumstances. 54 Comp. Gen. 112 (1974). In considering requests for relief of disbursing officers in cases involving fraud, our cases frequently examine the question of whether the official had notice of the fraud. For example, relief for a Navy disbursing officer who improperly paid lodging reimbursements based on inflated hotel receipts was denied because the record indicated that the officer had notice that overpayments were being made. B-146729-O.M., May 9, 1967. Conversely the lack of notice is a factor in deciding that reasonable care was exercised even though a criminal scheme was successful in defrauding the Government. *E.g.*, B-221395, *supra*.

In your submission, you argue that Mr. Kane acted with reasonable care in making payments until June 1, 1982. You take that date to be the point at which Mr. Kane had either actual or constructive knowledge of the February 5, April 8, and May 28, 1982 Supplements to the CID report, each of which concluded that fraudulent travel claims had been submitted to and paid by Mr. Kane. Prior to June 1, you argue that Mr. Kane's actions in continuing to abide by and enforce existing procedures to verify the amounts of suspicious travel vouchers constitute reasonable care in processing travel claims.

We do not agree that Mr. Kane continued exercising reasonable care until June 1, 1982. This theory of determining liability assumes that Mr. Kane became negligent in making payments only after the CID investigations substantiated the existence of fraud. We would agree if this were a case where no prior evidence of improper payments existed. In such a case, a CID investigation report establishing fraud might well establish when further payments became negligent. But the measure of an accountable officer's negligence is taken against the reasonableness of his conduct under all the circumstances before him. Further, the purpose of accountable officer liability is to make the officer an insurer of Government funds. *See*, 54 Comp. Gen. 112, 114 (1974). That purpose would be ill served if liability could be avoided by merely avoiding exposure to evidence of fraud. When there are longstanding questions about payments, the exercise of reasonable care may require action, such as strengthening verification procedures (B-212603, *et al.*, March 27, 1984, *rev'd.* B-212603, *et al.*, Dec. 12, 1984) or requesting an advance decision from this Office, long before clear evidence of actual fraud is discovered (49 Comp. Gen. 38 (1969)).

We conclude that Mr. Kane's continued payments based on the fraudulent vouchers had become negligent by January 1, 1982. During December 1981, Mr. Kane learned that the CID investigation had been reopened and that Ms. Sadler had received a telephone call exposing the device by which the fraudulent schemes had previously evaded detection. At that point, Mr. Kane was actually aware that the procedures in place for verifying travel vouch-

ers were not adequate to ensure that payments would be proper. A person exercising reasonable care in protecting his own funds under similar circumstances would have, at a minimum, ceased relying on a verification system shown to be faulty. Mr. Kane however, continued to accept telephone verification of handwritten lodging receipts until the time that the evidence of fraud was turned over to the U.S. Attorney's Office.

Mr. Kane apparently did ask the Buffalo District Office of Counsel whether he should withhold travel reimbursements between the time he learned of the first CID investigation and June 1982. That Office advised Mr. Kane to continue making the payments. This advice does not appear to have been predicated on the needs of furthering the CID investigation. An accountable officer faced with a questionable voucher does not exercise reasonable care by relying on advice from others within his agency in lieu of seeking an advance decision from this Office. 49 Comp. Gen. 38 (1969).

We, therefore, relieve Mr. Kane only for those payments which were made prior to January 1, 1982. We conclude that he was not negligent as to these payments because their suspicious nature, although recognized, had been investigated without success. These payments total $7,615.73. Mr. Kane remains jointly and severably liable with the recipients of the improper disbursements for the balance of the improper payments. These payments total $15,232.49.

Allocation of Amounts Collected

As an accountable officer liable for a loss of Government funds, Mr. Kane is jointly and severably liable with the recipients for the improper payments. However, because the recipients' liability for the improper payments they received is not foreclosed by the statute of limitations covering Mr. Kane, they remain liable for all fraudulent payments they have not returned. 31 U.S.C. § 3527(d)(2). Accordingly, this case has two classes of debts owed to the United States—one class consisting of payments made before January 1, 1982 for which only the recipients are liable, and a second class consisting of payments made after January 1, 1982, for which Mr. Kane and the recipients are jointly and severably liable. Your submission indicates the collections made from the recipients will be credited first to the payments in the second class, thereby reducing the liability of both the recipient involved and Mr. Kane. We do not agree that this is the correct allocation.

As a basis for this allocation, you rely on several comments in our publication, *Principles of Federal Appropriation Law.* Specifically, we stated there that agencies "should seek to recover from the recipient if possible" and that "[a]ny amounts recouped will reduce the accountable officer's liability." You have taken these statements to mean that any amounts collected from the recipients

in this case *must* be credited to reduce the debt owed by Mr. Kane. This interpretation takes our language out of context. Our discussion was meant to be a guide to agencies on how to approach accountable officer debts in the typical case where the amount of recipient debt and accountable officer debt arose from one transaction. In those cases, collection from the recipient will, in fact, reduce the accountable officer's liability. This statement does not apply to the situation where, as here, the recipient of payments is liable for debts arising from several transactions and which total more than the liability of the accountable officer.

The allocation of collections between the two classes of debts in this case must be determined by reference to the Federal Claims Collection Standards. 4 C.F.R. Part 101 *et seq.* (1986). Section 102.11(b) of the Standards specifies that when debtors owe more than one debt to the United States, and they do not specify which debt a payment will be credited toward, the agency involved should apply payments to liquidate the various debts in accordance with the best interests of the United States. In this instance, the best interests of the United States are clearly served by applying payments made by the recipients to the class of debt for which only the recipients are liable. The United States has, by virtue of the joint liability, greater assurance that the debt owned jointly by the recipient and Mr. Kane will be repaid. The interests of the United States are best served by retiring the least secure debts first. In addition, § 103.6 of the Standards specifies that agencies should not attempt to allocate the burden of paying debts between joint and several debtors. Instead, agencies are instructed to liquidate the debt as quickly as possible. Although we have noted the appropriateness of first seeking recovery from the perpetrators of the fraud, the allocation of repayments first to the class of debt for which Mr. Kane and the recipients are jointly liable is not consistent with § 103.6.

Conclusion

In response to your request, we grant relief for payments made by Mr. Kane based on fraudulent vouchers from October 19, 1981 to January 1, 1982. However, we deny relief for Mr. Kane for all of the fraudulent travel payments made after January 1, 1982. In addition, any collections already received from the recipients of the fraudulent payments, with whom Mr. Kane is jointly and severably liable, should be first credited to the debts which these recipients owe individually, rather than the debts which they owe jointly and severably with Mr. Kane.

[B-220734]

Compensation—Removals, Suspensions, etc.—Deduction From Back Pay—Unemployment Compensation

Unemployment compensation benefits must be deducted from backpay awards where state law requires employer, rather than employee, to reimburse the state for overpayments and where appropriate state agency has determined that an overpayment has occurred and has notified employing agency. Here, state agency determined that, since employee would receive backpay for period covered by unemployment compensation, he had been overpaid, and it so notified Veterans Administration (VA). The VA properly deducted the overpayment from backpay. Absent such a state determination and requirement, unemployment compensation should not be deducted from backpay. *Glen Gurwit,* 63 Comp. Gen. 99 (1983), modified.

Compensation—Removals, Suspensions, etc.—Deductions From Back Pay—Lump-Sum Leave Payment

Agency properly deducted from backpay an amount representing the lump-sum annual leave payment made to employee when he was removed. Lump-sum leave payments must be offset from backpay awards. *Vincent T. Oliver,* 59 Comp. Gen. 395 (1980). Waiver is denied because deduction of this amount did not result in a net indebtedness.

Compensation—Removals, Suspensions, etc.—Deductions From Back Pay—Retirement and Tax Adjustments

The agency's action in offsetting refunded retirement contributions from an employee's backpay award is consistent with Federal Personnel Manual requirements which were sustained in our decision in *Angel F. Rivera,* 64 Comp. Gen. 86 (1984). Therefore, we will not disturb the agency's action, although the issue of whether refunded retirement contributions are deductible from a backpay award is now in litigation.

Debt Collections—Waiver—Civilian Employees—Compensation Overpayments—Collection Against Equity and Good Conscience

Employee requests waiver of collection of several items offset from backpay, but waiver may be granted only to the extent there has been a net overpayment. The backpay computations were complex and subject to many revisions and corrections and the agency did make an overpayment. The overpayment is largely attributable to unemployment compensation. The employee relied upon published authority providing that unemployment benefits should not be offset from backpay, and he could not be expected to know how the impact of state law would alter the agency's determination on this issue. The agency found no evidence of fraud, misrepresentation, or lack of good faith. In these circumstances, it would be against equity and good conscience to collect the net overpayment; therefore, the net overpayment is waived.

Matter of: Jeffrey Kassel—Backpay—Computations and Deductions, September 24, 1986:

This is an appeal by Dr. Jeffrey Kassel from the settlement of our Claims Group which affirmed the deductions made by the Veterans Administration (VA) from Dr. Kassel's backpay award and denied waiver. We hold that state unemployment benefits must be offset from backpay where the state agency has notified the employing agency that there has been an overpayment of unemployment compensation and state law requires the employer to reimburse the state for overpayments. We also hold that the Veterans

Administration correctly deducted the lump-sum annual leave payment from the backpay award. No waiver is granted of the lump-sum leave payment because there is no net indebtedness owed in this regard. The VA's deduction of refunded retirement contributions from the employee's backpay is consistent with Federal Personnel Manual requirements which were sustained in a recent Comptroller General decision. Finally, we grant waiver of the net overpayment received by Dr. Kassel.

Facts

Dr. Jeffrey Kassel was employed as a clinical psychologist at the Veterans Administration Medical Center in Manchester, New Hampshire. He was removed from his position on November 4, 1982. He grieved his dismissal under the collective bargaining agreement in effect between the VA and the National Association of Government Employees and the grievance was submitted to arbitration. On August 15, 1983, Arbitrator Jerome J. Judge issued an award ordering, in pertinent part, reinstatement of Dr. Kassel without loss of pay or benefits. Dr. Kassel was reinstated on May 14, 1984. This decision concerns the computation of his backpay award for the period November 4, 1982, through May 14, 1984.[1]

Since the backpay award in this case is the result of an arbitration proceeding, both the agency and union representative were provided with notice and the opportunity to comment on the submission to GAO. No comments were received from the agency's representative in the arbitration proceeding or from the union representative, but additional comments and information were received from Dr. Kassel and the VA Director of Budget and Finance.

Dr. Kassel's submission also referred to an unfair labor practice charge filed with the Federal Labor Relations Authority (FLRA) alleging that the agency had failed to comply with the arbitration award. Since this allegation could conceivably include issues pertaining to backpay, we obtained the public case documents from the FLRA. It appears that two unfair labor practice charges were filed. One charge, 1-CA-40263, was withdrawn at the union's request and with the approval of the FLRA on July 23, 1984. The other charge, 1-CA-40302, was settled by the FLRA on August 6, 1984, prior to issuance of complaint. Our review of the charges and settlement indicates that neither charge raised any of the backpay issues considered herein, and we are aware of no objections to our

[1] In his appeal dated September 16, 1985, Dr. Kassel also requested waiver of an overpayment of $652.93 in FICA which occurred after his reinstatement and was unrelated to his backpay award. By letter dated December 8, 1985, Dr. Kassel advised that that issue has been resolved. Accordingly, it is not considered or discussed herein.

assertion of jurisdiction over the backpay issues raised by Dr. Kassel's submission.

The Agency's Backpay Computations

The Veterans Administration has provided several different breakdowns of backpay computations to Dr. Kassel and to this Office. There are revisions and corrections in each of these. Because of these ongoing revisions, the backpay check issued to Dr. Kassel exceeded the amount actually due. Only the final corrected figures will be discussed herein, with notations where necessary to explain discrepancies.

Dr. Kassel's gross backpay was $65,871.20 plus $493.02 in night differentials, for a total of $66,364.22. From this amount, $113.60 in interim earnings was deducted.

The agency's initial computation of backpay due Dr. Kassel did not include a deduction for refunded retirement contributions. Subsequently, however, the agency became aware of the new requirement established by the Office of Personel Management (OPM) in the Federal Personnel Manual (FPM) that refunds of retirement fund contributions withdrawn at the time of discharge must be offset from backpay awards and returned to the retirement fund. See FPM Letter 550-76, July 15, 1982; FPM Supplement 990-2, Book 550, Subchapter 8 at 550-64.02 (Inst. 73, April 20, 1984). Accordingly, the agency offset $21,439.65 in refunded retirement contributions and has paid that amount to the OPM.[2]

Dr. Kassel had received a lump-sum payment in the amount of $5,944.25 for 295 hours of annual leave at the time of his discharge. This amount was also deducted from his backpay and the leave was restored. Also deducted were retirement contributions for the period of the backpay award in the amount of $4,610.98. Federal taxes were initially calculated at $13,272.82 but this figure was later revised and is now $12,964.96. As corrected, $491.40 was deducted for medicare payments.[3]

The agency also deducted $6,660 which had been received by Dr. Kassel from the State of New Hampshire in the form of unemployment benefits during the period of his removal.

Thus, using the agency's final corrected figures, the agency's action on Dr. Kassel's claim for backpay can be summarized as follows:

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[2] The Agency states that OPM initially informed it that interest on the $21,439.65 at a rate of 3% compounded annually was also due the retirement funds. The agency therefore deducted an additional $926.33 from Dr. Kassel's backpay. However, the agency states that OPM later changed its position on this issue and said no interest was due. Accordingly. Dr. Kassel has been paid the $926.33.

[3] The VA had deducted a total of $997.47 for 1984 for medicare. Since this exceeded the maximum allowable deduction of $491.40, the VA says the excess of $506.07 has been refunded to Dr. Kassel.

Base pay		$65,871.20
Night differential		+493.02
Gross backpay		66,364.22
Less:		
Interim Earnings	$113.60	
Refunded retirement contribution for period prior to discharge	21,439.65	
Lump-sum annual leave payment	5,944.25	
Retirement contributions for period of award	4,610.98	
Federal taxes	12,964.96	
Medicare	491.40	
New Hampshire unemployment benefits	6,660.00	
Total Deductions		$52,224.84
Net Backpay		$14,139.38

Thus, according to our calculations using the agency's corrected figures, Dr. Kassel should have received net backpay of $14,139.38. However, because of the agency's ongoing revisions to backpay computations, particularly the uncertainty as to the deduction of unemployment compensation and the delay in learning of the FPM requirement that refunded retirement contributions for the period prior to discharge must be offset from backpay awards, the agency overpaid Dr. Kassel. Specifically, in June 1984, the agency paid $19,501.72 in backpay to Dr. Kassel. Thus, according to the above calculations, Dr. Kassel received an overpayment of $5,362.34. The record shows that the agency issued a bill for collection of $6,660 as the overpayment. As is apparent, however, using our calculations based on the agency's corrected figures, the correct net overpayment is $5,362.34.

Analysis and Opinion

There are three items in dispute: the deduction from backpay of $6,660 in New Hampshire unemployment benefits, the deduction of the $5,944.25 lump-sum annual leave payment, and the deduction of $21,439.65 in refunded retirement contributions. Dr. Kassel argues that none of these items should have been offset from his backpay award. In the alternative, he argues that assuming such deductions are required, they should be waived in his case. We will consider each item separately.

Deduction of Unemployment Compensation

Dr. Kassel argues that unemployment compensation should not have been offset from backpay because the Federal Personnel Manual Supplement 990-2, Book 550-64.02 (June 16, 1977) says that it should not be deducted.[4]

We considered the issue of whether or not unemployment benefits should be offset from backpay awards in *Glen Gurwit,* 63 Comp. Gen. 99 (1983). We held that state unemployment benefits should not be deducted from backpay awards because the reinstated employee may be required to refund that amount to the state. In this case, however, the agency points out that under New Hampshire law the employer, not the employee, is liable to make full restitution to the state unemployment fund for any unemployment benefits paid to an employee for a period covered by or included in any arbitration or backpay award.

Further, the record here contains a copy of a determination by the State of New Hampshire Department of Employment Security, dated July 27, 1984, and addressed to Dr. Kassel, advising him that, since he had received backpay for the period November 4, 1982, to May 14, 1984, the state had determined that he had been overpaid unemployment compensation in the amount of $6,660. The notice advises that recovery of the overpayment will be accomplished administratively as his "employer is a so called reimbursable employer." A copy of the notice was sent to the VA and it proceeded to deduct that amount from the backpay.

As noted in *Gurwit,* determinations of whether there have been overpayments of unemployment compensation are in all respects committed to state agencies for action in accordance with that state's unemployment compensation law. In this case, the appropriate state agency determined that an overpayment had occurred, and under New Hampshire law, the employer, rather than the employee is required to refund the money to the state fund. Therefore, giving deference to the state law the VA properly deducted the overpayment of unemployment compensation benefits from Dr. Kassel's backpay.

Accordingly, our decision in *Gurwit* is hereby modified in part. We now hold that unemployment benefits must be deducted from backpay awards where the appropriate state agency has determined that an overpayment has occurred and has notified the employing Federal agency and where state law requires the employer, rather than the employee, to refund overpayments. Absent such a determination and requirement under state law, the rule in *Gurwit* applies and unemployment compensation should not be deducted from backpay awards.

[4] FPM Supplement 990-2, Book 550, has since been revised. The new Subchapter 8 on Backpay, dated April 20, 1984, does not specifically discuss unemployment compensation.

Lump-Sum Annual Leave Payment

Dr. Kassel also objects to the deduction of $5,944.25 he received as a lump-sum leave payment. He states that he was told by Personnel that he would not have to repay that money.

We have held that lump-sum leave payments must be offset from backpay awards. *Vincent T. Oliver,* 59 Comp. Gen. 395 (1980). For the reasons stated in *Oliver,* the agency's action in deducting this amount from the backpay award is sustained. Where such deductions leave the reinstated employee in debt to the government, the indebtedness may be considered for waiver. *Oliver, supra,* and *Angel F. Rivera,* 64 Comp. Gen. 86 (1984). However, in this case, the deduction of Dr. Kassel's lump-sum leave payment from backpay did not result in net indebtedness to the government. Therefore, waiver is denied.

Refunded Retirement Contributions

Dr. Kassel argues that he was told several times that he would not have to repay the $21,439.65 in refunded retirement contributions that he withdrew when he was discharged. He points out the agency officials also initially believed that this money would not have to be offset from backpay, and first became aware of the FPM requirements in June 1984.

The VA's action in deducting refunded retirement contributions and transmitting them to OPM were consistent with the FPM requirements; and we sustained the legality of these requirements in our decision in *Rivera, supra.* Therefore, we will not disturb the VA's action. We note that the issue of the deductibility of refunded retirement contributions from backpay awards is the subject of a class action filed on July 18, 1986, in the United States Claims Court, entitled *Jerris Wise* v. *United States,* Cl. Ct. No. 447-86C.

Waiver of Overpayment

With respect to Dr. Kassel's request for waiver, we note that waiver may be granted only to the extent there has been an overpayment. As stated above, the VA paid Dr. Kassel $19,501.72 in backpay. Using the agency's later revised figures, however, we calculate that Dr. Kassel was overpaid $5,362.34. Accordingly, based upon the present record, this overpayment is subject to waiver consideration.

We grant waiver of the net overpayment received by Dr. Kassel. The backpay computations in this case were complex and were revised and corrected by the VA on several different occasions over an extended period of time. Further, with respect to the offset of unemployment compensation from backpay, Dr. Kassel relied upon published authority which provided that it should not be offset. Since the issue is one of first impression, it would be unreasonable

to assume that he knew or should have known how the impact of state law would alter the VA's determination on this issue. We also note that the VA waiver committee found that no evidence of fraud, misrepresentation, or lack of faith on the part of Dr. Kassel with respect to these proceedings. Given these circumstances, we find that it would be against equity and good conscience to collect the net overpayment from Dr. Kassel. Accordingly, we grant waiver of the net overpayment.

Conclusion

In summary, we have decided that: (1) where the appropriate state agency has determined that an overpayment of unemployment compensation has occurred and state law requires that the employer, rather than the employee, reimburse the state, unemployment compensation should be deducted from backpay; (2) the Veterans Administration acted properly in deducting the lump-sum leave payment and refunded retirement contributions from backpay; and (3) the net overpayment received by Dr. Kassel is waived.

[B-223594]

Bonds—Bid—Validity—Erroneous Solicitation Number

As a general rule, a bid bond which erroneously references another solicitation number is materially defective in the absence of other objective evidence which clearly establishes at the time of bid opening that the bond was intended to cover the bid for which it was actually submitted. If uncertainty exists that the bond is enforceable by the government against the surety, the bond is unacceptable and the bid must be rejected as nonresponsive.

Matter of: Kinetic Builders, Inc., September 24, 1986:

Kinetic Builders, Inc. (Kinetic), protests the proposed award of a contract to Fitzgerald & Company, Inc. (Fitzgerald) under invitation for bids (IFB) No. F08620-86-B0019, issued by the Department of the Air Force. The procurement is for the construction of a weather facility. Kinetic complains that the agency has improperly determined that Fitzgerald's bid is responsive despite the fact that the accompanying bid bond was materially defective.

We sustain the protest.

Background

The IFB required the submission of a bid bond or other suitable bid guarantee in the amount of 20 percent of the bid. Bids were opened on June 24, 1986. Fitzgerald was the apparent low bidder, but submitted a bid bond which referenced another solicitation number (IFB No. "F08620-86-B0051" instead of IFB No. "F08620-86-B0019"). The Air Force ultimately determined that the incorrect solicitation number on the bond was only a minor defect which did not render the bid nonresponsive, since IFB No. F08620-86-B0051, as erroneously referenced, was a solicitation for building alteration

with an amended bid opening date of July 17, three weeks later. In the Air Force's view, the fact that the bond referenced a June 24 bid date and was executed on that date was sufficient evidence that the bond was intended to cover IFB No. F08620-86-B0019, and not IFB No. F08620-86-B0051. Kinetic, the second low bidder, then protested the Air Force's determination to this Office.

Kinetic asserts that Fitzgerald's bid should be rejected as nonresponsive and the award made to itself because the incorrect solicitation number referenced in the bond created a material defect in the bond which rendered it unacceptable. We agree.

Analysis

The submission of a required bid bond is a material condition of responsiveness with which there must be compliance at the time of bid opening. *Baucom Janitorial Service, Inc.*, B-206353, Apr. 19, 1982, 82-1 CPD ¶ 356. When a bond is alleged to be defective, the determinative question is whether the bond is enforceable by the government against the surety notwithstanding the defect. See *J.W. Bateson Co., Inc.*, B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472. If uncertainty exists at the time of bid opening that the bidder has furnished a legally binding bond, the bond is unacceptable and the bid, therefore, must be rejected as nonresponsive. See *A & A Roofing Co., Inc.*, B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463.

With respect to the effect of an erroneous solicitation number referenced in a bid bond, we held in *Custodial Guidance Systems, Inc.*, B-192750, Nov. 21, 1978, 78-2 CPD ¶ 355, that a bid bond was enforceable by the government against the surety even though it contained the incorrect solicitation number where the error was obviously clerical in nature (the transposition of two digits—"19145" instead of "19154"), the bond correctly stated the schedule bid opening date, the agency conducted only one bid opening on that date, and the incorrect number was for a prior procurement for which bonds were not required and in which the bidder had not submitted a bid. We analogized the situation in *Custodial Guidance* to earlier cases which held that erroneously dated or undated bid bonds—which nevertheless were identifiable with the only invitation outstanding for a particular procurement—were only technically defective and could be enforced against the surety. *See* 39 Comp. Gen. 60 (1959); B-160659, June 9, 1967; B-159209, June 23, 1966. Therefore, we found in *Custodial Guidance* that since the erroneous solicitation number had apparently created no confusion as to the bid covered by the bond, the defect would not affect the enforceability of the bond by the government against the surety.

We reached a different result in *A & A Roofing Co., Inc.*, B-219645, *supra*. There, the bond was materially defective because it referenced not only the wrong solicitation number but also the wrong bid opening date, and there was no other objective evi-

dence of the intent of the surety to provide a bond on the bid in question. Significantly, the solicitation number and date entered on the bond specifically and accurately identified another solicitation for the same kind of work at the same facility, the bid opening for which had been only 11 days earlier than that of the protested procurement. Since, given the existence of the other solicitation, it was uncertain at the time of bid opening whether the surety had consented to be bound on the solicitation for which the bound was actually submitted, the bond was materially defective requiring rejection of the bid as nonresponsive.

We believe that our holding in *A & A Roofing,* rather than that in *Custodial Guidance,* is more applicable to the facts here. It is indisputed that IFB No. F08620-86-B0051, as erroneously referenced in Fitzgerald's bond, was an on-going solicitation for building alteration with an original bid opening date of June 12, 1986, later amended to June 25, and then to July 17. Fitzgerald's bond typically identified the work to be performed in general terms as "Construction," which, in our view, reasonably refers to building alteration under IFB No. F08620-86-B0051 as well as to weather facility construction under IFB No. F08620-86-B0019. Thus, apart from the June 24 date referenced in the bond,[1] there are no other indicia in the bond to identify it with IFB No. F08620-86-B0019. Moreover, unlike the facts in *Custodial Guidance,* the erroneous solicitation number does not involve a mere transposition of digits, and we cannot regard the insertion of "-B0051" instead of "-B0019" as only a minor clerical error.

Although the surety's agent in this case has stated after bid opening that it had made a typographical error in the bond with regard to the solicitation number and has consented to a correction, thereby indicating that the bond was intended to cover Fitzgerald's bid under IFB No. F08620-86-B0019, the fundamental rule remains that a nonresponsive bid cannot be made responsive by actions taken to correct a defective bond after bid opening. *Truesdale Construction Co., Inc.,* B-213094, Nov. 18, 1983, 83-2 CPD ¶ 591. Therefore, it is also immaterial that facts subsequent to bid opening have established that Fitzgerald submitted a bid in response to IFB No. F08620-86-B0051 on the July 17 opening date, which included a bid bond executed on that date by the same surety. A bond must be determined to be enforceable at the time of bid opening, and not afterwards.

Because the erroneous solicitation number created uncertainty at the time of bid opening as to the enforceability of the bond, not overcome by other objective evidence, the bond was unacceptable. Accordingly, by separate letter of today, we are recommending to the Secretary of the Air Force that Fitzgerald's bid be rejected as

[1] The Air Force states that there was one other bid opening at the activity on June 24, but that Fitzgerald did not submit a bid.

nonresponsive and that award be made to Kinetic, the apparent remaining low bidder, if the firm's bid is otherwise proper and the firm is determined to be a responsible prospective contractor.

Since we have recommended that Kinetic be awarded the contract, we will not allow the firm to recover its claimed costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.6(e) (1986); see also *EHE National Health Services, Inc.*, 65 Comp. Gen. 1 (1985), 85-2 CPD ¶362.

The protest is sustained.

[B-220283.2]

Contracts—Small Business Concerns—Awards—Self-Certification—Acceptance

Mere fact that awardee of service contract set aside for small business indicated in bid that it would perform services at facility owned by large business is not sufficient to require contracting officer to challenge self-certification in awardee's bid as to its size status, since it is not legally objectionable for a small business to subcontract with a large business on a set-aside contract.

Matter of: Robertson and Penn, Inc., d/b/a National Service Co., September 25, 1986:

Robertson and Penn, Inc. d/b/a National Service Co. (NSC), protests the contracting officer's failure to question the small business status of Crown Laundry & Dry Cleaners, Inc. (Crown) in making an award to the company under invitation for bids (IFB) No. M00264-85-B-0009, issued by the Marine Corps as a small business set-aside for base laundry and dry cleaning services at Quantico, Virginia. We deny the protest.

The IFB was part of a cost comparison to determine whether it would be more economical to accomplish the work in-house using government employees, or by contract. For various reasons, there were a number of delays in completing the cost comparison and bid evaluation, which ultimately led to the Marine Corps' determining that Crown's bid, as adjusted, represented the most economical method of performance. Over the next several months following the Marine Corp's selection of Crown, NSC, next in line, raised various concerns with the agency regarding Crown's subcontracting arrangements for a site where the work would be performed. Immediately prior to the award to Crown, NSC filed a protest with the contracting officer against the small business certification in Crown's bid.

Since the bids had been opened almost a year earlier and since NSC had received early notification of the selection of Crown for award, the contracting officer concluded that the size status protest was untimely and could not affect the outcome of the procurement. *See* Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.302(d) (1985). Nevertheless, the contracting officer forwarded NSC's protest to the Small Business Administration (SBA) for consideration

regarding Crown's status for future procurements. In the meantime, a contract was awarded to Crown with performance scheduled to begin in late September 1986.

NSC filed a protest with our Office after receiving notification from the Marine Corps that its protest against Crown's small business status was untimely. In NSC's view, the contracting officer had information in his possession casting sufficient doubt on Crown's small business status that he should have filed his own SBA protest challenging Crown's status; according to NSC, this information indicated that Crown improperly would have the overwhelming majority of the contract work performed by a large business subcontractor. In this respect, a contracting officer generally may accept at face value a bidder's self-certification that it is a small business unless he has information prior to award that would reasonably impeach the certification or has received a timely size protest. *Foam-Flex Inc.*, 62 Comp. Gen. 300 (1983), 83-1 C.P.D. ¶ 383.

The Marine Corps responds that the contracting officer found no reason to question Crown's certification that it was a small business either from any information provided by Crown with its bid or from any information subsequently provided by other sources. Further, the Marine Corps argues that the entire protest now is academic because the SBA has dismissed NSC's challenge to Crown's small business status.

We do not consider the matter academic. The SBA dismissed NSC's protest because it was untimely as to the instant procurement and because it alleged an affiliation between Crown and a large business for this procurement only, so that a decision also would have no prospective application. The procurement regulations, however, provide that a contracting officer may on his own protest an offeror's small business representation in any given procurement by forwarding the protest to the SBA either before or after award, FAR, 48 C.F.R. § 19.302(c)(1), and that any such protest always is considered timely. FAR, 48 C.F.R. § 19.302(d)(2). The SBA thus presumably would render a decision on Crown's small business status for this particular procurement if the contracting officer were to file his own protest at this time. Accordingly, it is appropriate for our Office to consider whether Crown's size status should have been, and thus now should be, challenged by the contracting officer himself for purposes of award under the protested IFB.

The only information in Crown's bid bearing on NSC's point is a listing of the address of the facility at which the company intends to perform laundry services. The facility located at this address apparently is owned by a large business. We do not believe this fact, by itself, is sufficient to have required the contracting officer to question the validity of Crown's small business certification, since it is not legally objectionable for a small business to subcontract with a large business on a small business set-aside service contract.

See *Mann Rental Service,* B-216868, Oct. 31, 1984, 84-2 C.P.D. ¶ 493. While a small business cannot transfer or impute its small business status to an established joint venture composed of itself and a large business for purposes of competing for small business set-asides, *Mantech International Corp.,* B-216505, Feb. 11, 1985, 85-1 C.P.D. ¶ 176, nothing on the face of Crown's bid indicated it was doing so here.

Aside from the face of Crown's bid, the only information currently before the contracting officer is NSC's contention that there is an improper affiliation between Crown and the large business based on the amount of contract work to be performed at the large business facility. Nothing in the record indicates, however, that the contracting officer has any information supporting NSC's assertions as to the extent of the work Crown intends to subcontract, and we do not think a contracting officer is required to question an offeror's status based solely on a competitor's bare assertions. (Crown itself disputes NSC's assertion and alleges that a number of services required by the solicitation in fact will be performed at other sites.)

Given the absence of a timely protest by NSC or another bidder or information that would reasonably impeach Crown's self-certification, the contracting officer properly accepted Crown's small business certification as correct on its face. See *Keco Industries, Inc.,* 56 Comp. Gen. 878 (1977), 77-2 C.P.D. ¶ 98. The protest is denied.

[B-214561.3]

Accountable Officers—Physical Losses, etc. of Funds, Vouchers, etc.—Without Negligence or Fault

Upon reconsideration, the clerk of a Federal district court is granted relief from financial liability (pursuant to 31 U.S.C. 3527 (1982)) for the unexplained physical loss of U.S. currency entrusted as evidence to his subordinates. Relief is granted because it is not clear that the clerk's negligence (as compared to that of his subordinates) was the proximate cause of the loss. Decision in 63 Comp. Gen 489 (1984) overruled.

To Mark S. Mandell, Esquire, Mandell, Goodman, Famiglietti & Schwartz, Ltd., Attorneys at Law, September 26, 1986:

We understand that you represent Mr. Frederick R. DeCesaris (Clerk of the Court of the United States District Court for the District of Rhode Island) in the matter of his liability for the loss in 1981 of $4,301 entrusted to persons under his supervision. This letter responds to his request (dated July 18, 1985) for reconsideration of our previous decision which declined to relieve Mr. DeCesaris (under 31 U.S.C. § 3527 (1982)) from financial liability for this loss. See 63 Comp. Gen 489 (1984). As explained below, we now conclude, on the basis of the new evidence he has submitted, that our

original decision in this matter should be reversed to grant Mr. DeCesaris relief from financial liability for this loss.

Background

On October 22, 1981, it was discovered that a total of $4,301 in United States currency was missing from an evidence "cage" used by the Clerk of the United States District Court for the District of Rhode Island. Those funds were being kept as physical evidence in two matters then pending before the court. The loss was initially discovered by the two deputy courtroom clerks to whom those funds had been entrusted. An investigation by the Federal Bureau of Investigation (FBI) proved inconclusive, and was closed without further action or recommendations. For this reason, the Director of the Administrative Office of the United States Courts (AOUSC) requested that we grant relief from financial liability (pursuant to 31 U.S.C. § 3527) to the two deputy courtroom clerks. The Director suggested that their supervisor, the Clerk of the Court (Mr. DeCesaris), should not be held liable for the loss.

Discussion

Accountable officers are automatically and strictly liable for funds entrusted to them. 64 Comp. Gen. 607 (1985). However, GAO is authorized by 31 U.S.C. § 3527 to relieve an accountable officer from liability for a physical loss of funds, if GAO concurs with administrative determinations made by the requesting agency to the effect that the loss occurred while the accountable officer was acting in the discharge of official duties and the loss occurred without fault or negligence on the part of the accountable officer. For this reason, the loss of funds entrusted to an accountable officer ordinarily raises a rebuttable presumption of negligence on the part of the accountable officer. 63 Comp. Gen. at 492.

In accordance with these principles, our previous decision held that relief should be given to the two deputy courtroom clerks who actually had custody of the missing funds. Although we found them to be negligent, we did not believe that their negligence was the proximate cause of the loss.

In our previous decision, relief was granted to the deputy clerks, despite our finding that they did not "behave as reasonably and prudently as they might have." This was because on the basis of the evidence provided to us at that time, consisting of documentary evidence, including affidavits, investigational reports, and FBI interview reports, all submitted by the AOUSC, we concluded that "pervasive laxity in the policies, procedures, and facilities established in the clerk's office was responsible for the loss." 63 Comp. Gen. at 494. That conclusion rested upon five basic findings:

(1) The evidence cage combinations were not kept confidential or periodically changed.

(2) The design and construction of the cages assigned to the deputy courtroom clerks were obviously deficient.

(3) Access to the vault (which contained the cages) was not adequately controlled. This left it vulnerable to unsupervised visits by various authorized and unauthorized persons.

(4) There were not adequate procedures governing the protection of evidence (including money and other valuables) that was entrusted to the deputy courtroom clerks in the normal course of their duties.

(5) Two deputy courtroom clerks were assigned to the same cage. This deprived them of exclusive control over the evidence entrusted to them, and deprived the clerk's office of accountability among the deputy courtroom clerks for items entrusted to them. 63 Comp. Gen. at 494.

The new evidence submitted by Mr. DeCesaris consists of his 19-page letter and 27 attachments to it (including a number of new affidavits and excerpts from several documents). The documents submitted by Mr. DeCesaris include an excerpt from a report made by an AOUSC "Management Review Team" prior to the loss in question which states, "The present system of maintaining exhibits in [Mr. DeCesaris'] office is one of the more secure systems observed by Management Review."

Conclusions

We have carefully reconsidered our previous decision in light of the new submissions by Mr. DeCesaris. On some points, the new submissions conflict with the findings of our original decision. In this regard, Mr. DeCesaris has presented additional information which casts doubt on the basic findings in our original decision.

For example, Mr. DeCesaris has presented new evidence by way of affidavits that employees of the clerk's office were well aware that office procedure required the combinations on the evidence cage locks to be periodically changed, that the deputy clerks in charge of the evidence cage from which the missing money disappeared were specifically informed of the procedure, that the lock on that particular cage had been replaced following an attempt to change the combination "on or before" January 14, 1981, and that specific instructions as to the need to preserve confidentiality of the combinations were given to the deputy clerks in question. While this new evidence does not demonstrate that the combination in question was in fact different when the loss occurred than the one that had been in use for several years, or that confidentiality was in fact maintained by the deputy clerks, it does tend to support Mr. DeCesaris' claim that reasonable procedures were in place and that reasonable steps were taken to enforce them.

Similarly, the new evidence suggests that controls over access to the vault in which the evidence cages were located were in place

and that an alarm system designed to preclude unauthorized access to the cages was customarily in operation in the vault. Thus, while the cages themselves (which have since been modified) may have been deficiently designed and constructed, as we originally concluded, the new evidence tends to support Mr. DeCesaris' claim that control over access to the vault and the cages nevertheless was reasonably adequate.

Finally, the favorable report of the AOUSC "management review team" demonstrates that the procedures governing the protection of evidence were considered to be adequate before the loss in question was discovered.

While it remains true that the assignment of two clerks to the same cage makes a determination of pecuniary liability in the event of a loss difficult, if not impossible, Mr. DeCesaris explains that this procedure was dictated by the Senior Judge in order to assure ready access to evidence when needed by judges. In any event, even had Mr. DeCesaris, rather than the Senior Judge, been responsible for the procedure which provided for dual access to the evidence cages, this factor alone would not, in our view, support a finding that he was responsible for the loss in question.

The additional facts presented by Mr. DeCesaris raise sufficent doubt as to whether lax procedures were the proximate cause of the loss to cause us to change our original conclusion. Accordingly, we now conclude that Mr. DeCesaris should be granted relief from liability for this loss pursuant to 31 U.S.C. § 3527. A refund for the full amount of the loss, which we understand has been withheld from his pay, should be made to him promptly. Our decision in 64 Comp. Gen. 489 is overruled accordingly.

[B-215735]

Taxes—State—Constitutionality—Assessment *v.* Service Charge

Maryland 9-1-1 fee may not be paid by Department of Health and Human Services, because the fee amounts to a tax from which the United States is constitutionally immune. 64 Comp. Gen. 655 (1985).

Matter of: 9-1-1 Emergency Number Fee, September 26, 1986:

The Director of the Division of Finance of the Social Security Administration of the Department of Health and Human Services (HHS) requested an advance decision under 31 U.S.C. § 3529 (1982) on the question of whether Federal agencies must pay a 9-1-1 fee to the State of Maryland and to Maryland counties. We decided in 64 Comp. Gen. 665 (1985) that, where 9-1-1 service is authorized or required by law to be offered by state or local governments and a service fee assessed to defray 9-1-1 costs, the fee amounts to a tax

which the Federal Government may not constitutionally be required to pay. This decision applies to Maryland's 9-1-1 fees.

Characteristics of the Maryland 9-1-1 Service Charge

The provisions for a statewide 9-1-1 emergency telephone system are contained in Md. Ann. Code, art. 41, §§ 204H-1-204H-8 (1983). As of July 1, 1985, all Maryland counties were required to have a 9-1-1 system in operation. (§ 204H-2.) The law created an Emergency Number System Board to supervise the operation of the various county 9-1-1 plans. The State Board is responsible for issuing statewide operational guidance and for reviewing and auditing county plans and systems. (§ 204H-3.)

Maryland law established a state 9-1-1 fee of 10¢ per month to be added to current bills rendered for switched local exchange access in the State. It also empowered counties to adopt, by ordinance, a local 9-1-1 charge of up to 30¢ per month, "to cover the total amount of eligible [9-1-1] operation and maintenance costs of the county." (§ 204H-5.) As to both charges, the telephone company serves strictly as a collection agency who is charged to remit the 9-1-1 fees to the State comptroller for deposit in a 9-1-1 Trust Fund, held in the State Treasury. *Id.* The telephone company is authorized to withhold an administrative fee of 1½ percent in return for its services.

The Trust Fund may disburse to the counties amounts needed to finance all equipment acquisition and maintenance costs. Use of 9-1-1 fees for personnel cost is limited to 50 percent of costs in counties with 100,000 or fewer residents and 30 percent in counties with over 100,000 population. (§ 204H-8.) The Trust Fund is not permitted to advance funds to the counties in anticipation of future receipts, and therefore any shortfalls in funding must presumably be covered by local tax revenues. (§ 204H-7(e).)

Discussion

It is an unquestioned constitutional principle that the United States and its instrumentalities are immune from direct taxation by states and their inferior governmental units. *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819). Direct taxation occurs where the legal incidence of the tax falls directly on the United States as the buyer of goods or the consumer of services. *Alabama* v. *King and Boozer,* 314 U.S. 1 (1941); 53 Comp. Gen. 410 (1973). Despite its immunity from taxation, the United States is entitled to the same municipal services that tax payers receive, including police and fire protection. 53 Comp. Gen. 410 (1973); 49 Comp. Gen. 284 (1969); 24 Comp. Gen. 599 (1945). The 9-1-1 service used to expedite contacting these municipal services in an emergency seems to be a logical extension of the services themselves, and hence one which must be provided despite Federal entities' tax exempt status.

In 64 Comp. Gen. 665, we identified the additional characteristics of 9-1-1 fees which make them constructive taxes. First, 9-1-1 service is provided by a local government or by a quasi-governmental unit. Second, public funding of the service requires legal authority, *e.g.* an ordinance or referendum. Third, the fee is based on a flat rate per telephone line, and not related to actual levels of service.

Conclusion

It is our opinion that the Maryland 9-1-1 emergency service fee is a tax, the legal incidence of which falls directly on the United States as the user of telephone services. The telephone company only acts as a collection agent for the State and county. This decision is in accordance with our previous decision in 64 Comp. Gen. 665 (1985). Accordingly, payment of the Maryland 9-1-1 fee would be improper, and HHS should withhold the 9-1-1 fee from its payments for telephone services in the State.

[B-219940, et al.]

Accountable Officers—Physical Losses, etc. of Funds, Vouchers, etc.—What Constitutes

Requests for relief for losses incurred in the routine business operation of the Tax Lien Revolving Fund of the Internal Revenue Service (IRS) (those where the cost of redeeming property financed out of the fund exceeds the resale price received for the property which is deposited to the Fund) are inappropriate for consideration under 31 U.S.C. 3527(a) since such losses do not constitute "physical losses or deficiency" for the purpose of this relief statute. Request for relief for illegal, erroneous, or incorrect payments are for consideration under 31 U.S.C. 3527(c) or 3528. However, mere fact that subsequent sale does not recover the amount spent by IRS for redemption does not by itself serve to make the redemption an "illegal, improper, or incorrect" payment.

Appropriations—Availability—Revolving Fund Replacements

Internal Revenue Service (IRS) operating appropriations are not available for transfer to Tax Lien Revolving Fund to restore Fund's funding level which has been reduced as a result of the amounts IRS pays from the Fund in order to redeem property subject to junior tax liens in favor of the Government exceeding the amount received by the IRS and deposited to the Fund when the property is sold. The Fund is the appropriation specifically available to IRS for redeeming property subject to junior tax liens in favor of Government. Therefore, more general appropriation available to IRS for operations may not be used to finance this activity. Thus, absent any statutory authority authorizing transfer, the only way IRS could replenish losses to the Fund would be for it to specifically request appropriations from Congress for this purpose.

To the Honorable Lawrence B. Gibbs, Internal Revenue Service, September 26, 1986:

This decision is in response to three submissions from John Wedick, Jr., Assistant Commissioner (Planning, Finance and Research), Internal Revenue Service (IRS), concerning a loss to IRS' Federal Tax Lien Revolving Fund as a result of its inability to resell certain property for at least as much as the IRS expended to

redeem the property from a foreclosing lien holder. Two of the submissions seek relief from a physical loss to the Fund, under 31 U.S.C. §3527(a), apparently on behalf of the District Directors of the Atlanta and Las Vegas Districts, while the third seeks clarification of the authority of IRS to transfer funds appropriated for Internal Revenue Collection to the Tax Lien Revolving Fund to offset losses incurred in the operation of the Fund. For the reasons stated below, it is our opinion that the losses incurred in the routine business operations of the Revolving Fund are inappropriate for consideration under 31 U.S.C. §3527(a) and we are unaware of any authority under which the IRS may transfer funds from annual appropriations for Internal Revenue Collection to the Revolving Fund to offset these losses.

The Tax Lien Revolving Fund is established by 26 U.S.C. §7810 to fund the redemption (purchase) of property by the United States from those who have purchased the property from a foreclosing lienholder whose lien was senior to the Government's tax lien.[1] Property is redeemed by the IRS in anticipation that it will be resold at a price in excess of the redemption price. The Revolving Fund is reimbursed from the proceeds in an amount which may not exceed the amount the United States paid at redemption and any excess is credited towards the taxpayer's indebtedness to the United States. Thus, as is the case generally with regard to revolving funds, the law authorizes both expenditures from the Fund and deposits to the Fund. There are two separate and distinct transactions, the propriety of either under the law being independent of the other.

The actions taken which prompted the requests for relief, while factually complex, may, for purposes of our discussion, be summarized as follows:

—In the Atlanta case, property was redeemed at the cost of $14,923.43 and it could be resold for only $9,000. As a result, the Revolving Fund has been reduced by the amount of $5,923.43.

—In the Las Vegas case, property was redeemed at the cost of $143,941.87 and it could be resold for only $91,000. As a result, the Revolving Fund has been reduced by the amount of $52,941.87. Additionally, IRS indicates that it incurred another $12,189.57 in administrative expenses which apparently were paid out of its annual appropriations.

In both cases, the submissions suggest that there may be some question as to whether the officials involved in deciding to redeem

[1] 26 U.S.C. §7810(a) provides:

There is established a revolving fund, under the control of the Secretary, which shall be available without fiscal year limitation for all expenses necessary for the redemption (by the Secretary) of real property as provided in section 7425(d) and section 2410 of title 28 of the United States Code. There are authorized to be appropriated from time to time such sums (not to exceed $1,000,000 in the aggregate) as may be necessary to carry out the purposes of this section.

the property (neither submission clearly identifies these persons) exercised reasonable judgment. The Las Vegas case raises the question of whether internal procedures which apparently require that a purchase bid be in hand prior to redemption had been properly waived. The Atlanta case raises the question of the property of permitting a bid to expire before the property was offered for resale.

The important point for purposes of this response is that 31 U.S.C. § 3527(a), the statute under which relief was requested in both cases, is inapplicable. Under 31 U.S.C. § 3527(a), the Comptroller General may relieve a present or former accountable officer or agent from liability for the *physical loss* or *deficiency* of public money upon concurrence with determinations by the head of the agency that the officer was carrying out official duties when the loss or deficiency occurred, that the loss was not attributable to fault or negligence on the part of the officer, and that the loss or deficiency was not the fault of an illegal or incorrect payment. As to whether a particular transaction constitutes a "physical loss or deficiency," we have stated:

> In sum, "physical loss or deficiency" includes such things as loss by theft or burglary, loss in shipment, and loss or destruction by fire, accident, or natural disaster. It also includes the totally unexplained loss, that is, a shortage or deficiency with absolutely no evidence to explain the disappearance. *E.g.*, 48 Comp. Gen. 566 (1969). Finally, * * * losses resulting from fraud or embezzlement by subordinate finance personnel may continue to be treated as physical losses. With this exception, however, the disbursement of public funds by a disbursing officer or his subordinate is a payment, and if it is illegal or erroneous, the proper relief statute is 31 U.S.C. § 3527(c). B-202074, July 21, 1983.

It is clear that a loss to the Revolving Fund such as those involved in the Atlanta and Las Vegas cases, cannot be considered for relief as a *physical* loss or deficiency under 31 U.S.C. § 3527(a). Generally, questions concerning responsibility for losses resulting from illegal or erroneous payments from appropriation accounts (and the Revolving Fund is an appropriation account) are determined under 31 U.S.C. §§ 3527(c) or 3528, which apply to finance personnel (specifically, disbursing officers and certifying officers). It does not appear that the agents charged with deciding whether to redeem the property fit into either of these categories. Non-accountable officers are not fiscally responsible for errors in judgment.

In any case, the error, if one existed, did not amount to a violation of a statutory requirement. 26 U.S.C. § 7810(b) provides:

> The fund shall be reimbursed from the proceeds of a subsequent sale of real property redeemed by the United States in an amount equal to the amount expended out of such fund for such redemption.

It is clear that this language is intended to be merely a limitation on the amount that may be desposited to the Fund from the proceeds of the sale, and not an unalterable legislative requirement below which deposits may not be made. For example, the Committee on Ways and Means, in its report on the Federal Tax Lien Act of 1966 which enacted this provision into law, commented on this provision as follows:

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"* * * It is anticipated that the proceeds on the resale of redeemed property will replenish the revolving fund so that additional appropriations will not be necessary." H.R. Rep. No. 1884, 89th Cong., 2d Sess. 30 (1966). See also S. Rep. No. 1708, 89th Cong., 2d Sess. 32 (1966).

This language thus appears to recognize that there may be some instances where circumstances may result in resales that do not recover the amount expended for the redemption (although these should be rare).

Since the request is inappropriate for consideration under any of the accountable officer relief statutes, IRS may not avail itself of the authority to restore losses in accounts from current agency appropriations in 31 U.S.C. §3527(d) (when relief is granted) or 31 U.S.C. §3530 (when relief is denied and the loss is determined uncollectible).

One of the letters from Assistant Commissioner Wedick suggests that IRS operating appropriations may be available to replenish the Revolving Fund under our decision A-42511, June 1, 1932, which held that operating appropriations could be used to fund redemptions. See also A-42511, August 24, 1982. However, these decisions were rendered prior to the Revolving Fund's establishment in 1966.

As a general rule, an appropriation for a specific object is available for that object to the exclusion of a more general appropriation which might otherwise be considered available for the same object, and the exhaustion of the specific appropriation does not authorize charging any excess payment to a more general appropriation.[2] Therefore, establishment of the Revolving Fund precluded the use of a more general appropriation which otherwise might have been available.

The only way IRS can replenish losses to the Tax Lien Revolution Fund is to specifically request appropriations to the Revolving Fund in the amount it deems necessary in order to carry on its authorized activity. Such appropriations are specifically authorized by 26 U.S.C. §7810(a), quoted in footnote 1, *supra*.

[B-219958]

Travel Expenses—Air Travel—Reimbursement Basis

When travel orders given to military members specify travel by commercial airline with Government Transportation Requests (TR's) to be used, and the members are unable to obtain TR's and instead personally pay for their commercial flights, they may be reimbursed if an appropriate official certifies that TR's were not available to them. Such certification does not entail a retroactive modification of the travel orders and is instead simply a factual determination concerning the conditions that existed at the time the travel was performed.

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[2] *E.g.*, 38 Comp. Gen. 758, 767 (1950); 46 Comp. Gen. 198 (1966); B-70219, January 19, 1948; B-183922, August 5, 1975; B-202362, March 24, 1981.

Orders—Amendment—Retroactive

Military travel orders may not be amended retroactively to increase or decrease rights which have become fixed under statute and regulation after the travel has been performed, except to correct plain errors. Retroactive modification of a Marine Corps sergeant's orders to delete a provision requiring group travel is appropriate under this rule to correct a plain error, where it was demonstrated that no group existed with which he could travel and that the order-issuing authority had not intended to specify group travel at the time the orders were published.

Orders—Amendment—Retroactive

The travel and transportation entitlements of members of the uniformed services are for computation under the statutes and regulations in effect at the time the travel is performed. Generally, if the applicable statutes and regulations are amended after the issuance of orders but before the completion of travel, no retroactive modification of the travel orders would be involved, and instead the orders would be automatically brought into conformity with the statutes and regulations at the time of their amendment.

Matter of: Sergeant Paul D. Wilson, USMC, and others, September 26, 1986:

Major W.J. Byrne, Jr., a disbursing officer of the Marine Corps at Camp Lejeune, North Carolina, has requested an advance decision regarding whether two individuals' travel orders may be amended retroactively to authorize them to travel by commercial airlines at personal expense, instead of using a Government Transportation Request as initially specified in their orders. First Lieutenant D. B. Jennings of the Disbursing Office, Marine Corps Air Station New River, Jacksonville, Florida, questions whether another individual's travel orders may be amended retroactively to change the orders to read "individual" rather than "group" travel. In forwarding these cases, the Marine Corps Finance Center appended two more general questions regarding retroactive amendments of travel orders. The Per Diem, Travel and Transportation Allowance Committee approved the submission and assigned it control number 85-29.

Initially, we note that travel allowances are authorized under statute and regulation for service members for their expenses in complying with travel requirements imposed on them by competent orders issued by the services. See *Private Vincent A. Manaois,* 63 Comp. Gen. 621, 623 (1984). If the travel is for the benefit of the service and the service member is directed by competent orders issued in advance to perform the travel, the member is entitled to be reimbursed in accordance with the applicable statutes and regulations in effect at the time the travel is performed. See *Ensign Cheryl R. Dallman, USNR,* 64 Comp. Gen. 489, 491 (1985). The general rule is that legal rights and liabilities with regard to travel allowances vest under the statutes and regulations when travel is performed in compliance with competent orders. As a result, such orders may not be revoked or modified retroactively so as to increase or decrease the rights which have become fixed under statute and regulation after the travel has been performed. An excep-

tion to this rule has been recognized in cases involving errors which are apparent on the face of the original orders, or where all the facts and circumstances surrounding the issuance of the original orders clearly demonstrate that some provision which was previously determined and definitely intended had been inadvertently omitted in their preparation. See *Warrant Officer John W. Snapp, USMC,* 63 Comp. Gen. 4, 8 (1983), and decisions therein cited.

Orders Directing the Use of Transportation Requests

Major Byrne of Camp Lejeune has presented two cases involving purported retroactive modifications of travel orders to approve reimbursement of a member's travel by commercial airlines at the member's expense. The two cases involve Sergeant Paul D. Wilson and Warrant Officer Ronald W. Bentley.

On June 18, 1984, Sergeant Wilson was issued temporary additional duty orders specifying he was to report on June 21, 1984, to Field Artillery School at Fort Sill, Oklahoma. The specified mode of travel was commercial air procured by Government Transportation Request, but he purchased an airline ticket at his own expense instead. Subsequently, the Commanding General of Sergeant Wilson's division determined that he had been unable to obtain a Government Transportation Request in time to report to Fort Sill by June 21, 1984, and issued an order retroactively authorizing his travel by commercial air without a Government Transportation Request.

In the second case, on February 5, 1985, Warrant Officer Bentley was issued travel orders directing him to perform temporary duty at Bardufoss, Norway, but the orders authorized "variation of itinerary." His orders directed him to use Government transportation if available. Otherwise he was to obtain a Government Transportation Request. Upon leaving Camp Lejeune, Warrant Officer Bentley was given Transportation Requests enabling him to travel from Camp Lejeune to Bardufoss, Norway, and back to Camp Lejeune. While in Bardufoss, the member performed temporary duty at Oslo, Norway, for which travel he purchased commercial airline tickets with his personal funds. Upon return to Camp Lejeune, Warrant Officer Bentley's travel orders were retroactively amended to authorize the use of commercial transportation at personal expense so as to enable him to be reimbursed the cost of his travel between Bardufoss and Oslo for which travel he could not use a Government Transportation Request.

In situations such as those involving the two military members discussed above, there is a regulation in Volume 1 of the Joint Travel Regulations (1 JTR) which is applicable. This provision, 1 JTR, para. M4203-3e, states:

e. *Orders Direct Utilization of Transportation Requests.* When travel orders specifically direct (as distinguished from authorize) the issuance of transportation requests via specific modes of transportation but the member travels by common car-

rier at personal expense, reimbursement is prohibited unless the appropriate authority responsible for furnishing such transportation requests certifies that transportation requests were not available or the mode of transportation directed was not available at the time and place required in time to comply with the orders.* * *

Under the regulation, the two members may be reimbursed since the appropriate authority has made the certification required by this provision that Transportation Requests were not available. *Gunnery Sergeant Michael M. McClure*, 64 Comp. Gen. 234 (1985). Although the certifications were made in the form of purported retroactive modifications to the members' travel orders, our view is that no modification of the orders was actually involved. That is, the certifications were simply factual determinations that Transportation Requests were not available and no corrections of error in the original orders were involved. See B-170423, February 18, 1972. See also *Gunnery Sergeant Michael M. McClure*, 64 Comp. Gen. 234, *supra*.

Orders Designating Group Travel

First Lieutenant Jennings of Marine Corps Air Station New River presents a question in regard to a change in a travel order designation from group travel to individual travel. Since members in a group travel status normally do not receive per diem (see 1 JTR, para. M4101-2), a change from group travel to individual travel generally will result in an increase in travel entitlements bringing into effect the rule against retroactive modifications of travel orders.

The facts are that on July 13, 1984, Master Gunnery Sergeant Ray F. Garrett was issued travel orders directing him to report for temporary duty at Cecil Field, Florida. Group travel was designated. Subsequently, according to the administrative officer at the member's duty station, his travel orders were modified to authorize individual travel instead of group travel because "[h]e was erroneously placed on Group Orders after the original orders had been executed and the personnel had already arrived at Cecil Field, Florida."

The regulations regarding group travel are found in 1 JTR, paragraphs M4100-M4104. As the regulations point out, among other things, group travel should be used when several members are to travel from the same point of origin to the same destination. In this situation, our view is that since there were not several members traveling from the same point—the other members having departed prior to the issuance of Sergeant Garrett's orders—the orders were not consistent with the regulations and were retroactively modified properly on the basis of plain error. Compare 44 Comp. Gen. 405, 407-408 (1965).

General Questions From the Marine Corps Finance Center

The first question is "[w]ould increased amounts for transportation or per diem, because of computations made under appropriate regulations be considered retroactive modification?"

As indicated, travel and transportation allowances are for computation under the statutes and regulations in effect at the time the travel is performed. Generally, if the applicable statutes or regulations are amended after the issuance of orders but before the completion of travel, no retroactive modification of the orders would be required. Instead, the amendment of the statute or regulation would operate simultaneously and automatically to amend the orders prospectively, since travel orders must conform to the governing provisions of statute and regulation in effect at the time the travel is performed. See *Warrant Officer John W. Snapp, USMC, supra,* 63 Comp. Gen. at page 7.

The Finance Center's second question is:

> Would the increased costs of a government procured airline ticket, born by the traveler, which is caused by deregulation or change in air carrier be considered a retroactive modification? The entitlement to transportation has been vested in the basic order but the amount has been increased.

Generally, an increase in the cost of transportation under the situation described would not appear to require a retroactive modification, since travel would be accomplished in the manner specified in the travel orders.

The questions presented are answered accordingly. The vouchers presented for decision are returned for payment, if otherwise correct.

[B-220227]

Station Allowances—Military Personnel—Dependents—Effective Date of Entitlement

The Joint Travel Regulations may be amended to authorize payment of overseas station allowances authorized by 37 U.S.C. 405 to members with dependents after the date a change in homeport of the vessel or staff or mobile unit to which they are assigned or are being transferred has been officially announced. Allowances may be paid even though travel of dependents occurs before the effective date of the vessel's or unit's change of homeport. 45 Comp. Gen. 689 (1966); 43 Comp. Gen. 505 (1964) overruled.

Matter of: Allowances on Homeport Change, September 26, 1986:

This responds to a request for our decision as to whether Volume 1 of the Joint Travel Regulations (1 JTR) may be changed to permit the payment of overseas station allowances when the homeports of vessels are changed from the contiguous United States to overseas locations and the members' dependents arrive at the over-

seas station prior to the effective date of the homeport change.[1] The provisions of 1 JTR may be changed to authorize the payment of overseas station allowances under these circumstances.

Background

The Assistant Secretary of the Army indicates that payment of the allowance in question is prohibited by principles set forth in two of our decisions, 45 Comp. Gen. 689 (1966) and 43 Comp. Gen. 505 (1964). These decisions held that the temporary lodging allowance and other overseas station allowances authorized by 37 U.S.C. § 405 (Supp. III, 1985) are not payable until vessels' change-of-homeport orders become effective. According to the Assistant Secretary, this often occurs 3 or 4 months after the dependents arrive overseas. The Assistant Secretary says that the rule presents a burdensome financial problem for members who find it difficult to pay the substantial costs of hotel-type accommodations and restaurant meals for their dependents during the period between arrival of the dependents and the effective date of the homeport change.

The proposed changes would permit payment of the temporary lodging allowance and other overseas station allowances, if appropriate, after the dependents arrive at the new homeport for members ordered on a permanent change of station to a vessel or staff or mobile unit that has an announced but not yet effective homeport change to an overseas homeport.[2] Payment is also proposed for members on permanent duty in a vessel after the homeport change to an overseas homeport is announced.

The Assistant Secretary states that the principles established in the two cited decisions defeat members' plans that would otherwise provide some relief from relocation problems. He points out that service members and their dependents can use permanent-change-of-station entitlements before the effective date of a homeport change. Thus, travel and transportation allowances are available to dependents who relocate to the new homeport during the period between the announced homeport change and its effective date. Also, based on 60 Comp. Gen. 561 (1981), paragraph M4156 of 1 JTR (cases 12 and 16) even permits members to travel for the purpose of assisting their dependents in making travel and transportation arrangements.

The Assistant Secretary contends that to postpone payment of the station allowances for several months after arrival of dependents at the vessel's new overseas homeport until the effective date

[1] The request was made by the Assistant Secretary of the Army (Manpower and Reserve Affairs) on behalf of the Per Diem, Travel and Transportation Allowance Committee.

[2] Subsequently we will refer only to vessels, although that term should be read to include other mobile units which have homeports.

of the vessel's orders creates a serious gap in a statutory plan intended to relieve members of undue financial burdens:

> Since overseas station allowances are, like dependent travel, household goods transportation, and POV transportation, related to permanent changes of station, it would appear logical not to stop (in reality) the use of three entitlements and the service member's ability to help with a move by limiting one entitlement to use only on or after the effective date of orders. In the case of members serving in ships or with staffs or mobile units when the homeport change is announced, they must frequently travel with the unit when it relocates thereby further complicating the member's ability to actually assist with the household relocation. The inability of service members to pay out-of-pocket, the expenses normally covered by TLA [Temporary Lodging Allowance] and other station allowances can prevent well-planned moves. (I note that on inter-overseas PCA moves, JTR par. M4301-9b permits the payment of station allowances (including TLA) on arrival of dependents if that arrival is after the issue date of the PCA order).
>
> This problem is not isolated. As ships undergo homeport changes following regular overhaul or construction from the continental United States to overseas homeports, the crew members assigned to or ordered to the vessel face this problem.
>
> Normally, the change to an overseas homeport from a continental United States homeport occurs two or more times per year. Permitting the payment of station allowances on behalf of a member and/or dependents upon arrival at the promulgated overseas homeport but after the issuance date of PCS orders or promulgation date of a homeport change would be a logical continuation of the provision JTR par. M4301-9b and would alleviate a significant and recurring problem.

Discussion

The pertinent part of 37 U.S.C. § 405(a) is:

> Without regard to the monetary limitations of this title, the Secretaries concerned may authorize the payment of per diem, considering all elements of the cost of living to members of the uniformed services under their jurisdiction and their dependents, including the cost of quarters, subsistence, and other necessary incidental expenses, to such a member who is on duty outside of the United States or in Hawaii or Alaska, whether or not he is in a travel status. * * *

We refused in 45 Comp. Gen. 689 to approve amendments to the regulations to authorize payment of the allowances upon arrival of dependents or members overseas prior to the effective date of orders changing the vessel's homeport. The holding was based on the rule established in 43 Comp. Gen. 505, where we viewed the allowances as permanent station allowances and determined that the change of homeport constituted the permanent change of station and that the overseas allowances could not be paid until the permanent station overseas has become effective.

Having reconsidered our prior decisions, we now agree that the JTR's may be amended to provide for payment of overseas station allowances to commence once a homeport change has been announced. As described above, the Assistant Secretary has presented compelling practical reasons in support of such an approach. Moreover, contrary to the implication of our decision in 45 Comp. Gen. 689, we find nothing in the statute to limit the exercise of discretion to amend the JTR's for this purpose.

Under 37 U.S.C. § 405(a), the overseas station allowance is available to the dependents of a member "who is on duty outside of the United States or in Hawaii or Alaska." We have consistently held that the permanent duty station of a member assigned to a vessel

is the vessel itself. The vessel's homeport is regarded as a duty station for administrative convenience in applying the travel and transportation entitlements of the member's dependents, as well as the overseas station allowances. *See, e.g.*, 45 Comp. Gen. 689, *supra*, at 692. Since use of the homeport for purposes of dependent allowances is a matter of administrative discretion, we believe that it may be applied with some flexibility.

In sum, while the effective date of a homeport change may have significance from an administrative standpoint, it need not limit the availability of overseas station allowances under 37 U.S.C. § 405. Such a result is not required by the statutory language, and it can result in inefficiencies which were obviously not contemplated when 37 U.S.C. § 405 was enacted. We hold, therefore, that with respect to these entitlements, the Joint Travel Regulations may be changed to provide that such entitlements may commence once the dependents have relocated, as authorized, to the designated new homeport outside the United States even though the specified effective date for change in homeport has not arrived.

[B-221065]

Intergovernmental Personnel Act—Assignment of Federal Employees—Relocation Expenses

An employee who incurred relocation expenses as the result of an Intergovernmental Personnel Act (IPA) assignment is entitled to a relocation income tax allowance under 5 U.S.C 5724b (Supp. III, 1985). The IPA relocation expenses are payable under the authority of 5 U.S.C. 5724 and 5724a while the income tax allowance applies to reimbursements or allowances under the same statutes. Prior decisions are distinguished.

Matter of: Glenn A. Truglio—Claim for Relocation Income Tax Allowance Pursuant to IPA Assignment, September 26, 1986:

This is in response to a request from the Social Security Administration for a decision as to whether the relocation income tax (RIT) allowance may be paid to an employee who incurred relocation expenses as a result of an assignment under the Intergovernmental Personnel Act of 1970 (IPA). For the reasons stated below, we hold that the employee is entitled to a RIT allowance.

Pursuant to an IPA assignment, the employee, Glenn A. Truglio, was assigned from his position in the Office of Child Support Enforcement, Department of Health and Human Services, to the New Jersey Department of Citizen Services. The assignment was from January 23, 1984, through January 23, 1986, and necessitated Mr. Truglio's relocation from Mount Laurel, New Jersey, to Livingston, New Jersey. Mr. Truglio was authorized travel expenses to his new assignment, shipment of his household goods, temporary quarters, and miscellaneous expenses, and he has been reimbursed for those expenses in the amount of $8,162.18. The issue to be decided is

whether Mr. Truglio is entitled to a relocation income tax allowance to reimburse him for the income tax he paid on these relocation expense reimbursements.

The Intergovernmental Personnel Act of 1970, Pub. L. No. 91-648, 84 Stat. 1909 (1970), codified at 5 U.S.C. §§ 3371-3376 (1982), provides for the temporary assignment of personnel between Federal agencies and State and local governments and other organizations in situations where such an assignment would facilitate work of mutual benefit to both the Federal agency and the State or local jurisdiction concerned. See B-209132, October 3, 1983. The entitlement to reimbursement for travel expenses incurred as a result of an IPA assignment is subject to section 3375 of title 5, United States Code, which provides for (1) travel expenses to and from the assignment location and per diem allowance during assignment, (2) transportation and per diem for the employee's family, (3) shipment or storage of the household goods, (4) a temporary quarters allowance, and (5) a miscellaneous expense allowance. Although the relocation income tax allowance, 5 U.S.C. § 5724b (Supp. III, 1985), is not specifically listed among the travel expenses authorized for an IPA assignment, we believe the allowance is applicable to employees who incur certain relocation expenses for which they are reimbursed in connection with the IPA assignment.

The IPA statute authorizes payment of certain travel expenses that are in fact relocation expenses authorized under 5 U.S.C. §§ 5724 and 5724a (1982). See 5 U.S.C. § 3375. The statute governing the RIT allowance provides reimbursement for Federal, State, and local income taxes incurred for any moving or storage expenses furnished in kind or for which reimbursement or an allowance is provided. 5 U.S.C. § 5724b (Supp. III, 1985). The term "moving or storage expenses" is defined in section 5724b(b) to mean travel and transportation expenses under section 5724 and other relocation expenses under sections 5724a and 5724c. Since some of the expenses Mr. Truglio incurred were payable in accordance with sections 5724 and 5724a, the RIT allowance statute by its terms applies to allowances or reimbursements for those expenses.

We note that we have previously held that if a travel or relocation expense is not specified under 5 U.S.C. § 3375, an employee assigned under the IPA may not be reimbursed for that expense. *Forest Service,* B-209132, October 3, 1983; *Roy A. Harlan,* B-198939, April 3, 1981; *Burnell F. Peters,* B-193443, June 7, 1979; *James D. Broman,* B-185810, November 16, 1976; *William S. Harris,* B-183283, August 5, 1975; *Alan O. Mann,* B-183042, April 24, 1975; and *Donald B. Kornreich,* B-170589, September 18, 1974. We would distinguish those prior decisions in this instance in view of the language of section 5724b which authorizes a tax allowance for expenses incurred under sections 5724 and 5724a.

Similarly, we would distinguish those prior decisions which held that an IPA assignment is not a permanent change of station and

that the assignment site is considered a temporary duty station. *Richard M. Morse,* B-217301, June 4, 1985; *Philip A. Jarmack,* B-206258, June 16, 1982; *Harris,* cited above; and *Kornreich,* cited above. The language of section 5724b is not strictly limited to expenses incurred by employee incident to a permanent change of station, but rather it applies to "moving and storage expenses" authorized under sections 5724 and 5724a.

We note that the regulations prescribed by the General Services Administration (GSA) to administer the RIT allowance state that "[p]ayment of a RIT allowance is authorized for employees transferred * * * from one official station to another for permanent duty." Federal Travel Regulations, para. 2-11.2a (Supp. 14, April 1, 1985). *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1985). However, these regulations do not specifically address IPA assignments, and we have been informally advised by GSA officials that, in their opinion, the RIT allowance may be paid to employees under an IPA assignment. Therefore, to the extent an employee incurs tax liability for reimbursements or allowances payable during an IPA assignment under the authority of sections 5724 and 5724a, we conclude that the employee may be reimbursed for the RIT allowance under section 5724b.

[B-217181]

Federal Claims Collection Act of 1966—Compromise, Waiver, etc. of Claims—Authority

Agencies may, on a case-by-case basis, take the anticipated costs of required administrative hearings into consideration when determining whether to compromise or terminate collection of debts owed to the United States pursuant to the Federal Claims Collection Standards, 4 C.F.R. ch. II. However, those costs (like other kinds of administrative costs) should be included only when there is a substantial likelihood that they will actually be incurred in the particular case.

Federal Claims Collection Act of 1966—Debt Collection—Administrative Responsibility

Agencies should not consider the anticipated costs of administrative hearings or reviews when establishing minimum debt amounts and points of diminishing returns for their debt collection programs.

Debt Collections—Abandonment—Small Amounts, etc.—Propriety

Agencies may, without conducting cost studies, provide that debts of $1 or less that are owed to the United States by Federal civilian and military personnel need not be collected. Similarly, refunds of $1 or less that are owed to such personnel need not be paid, unless a specific claim for the refund is made.

Matter of: Termination of Claims Against Federal Civilian and Military Personnel Based on Costs of Collection, September 29, 1986:

Questions have arisen concerning the authority of Government agencies, under the Federal Claims Collection Act of 1966 (as

amended and codified in 31 U.S.C. ch. 37 (1982)), to terminate the collection of debts owed the United States. Two agencies have asked that we clarify the extent to which that authority applies to debts owed by Government employees.[1]

For the reasons set forth below, we conclude that:

—When determining whether to compromise or terminate the collection of debts owed by Federal employees, agencies may, on a case-by-case basis, consider the costs of providing administrative due process-styled procedures that are required by law, including oral or paper hearings and other procedures required by provisions of the Debt Collection Act of 1982.

—Agency debt collection policies may include realistic points of diminishing returns and minimize debt amounts (beyond which collection need not be undertaken) for debts owed the United States by Federal employees. However, agencies may not consider the anticipated costs of administrative due process-styled procedures when establishing those policies.

Background

The DOT Proposal. The Director of Financial Management of the Department of Transportation (DOT) seeks our views regarding a draft change to DOT collection procedures. According to its submission, DOT presently "pursues all collection and refund actions regardless of the amounts involved." DOT observes that, when the amounts involved are "nominal," DOT's policy "results in resource investments which cannot be justified." For this reason, DOT is considering modifying its policies to state that:

> (1) Operating administrations shall not initiate collection action of $1 or less on the assumption, without cost studies, that collection costs will always exceed the amount recoverable. They may, however, on their own initiative, establish higher minimums provided that the dollar figure is reasonable and supported by cost studies.
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> (2) The dollar figures and criteria provided for collections are also relevant in the case of refunds with one exception. Refunds shall be processed, regardless of the amount involved, when a specific claim is made.

DOT notes that GAO has previously endorsed similar proposals regarding debts owed by persons other than current Government employees. *E.g.,* 58 Comp. Gen. 372 (1979). The question is whether the same policy may be legally applied to debts and refunds involving current Federal employees.

The DOE Inquiry. The Department of Energy (DOE) asks whether, in view of the procedural requirements imposed on the process of salary offset by the Debt Collection Act of 1982 (DCA) (Pub. L. No. 97-365, § 5, 96 Stat. 1749, 1751-52), agencies may terminate the collection of debts owed by employees when the amounts to be re-

[1] For purposes of this decision, the terms "Government employees" and "Federal employees" should be read as including military personnel.

covered would be exceeded by the costs of conducting administrative hearings required by law. The DOE submission notes that the Debt Collection Act of 1982 requires agencies to accord employees with certain due process-styled procedures prior to taking salary offsets under 5 U.S.C. § 5514. DOE makes the following argument:

> Many of the hearings that are planned in [DOE] will result in costs in excess of the debt. In the past, the Comptroller General has held that termination is not authorized in overpayment cases where payroll withholding under 5 U.S.C. 5514 is available for remedy. However, with the current revision to 5 U.S.C. 5514 and the additional costs of conducting hearings, reconsideration of this position is necessary.
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> [DOE believes] that in the interest of economy, hearings of this type should have a "diminishing returns" standard applied to ensure efficient use of resources in carrying out the debt collection program. By this we do not mean that an employee's right to a hearing hinges on the amount of the indebtedness; rather, the Federal Government should have the right to terminate collection activity when it is cost effective to do so. * * *

Federal Claims Collection

In 1966, Congress passed the Federal Claims Collection Act (FCCA) to require Government agencies to administratively attempt to collect all debts owed the United States. The FCCA also gave agencies limited authority to suspend, compromise, and terminate collection action on certain types of claims that do not exceed $20,000. Among the criteria specified in the FCCA for the exercise of this authority is a statement that agencies should consider whether "the cost of collecting the claim is likely to exceed the amount of recovery."[2] The FCCA is implemented in joint regulations—the Federal Claims Collection Standards (FCCS), 4 C.F.R. ch. II (1985)—issued by GAO and the Department of Justice. Unless another statute either specifies different procedures to be followed in collecting debts under it, or authorizes an agency to set different procedures in its regulations (and the agency does so), each agency's collection activities are required to be consistent with the FCCS.[3]

At the time of the FCCA's enactment, agencies were already authorized by a number of statutes to take salary offsets, that is, to make involuntary deductions from an employee's pay in order to collect debts owed to the United States.[4] Few of those statutes specified what (if any) procedures were to be followed by the Government when it took salary offset under them. However, in 1982, Congress passed the DCA to "put some teeth into Federal [debt] collection efforts" by giving the Government more of "the tools it

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[2] Pub. L. No. 89-508, § 3, 80 Stat. 308, *codified in* 31 U.S.C. ch. 37 (1982). *See also* FCCS, 4 C.F.R. §§ 102.14, 103.4, 104.3(c).

[3] FCCS, 4 C.F.R. § 101.4. *Cf., e.g.*, 64 Comp. Gen. 142, 148 (1984).

[4] *E.g.*, 5 U.S.C. §§ 5511(b) (debts owed by employees removed for cause), 5512(a) (accountable officer debts), 5513 (disallowed payments), 5514 (erroneous payments of pay), 5522(a)(1) (advance payments for evacuations), 5705 (travel advances), 5724(f) (advances for travel and transportation); 37 U.S.C. § 1007 (debts owned by Army and Air Force members). (Note: some of these statutes were amended subsequent to enactment of the FCCA.)

needs to collect those debts, while safeguarding the legitimate rights of privacy and due process of debtors."[5] Section 5 of the DCA amended 5 U.S.C. § 5514 to expand the number and type of debts that can be collected by salary offset.[6] Section 10 of the DCA amended the FCCA to include a provision concerning administrative offset against debtors who are not subject to more specific statutory offset authority.[7] In both cases, however, the DCA in keeping with its stated purposes also imposed specific due process-styled procedures to be followed, prior to taking offset under those provisions. The procedures dictated by those sections, though somewhat different in their details, require the Government to notify debtors of the amount and existence of their debts, and to afford them opportunities for oral or paper hearings, as appropriate.[8]

In addition, GAO has consistently expressed the view that agencies should establish "minimum debt amounts" and realistic "points of diminishing returns" in their debt collection activities.[9] Both concepts derive from the notion of cost effectiveness—that is, agencies should not spend more money to attempt to collect a debt than is likely to be recovered on it.

The term "minimum debt amounts" refers to the designation of categorical thresholds beneath which collection action need not be *initiated* because the amounts of the debts in that class are so small (in relation to the costs of attempting *any* collection efforts) that it would not be cost effective to make any effort to collect those debts. Except for nominal amounts, minimum debt amounts should be supported by cost studies.[10] "Diminishing returns" refers to an agency's designation of thresholds at which the agency will *discontinue* collection efforts (already initiated) when it appears that for that class of debts, the costs of *additional* collection actions would exceed the amounts likely to be recovered. For example, initial demand letters may be relatively inexpensive to prepare and send, even when compared to the value of very small debts. However, if the debtors refuse to pay in response to the intitial letters, the small size of those debts may not justify further collection actions.

It will be seen from this brief summary that in addressing the requests in this case, we are dealing with two conceptually related but nevertheless different things: (1) the authority to compromise a claim or terminate collection action on a case-by-case basis, and (2)

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[5] 128 Cong. Rec. S12328 (daily ed. Sept. 27, 1982) (remarks of Sen. Percy). *Cf., e.g.,* 64 Comp. Gen. 142, 143 (1984); 64 Comp. Gen. 816, 817 (1985).

[6] DCA, § 5, 96 Stat. 1751-52, *codified in* 5 U.S.C. § 5514, *as implemented in* 5 C.F.R. pt. 550, subpt. K (hereafter cited as "Subpart K").

[7] DCA, § 10, 96 Stat. 1754-55 *codified in* 31 U.S.C. § 3716; *as implemented in* FCCS, 4 C.F.R. §§ 102.3, 102.4 (1985).

[8] 5 U.S.C. § 5541(a)(2), *as implemented in* Subpart K, § 550.1102(b), 49 Fed. Reg. at 27472; 31 U.S.C. § 3716(a), *as implemented in* FCCS, 4 C.F.R. § 102.3.

[9] *E.g.,* 18 Comp. Gen. 838 (1939); 55 Comp. Gen. 1438 (1976). As is indicated below, this policy is reflected in the FCCS, 4 C.F.R. § 102.14 (1985).

[10] *E.g., 58 Comp. Gen. 372 (1979).*

the authority to establish "minimum debt amounts" and "points of diminishing returns" to be applied categorically.

Discussion

1. Compromise/Termination

The FCCS recognize the concept of cost-effectiveness with respect to both compromise and termination. Thus, an agency may compromise a claim "if the cost of collecting the claim does not justify the enforced collection of the full amount." 4 C.F.R. § 103.4. Similarly, an agency may terminate collection action "when it is likely that the cost of further collection action will exceed the amount recoverable thereby." 4 C.F.R. § 104.3(c). The question has arisen frequently in our previous decisions whether this authority applies to debtors who are currently employees or military members of the Federal Government.

Viewed in the aggregate, the thrust of our prior decisions in this area is that, while the statutory authority to compromise or terminate applies to all debtors, some of the specific criteria in the FCCS (e.g., diminishing returns, 4 C.F.R. § 104.3(c)) would rarely if ever apply in the case of current Federal employees.[11] As noted above, the DCA and its implementing regulations (FCCS and Subpart K) now require Federal agencies to afford debtors with certain procedural rights, including notice and an opportunity to be heard (through either an oral or a paper hearing) prior to taking offset. Some of these procedural requirements necessarily entail significant administrative costs. Thus, as DOE suggests, these new developments in the law warrant reconsideration of whether agencies may, if the costs of administrative procedures required by law would exceed the amounts likely to be recovered, compromise or terminate collection, with regard to debts owed by Federal employees who are subject to salary offset.

We think it is legitimate for agencies to take the cost of required administrative procedures into account when evaluating debt collection options. We also think it is fundamental that agencies should *generally* terminate collection when the costs of collection would exceed the amount to be recovered. We say "generally," because there may be cases in which sound countervailing Government policies dictate that collection be attempted, despite the costs. For example, it may be desirable for the agency to disregard the costs of collection when it wishes to "set an example," and thereby discourage or deter other persons from incurring similar debts or resisting payment of them.[12]

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[11] The cases are collected and discussed in GAO's *Principles of Federal Appropriations Law*, pp. 11-186 through 11-189 (1982).

[12] *Cf., e.g.*, FCCS, 4 C.F.R. § 103.5 (Debts may be compromised "if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon. Mere accidental or technical violations may be dealt with less severely than willful and substantial violations.").

Consequently, we think that agencies may (but are not required to) take the costs of administrative procedures required by law into account when deciding whether to terminate the collection of debts. This holds true for all kinds of debtors, including Federal employees. We stress, however, that these costs constitute only one of the factors to be considered in the agency's exercise of sound discretion under the FCCS.

These conclusions are consistent with advice that GAO and the Justice Department have already issued regarding the authority to compromise debts under section 103.4 of the FCCS. When the FCCS were promulgated, the following guidance was included in the Supplemental Information Statement that accompanied the final regulations:

> [A] Federal agency queried whether the cost of collecting a claim for purposes of § 103.4 includes the cost of various administrative hearings and appeals, such as a pre-offset oral hearing where required or an appeal from an audit disallowance. In brief, the answer is yes, and we think the existing language is sufficient to cover the desired ground. However, we caution agencies to be realistic in their estimation of costs. Inclusion of an item should be triggered by a substantial likelihood that the cost will actually be incurred in the particular case, not merely because it is vaguely possible. With rare exceptions, the cost of a pre-offset oral hearing will normally not be relevant for purposes of [§ 102.13(d)]. 49 Fed. Reg. 8889, 8895 (1985).[13]

The same caveats applicable to compromise apply also to termination. For example, there must be a substantial likelihood that the particular type of cost will be incurred in the particular case before that cost may serve as a basis for termination. Moreover, although agencies must accord debtors with their full procedural rights, agencies should take all necessary and appropriate steps to assure that this is done in the most efficient and cost-effective manner, so that when such costs are taken into consideration, they are as accurate, realistic, and as minimal as possible. Otherwise, the viability of the Government's debt collection programs could be jeopardized.

3. Minimum Debt Amounts/Diminishing Returns

What we have said thus far applies to case-by-case determinations. In our opinion, these same considerations do not apply to the establishment of categorical minimum debt amounts and points of diminishing returns, and agencies normally should not include the costs of administrative hearings in their calculations when establishing these categorical levels.

First, the procedures prescribed by the DCA are still evolving and their costs are uncertain. Agencies are still learning the parameters of the statutory requirements, and it is not yet clear just how costly they will ultimately prove.

Second, factoring in the cost of administrative proceedings when setting categorical levels necessarily requires agencies to assume

[13] When the FCCS were published, a typographical error was included in this passage. The last sentence referred to "§ 103.4." The reference should have been § 102.13(d).

that a significant number of "small" debt cases would, in fact, result in requests for administrative review. We doubt that the agencies are presently in a position to accurately estimate whether a significant number of such requests will in fact be filed. Many small claim debtors may be willing to pay their debts once notified of them. Under these approaches, however, on the assumption that debtors would resist collection efforts and request costly hearings, those debtors would never be advised of the existence of their debt or afforded the opportunity to voluntarily pay.

Third, inclusion of these costs in the determination of points of diminishing returns could tend to encourage frivolous requests for administrative procedures. Under the FCCS termination authority, agencies must evaluate the costs of administrative procedure on case-by-case basis. Under diminishing returns, by contrast, termination would be automatic. Many debtors who learn of the establishment of this point of diminishing returns would automatically request hearings in order to manipulate the debt into a posture that would necessarily preclude its collection.[14]

Finally, and most importantly, these approaches require an agency to automatically forego or discontinue collection without considering whether there may be countervailing reasons (such as those mentioned earlier) which militate in favor of collection, despite the potential costs. In essence, adopting the minimum debt amount and diminishing returns approaches could result in the loss, to an extent we consider undesirable, of agency flexibility and discretion.

We think that, at least for now, it is sufficient that agencies have the ability to take into consideration, on a case-by-case basis, the anticipated costs of administrative procedures, which the debtor has actually requested, when considering whether to compromise or terminate collection on particular debts. At least until there has been sufficient experience to warrant re-evaluation, agencies should not include the costs of required due process-styled procedures in their calculations of minimum debt amounts and diminishing returns. Of course the considerations noted above do not apply when the minimum debt amount is nominal, as in the DOT proposal. Nominal amounts do not require cost studies (58 Comp. Gen. at 375). We see no reason why a proposal such as DOT's should not apply to all debtors equally.

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[14] We recognize that this same problem exists to an extent even in the context of case-by-case determinations. Once it is known that an agency will consider the cost of administrative hearings in evaluating its collection options, a debtor whose case has little merit may request a hearing solely to encourage compromise or termination by "puffing up" the agency's collection costs. We do not have a perfect solution. The views expressed in this decision reflect an attempt to balance cost-effectiveness with what we think is necessary agency flexibility. An agency can minimize the problem by not permitting termination to become automatic.

Conclusions

(1) An agency may, on a case-by-case basis, take the cost of required administrative hearings into consideration when determining whether to compromise a debt claim or terminate collection action, if there is a substantial likelihood that the cost will actually be incurred in the particular case. This applies to Government employees as well as other debtors. (Department of Energy request.)

(2) Agencies should not use the anticipated costs of administrative hearings or reviews when establishing categorial minimum debt amounts or points of diminishing returns.

(3) An agency policy not to initiate collection action on debts of $1 or less may, without cost studies, be applied to debts owed by Federal employees. Similarly, refunds to such persons in amounts of $1 or less need not be made unless a specific claim is made (Department of Transportation proposal). As we have suggested in the past, a refund policy along these lines should be announced in appropriate regulations.

[B-218645]

Officers and Employees—Transfers—Agency Liability for Expenses of Transfer

An employee involved in an inter-agency transfer in the interest of the government without a break in service, which also involved vested overseas return travel rights from Alaska, is entitled to relocation expenses under 5 U.S.C. 5724 and 5724a. *Milton J. Parsons*, 58 Comp. Gen. 783 (1979), distinguished.

Officers and Employees—Transfers—Travel Orders—Required for Reimbursement of Expenses—Orders Issued Subsequent to Transfer—No Effect on Entitlement

An employee transferred in the interest of the government was not issued travel orders. However, travel orders are not essential for relocation expense reimbursement. While the issuance of travel orders demonstrates an agency's intention to transfer an employee, the absence of such orders is not fatal to those relocation expense reimbursement rights if there is other objective evidence of that transfer intention. *Orville H. Myers*, 57 Comp. Gen. 447 (1978).

Officers and Employees—Transfers—Service Agreements—Failure to Execute

An employee transferred in the interest of the government did not execute a service agreement incident to that transfer. However, lack of such an agreement does not defeat relocation expense reimbursement. The statutory condition to payment of relocation expenses incident to such a transfer is that the employee remain in government service without a break in service for a minimum of 12 months following transfer. So long as that condition is met, relocation expenses may be paid. *Baltazar A. Villarreal*, B-214244, May 22, 1984. Time with a particular agency is not a condition precedent to relocation expense reimbursement. *Finn.* v. *United States*, 192 Ct. Cl. 814 ((1970).

Officers and Employees—Transfers—Agency Liability for Expenses of Transfer

Ordinarily, all relocation expense reimbursements under 5 U.S.C. 5724 and 5724a associated with an inter-agency transfer are the sole responsibility of the gaining agency. 5 U.S.C. 5724(e). However, where an employee also has vested return travel rights under 5 U.S.C. 5722, these are to be paid by the losing agency so long as return travel is performed before the transfer is effected. *Milton G. Parsons*, 58 Comp. Gen. 783 (1979); 46 Comp. Gen. 628 (1968).

Matter of: Thomas D. Mulder—Relocation Expenses—Inter-Agency Transfer, September 29, 1986:

This decision is in response to a request from the Director, Fiscal and Accounting Management, Forest Service, United States Department of Agriculture. It involves several questions concerning the entitlement of a Forest Service employee, Mr. Thomas D. Mulder, to be reimbursed for various relocation expenses incident to several inter-agency transfers. For the reasons stated hereafter, we conclude that Mr. Mulder is eligible for the full range of relocation expense payments under 5 U.S.C. §§ 5724 and 5724a. We also conclude that the Bonneville Power Administration (BPA), to which Mr. Mulder transferred upon return from service with the Interior Department in Alaska, is responsible for payment of Mr. Mulder's expenses under 5 U.S.C. §§ 5724 and 5724a. However, Interior remains liable for the portion of those expenses representing Mr. Mulder's return travel benefits under 5 U.S.C. § 5722.

Background

Mr. Thomas D. Mulder was an employee of the Minerals Management Service (MMS), Department of the Interior, in 1983, stationed in Anchorage, Alaska. On December 2, 1983, he was offered and accepted a position with the Bureau of Land Management (BLM), Department of the Interior, in Salem, Oregon, to be effective December 11, 1983. At the time he accepted that position, he had completed his agreed upon tour of duty with MMS in Alaska and, thus, under the provisions of 5 U.S.C. § 5722(a)(2) (1982), was entitled to return travel benefits at the expense of MMS.

On December 6, 1983, prior to performing return travel, Mr. Mulder received a second job offer, this time from BPA, Department of Energy, for a position in Portland, Oregon. BPA informed him that payment of travel expenses and shipment of household goods was not authorized. Mr. Mulder, in turn, informed BPA of his acceptance of a job with BLM and that it carried with it transfer entitlement rights. According to Mr. Mulder, BPA then offered to at least match the transfer benefit offer made by BLM. Mr. Mulder cancelled his acceptance of the BLM position, accepted the BPA position, and began to arrange his move to Portland, Oregon.

On December 9, 1983, Mr. Mulder left Anchorage, Alaska, and he arrived in Portland, Oregon, on December 15, 1983. He was termi-

nated by MMS effective December 24, 1983, and appointed by BPA effective December 25, 1983. Since the Christmas legal holiday in 1983 was Monday, December 26, he first reported for duty at the BPA office in Portland on Tuesday, December 27. No travel authorization was issued to Mr. Mulder by either MMS or BPA. He was informed by BPA that a travel authorization would not be issued until his old agency, MMS, returned a Memorandum of Understanding to BPA regarding MMS's agreement to reimburse BPA 50 percent of the expenses incurred by BPA incident to his transfer. That Memorandum of Understanding, prepared by BPA, was agreed to by MMS and returned to BPA on December 30, 1983. It provided in part:

1. Mr. Mulder will be entitled to all the normal expense reimbursements provided for Federal employees associated wtih permanent change of duty station.

On January 11, 1984, while in the employ of BPA, Mr. Mulder received an offer of a position from the Forest Service. Since he had yet to be reimbursed for the expenses incurred as a result of his transfer from Anchorage to Portland incident to his employment by BPA, he expressed concern to the Forest Service as to the effect his acceptance of their offer would have on his entitlement to expense reimbursement for his move from Anchorage to Portland. Based on the Forest Service's assurances that his acceptance and transfer to the Forest Service from BPA would not adversely affect his reimbursement rights, Mr. Mulder accepted the position. Effective January 22, 1984, he transferred to the Forest Service for duty in its Wind River Ranger District, Gifford Pinchot National Forest, Oregon.

There is considerable confusion as to what entitlements Mr. Mulder has as a result of the above transactions and which agency or agencies are responsible to pay Mr. Mulder's entitlements. Initially, BPA agreed to pay all Mr. Mulder's normal relocation expenses incident to his transfer to BPA and, upon payment of those expenses, to bill MMS for 50 percent of that cost. However, the submission points out that, based on our decision *Milton G. Parsons*, 58 Comp. Gen. 783 (1979), MMS determined that its responsibility was limited to Mr. Mulder's return travel expenses to Portland, Oregon, but not the other expenses agreed to by BPA, such as real estate expenses, miscellaneous expenses, and temporary quarters subsistence expenses.

We also understand that, following Mr. Mulder's transfer from BPA to the Forest Service, BPA, in spite of its agreement to provide normal relocation expense reimbursement, has refused to reimburse Mr. Mulder for any of the expenses he incurred. The BPA's position is that, since Mr. Mulder was employed by it for such a short period of time, BPA should not have to incur expenses from which it did not derive any benefit by virtue of the transfer. Further, BPA asserts that since it did not appoint Mr. Mulder until after he arrived in Portland, all of his travel from Alaska to Port-

land constituted return travel, the expenses of which must be borne by MMS.

Because of the several inter-agency transfers involved, the lack of travel orders and an executed service agreement, as well as the perceived limitation imposed on Mr. Mulder's travel and relocation expense reimbursement rights by our decision in *Parsons*, above, the Forest Service is uncertain as to the extent of his travel and relocation expense rights and the agency or agencies which are responsible for that reimbursement. Based on that uncertainty, the Forest Service has requested our decision on these questions.

Decision

The initial question concerns the extent of Mr. Mulder's relocation reimbursement rights in the first instance. The basic provisions of law governing transfer travel and relocation rights are contained in 5 U.S.C. §§ 5724 and 5724a (1982). Subsection (a) of section 5724 authorizes reimbursement of the travel expenses incurred by a government employee who is "transferred in the interest of the Government from one official duty station or agency to another for permanent duty," as well as the transportation expenses of his immediate family and movement of his household goods. Those employees who qualify for reimbursement under section 5724 also become entitled under 5 U.S.C. § 5724a to the payment of family per diem, temporary quarters subsistence expenses, house sale and purchase expenses, and other relocation expenses.

All expense reimbursement rights associated with relocation travel between duty stations where permanent duty is to be performed at the new duty station come within the purview of 5 U.S.C. §§ 5724 and 5724a. The only statutory limitations on those rights are that the transfer must be (1) in the interest of the government, and (2) without a break in service.[1] Further, if the transfer is between agencies, 5 U.S.C. § 5724(e) mandates that "* * * the agency to which * * * [an employee] transfers pays the expenses authorized by this section.

In contrast to the above, 5 U.S.C. § 5724(d) provides that when an employee is transferred to a post of duty outside the continental United States, his travel entitlements to that location and his return travel "shall be allowed to the same extent and with the same limitations prescribed for a new appointee under * * * [5 U.S.C. § 5722]." Section 5722 provides, in part:

> (a) Under such regulations as the President may prescribe * * * an agency may pay from its appropriations—
>
> (1) travel expenses of a new appointee and transportation expenses of his immediate family and his household goods and personal effects from the place of

[1] As it relates to real estate transaction expenses, 5 U.S.C. § 5724a(a)(4) requires that the old and new duty stations must be within the United States (including Alaska), its territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone.

actual residence at the time of appointment to the place of employment outside the continental United States; and

(2) these expenses on the return of an employee from his post of duty outside the continental United States to the place of his actual residence at the time of assignment to duty outside the United States.

It is clear that Mr. Mulder is entitled to return travel and transportation expenses under 5 U.S.C. § 5722 by virtue of his service with MMS in Alaska. The question is whether he is also entitled to the full range of relocation benefits under 5 U.S.C. §§ 5724 and 5724a.[2] We conclude that he is so entitled.

In the present case, Mr. Mulder made an inter-agency transfer from Anchorage, Alaska, to Portland, Oregon. Since his transfer was in the interest of the government and occurred without a break in service, Mr. Mulder meets the statutory conditions for entitlement to the full range of relocation benefits in 5 U.S.C. §§ 5724 and 5724a. See *Richard E. Whitmer,* B-196002, March 18, 1980. We find no basis for distinguishing between the relocation rights of an employee who makes an inter-agency transfer where both posts of duty are in the continental United States and an inter-agency transfer involving a return from a post of duty in Hawaii or Alaska to a post of duty in the continental United States.

Contrary to BPA's suggestion, our decision in *Milton G. Parsons,* above, does not limit Mr. Mulder's relocation entitlements under 5 U.S.C. §§ 5724 and 5724a. Indeed, this decision deals only with the allocation of liability between a transferee and transferor agency for the payment of return travel and transportation expenses under 5 U.S.C. § 5722, discussed previously. *Parsons* applied the rule first established in 46 Comp. Gen. 628 (1968) and followed in subsequent decisions [3] that when an employee returns to the continental United States prior to transfer, the transferor (losing) agency must pay the employee's return travel expenses; however, when the transfer is effected before the employee's return to the continental United States, the transferee (gaining) agency is liable for such expenses. The *Parsons* line of decisions has no bearing on a transferred employee's entitlement to relocation benefits under 5 U.S.C. §§ 5724 and 5724a. Cf., *William F. Krone, supra,* at pages 5-6, which recognized that payment of relocation benefits under these authorities was a matter separate from the question of liability for return travel expenses under 5 U.S.C. § 5722.

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[2] An employee's return travel expense reimbursement rights under 5 U.S.C. § 5722 are significantly more limited than those under 5 U.S.C. §§ 5724 and 5724a. While an employee is eligible under 5 U.S.C. §§ 5724 and 5724a for the full range of relocation expense reimbursements (including those payable under 5 U.S.C. § 5722), items such as family per diem, cost of househunting, subsistence while occupying temporary quarters, miscellaneous expense allowance, and residence sale and purchase expenses are not authorized under 5 U.S.C. § 5722. See FTR para. 2-1.5. See also *Dr. Arnold Krochmal,* B-213730, April 17, 1984.

[3] See, in addition to *Parsons,* B-163364, June 27, 1968; 51 Comp. Gen. 14 (1971); B-170639, July 29, 1971; and *William F. Krone,* B-213855, May 31, 1984.

The absence of travel orders and a signed service agreement does not defeat Mr. Mulder's entitlement to relocation expenses. We have held that, while travel orders are generally recognized as being the authorizing document upon which reimbursement of transfer expenses may be allowed, the absence of travel orders is not fatal if there is other objective evidence of an intent to transfer the employee. *Orville H. Myers,* 57 Comp. Gen. 447 (1978), and decisions cited; see also *James F. Hansard,* B-201732, June 30, 1981. In this case there is no question regarding the intent to transfer Mr. Mulder.

Likewise, we have held that the absence of a signed service agreement is not fatal to payment of relocation expenses where the employee in fact performs the required minimum service. *Baltazar A. Villarreal,* B-214244, May 22, 1984, and decisions cited. In this regard, time with a particular agency is not a condition precedent to relocation expense reimbursement. *Finn* v. *United States,* 192 Ct. Cl. 814 (1970). Thus, an employee need only remain in government service without a break in service for a minimum of 12 months following the transfer for which reimbursement is claimed. Mr. Mulder has performed well in excess of the required 1 year's minimum federal service following his transfer to BPA, most of it being with the Forest Service.

Having concluded that Mr. Mulder is entitled to the full range of relocation benefits, the remaining question is which agency's appropriations are to be charged for these expenses?

The first sentence of 5 U.S.C. § 5724(e) provides:

> When an employee transfers from one agency to another, the agency to which he transfers pays the expenses authorized by this section.* * *

This language clearly serves to place responsibility for reimbursement of employee relocation expenses upon the gaining agency. Therefore, since Mr. Mulder was transferred to BPA, that agency has the basic responsibility under 5 U.S.C. § 5724(e), as the gaining agency, to reimburse Mr. Mulder for the travel and relocation benefits attendant to his permanent change-of-station transfer. To the extent applicable, these benefits include travel and transportation for the employee and his family, their travel per diem, movement of household goods, real estate sales expenses, a miscellaneous expense allowance, and temporary quarters subsistence expenses. While Mr. Mulder spent only 4 weeks with BPA, such a brief period of service has no bearing upon BPA's payment obligation under the plain terms of section 5724(e).

As noted previously, however, under the rule applied in the *Parsons* line of decisions, MMS remains liable for that portion of Mr. Mulder's expenses which represent return travel and transportation benefits payable under 5 U.S.C. § 5722. This is because Mr. Mulder's transfer to BPA was effective after he returned from Alaska.

[B-219013]

Subsistence—Per Diem—Headquarters—What Constitutes

Eleven seasonal employees of the Forest Service's Northern Region claim per diem for a 3-month assignment to fight fires in the Southwestern Region from April to July 1983. The Forest Service denied per diem under the Northern Region's Supplement to Federal Travel Regulations (FTR) para. 1-1.3 which provides that when a seasonal employee is assigned to a new location for over 2 weeks, the new location becomes the employee's official station. The denial of per diem is sustained. The Supplement is a valid exercise of discretion and is consistent with the FTR and our decisions.

Matter of: Gene Bassette, et al.—Seasonal Employees—Per Diem Entitlement, September 29, 1986:

This decision is in response to a request from Mr. C.E. Tipton, Authorized Certifying Officer, Forest Service, United States Department of Agriculture, as to whether 11 seasonal employees of the Forest Service are entitled to per diem for approximately 3 months at a seasonal worksite in Sacramento, New Mexico.[1] For the reasons hereafter stated, we conclude that per diem allowances may not be paid the 11 seasonal employees for the 3-month tour of duty at Sacramento, New Mexico.

Factual Background

After the 1982 fire season, the Southwestern Region of the Forest Service decided to disband a fire crew from the Coronado National Forest and establish a new crew at the Lincoln National Forest with its official duty station at Sacramento, New Mexico, because of better accessibility to fires. All members of the 1982 crew were given an opportunity to relocate to the new site, but only 2 members of the 20-person crew chose to do so. The Director of the Forest Service's Northern Region suggested that, rather than hire inexperienced firefighters for the normal fire season of April 1 to July 15, 1983, the vacant positions be filled with the Northern Region's unemployed smokejumpers who traditionally are not employed by the Forest Service during this time period. The Northern Region's fire season begins later in the year than the Southwestern Region's. The Southwestern Region accepted the proposal provided the employees were reassigned, as the cost of a detail in excess of 100 days would be prohibitive.

The Northern Region's smokejumpers were GS-6's with career or career conditional appointments and a guaranteed tour of duty of 6 pay periods (12 weeks) per year. They were in intermittent status for the balance of the year and could be called to duty. Rather than reappoint the smokejumpers as ground attack firefighters (GS-3 or GS-4) for the period of reassignment, it was decided to keep them

[1] The 11 employees are: Gene L. Bassette, Michael J. Brick, Scott W. Chehock, Kenneth W. Heare, Larry L. Lackner, Philip A. Mason, M. Bradley Morigeau, Donald C. Rees, James W. Stephens, Ernest R. Trujillo, and Everett A. Weniger.

under their regular appointments at GS-6 so that they could be activated into a smokejumper crew if necessary.

The actual assignment began on March 20, 1983, when 14 smokejumpers (11 of whom have filed a claim) reported for duty at Missoula, Montana. They received 1-week refresher smokejumping training. On March 28, 1983, under written travel orders, they departed the Northern Region for transfer to Sacramento, New Mexico. Personnel actions were processed establishing Sacramento as the new official duty station effective April 3, 1983. All 11 claimants worked out of the Sacramento Work Center as members of the firefighting crew until they returned to the Northern Region on July 9 and 10. At that time, their official duty station was changed by personnel action to various sub-bases in the Northern Region.

The transferred employees were volunteers. They were given prior notice that they would not receive per diem and they were required to sign a waiver foregoing per diem benefits before they could be selected. The claimants state that they objected to the waiver requirement, but signed under duress because they needed the early season employment.

Claimants state that they were advised by management officials that housing at Sacramento would be provided at no cost, but on arrival they were told they would have to pay for their quarters. Also when they arrived they discovered that groceries and supplies could be obtained only at Alamagordo, New Mexico, a 3-hour round trip over poor roads. They were not paid per diem while at Sacramento, but they did receive it when they traveled to fight fires away from Sacramento and also for their travel to and from Sacramento.

Claimants' Argument

The claimants contend they were on temporary duty at Sacramento while away from their regular duty station and are, therefore, entitled to per diem for that period. They believe their duty station was unreasonably changed by the Forest Service specifically to deny them per diem. They also feel that they were coerced into signing the "waiver" of per diem. Finally, they were disgruntled because another group of Missoula smokejumpers detailed to Silver City, New Mexico, for 3 months was granted per diem.

The attorney for the 11 claimants argues that Missoula, Montana, was their official duty station during their 1983 detail to Sacramento, New Mexico, because that is where they spent the major part of their time. He cites our decisions for the longstanding rule that the official station of an employee is a matter of fact and not merely administrative designation and that it is the place where the employee performs the major part of his duties and is expected to spend the greater part of his time. *Gretchen Ernst,* B-192838,

March 16, 1979. See also 32 Comp. Gen. 87 (1952) and 58 Comp. Gen 744 (1979).

The attorney also argues that our decisions have placed great weight on the duration of an assignment (33 Comp. Gen. 98 (1953)) and that the 3 months involved here was well within the duration reasonably considered to be temporary (36 Comp. Gen. 757 (1957) and 57 Comp. Gen. 147 (1977)). Therefore, he concludes that under 5 U.S.C. § 5702(a) and the Federal Travel Regulations, the claimants are entitled to per diem for the detail period.

Agency's Argument

The Forest Service contends that Sacramento, New Mexico, was the employees' official duty station and that they may not be paid per diem. In the Forest Service's view, the critical issue is whether it can distinguish between the duration of seasonal and permanent appointments when designating an official station.

The Forest Service points out that the smokejumpers were seasonal employees with a guaranteed duty tour of 6 pay periods (12 weeks) of employment each year and were in intermittent status for the rest of the year. The decision to relocate these employees to Sacramento was made in accordance with the Northern Region's Supplement to the Federal Travel Regulations (FTR), para. 1-1.3. The Supplement provides for all temporary and WAE (When Actually Employed) employees that:

> Assignments away from the official station planned to exceed 2 weeks at one location will be considered as reassignment. This new location will be established as the official duty station by personnel action.

The Northern Region's Supplement to FTR 1-1.3 has been in effect since 1977. The Forest Service states that, following a series of congressional inquiries, there was a clear need to clarify for seasonal employees what constitutes a change of station versus a detail for temporary duty. The resulting Supplement was developed with input and concurrence from the unions and from management officials and, according to the Forest Service, has worked well since then without complaints or grievances.

The Forest Service does not take issue with our decisions on the duration of temporary duty assignments cited by the claimants, but points out that these decisions pertain to permanent, not seasonal, employees and that the Northern Region's Supplement to the FTR recognizes the essential difference between the duration of seasonal and permanent appointments.

As to the claimants' complaint about the smokejumpers detailed to Silver City who did receive per diem, the Forest Service states that those smokejumpers, in contrast to claimants, were essentially full-time employees who spent the greater part of their time in the Northern Region. They were not seasonal employees and were covered by different regulations.

Opinion

We must agree with the Forest Service on this matter because we are unable to find that the Northern Region's Supplement to paragraph 1-1.3 of the Federal Travel Regulations, FPMR 101-7, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1985) (FTR), is arbitrary, capricious, or an abuse of discretion. The Supplement is consistent with the governing Federal Travel Regulations and with our decisions.

As recognized by both parties, this Office has long held that the location of an employee's official duty station is a question of fact, not limited by the agency's designation, to be determined from the orders directing the assignment, and from the nature and duration of the assignment. *Frederick C. Welch,* 62 Comp. Gen. 80 (1982). We have stated that the duration and nature of the duties assigned are of particular importance in making the determination of whether an assignment to a particular duty station is a permanent change of station. 36 Comp. Gen. 757 (1957); 33 Comp. Gen. 98 (1953). We have also determined that there is no hard and fast rule as to the length of time which an employee may be entitled to subsistence at a particular place. It is dependent not so much on the length of time as upon the nature of the duties and whether, as a matter of fact, that place constitutes his permanent duty station or a temporary assignment. 18 Comp. Gen. 423, 424 (1938). The actual facts in each case are controlling.

The length of the claimants' assignment to Sacramento (approximately 3 months) would not be of such duration as to raise a prima facie question concerning the validity of an agency designation as temporary duty. However, we have recently recognized the significant difference between permanent employees and seasonal employees for per diem purposes. In *Daisy Levine,* 63 Comp. Gen. 225 (1984), the Department of the Interior had hired seasonal employees to serve approximately 5 months beginning in April 1983 on an archeological field survey at Chaco Canyon, New Mexico. We held that, since the seasonal employees were assigned to duty and performed their actual work at Chaco Canyon, it was their official duty station for purposes of 5 U.S.C. § 5702 and payment of per diem there was not authorized.

Similarly, in the present case, we conclude that the Sacramento Work Center was properly designated as the smokejumpers' official station for the period in question since they performed their actual duties there. As seasonal employees, they were subject to the Northern Region's Supplement to FTR para. 1-1.3. Since the assignment to the Southwestern Region was for more than 2 weeks, the Forest Service properly designated the Sacramento Work Center as their official station for the period of the assignment.

Accordingly, the claimants are not entitled to per diem payments for the 3-month period in question.

[B-221462]

Departments and Establishments—Damage Claims—Reimbursement Prohibition

Rule that a Federal agency or entity does not pay inter- or intra-agency claims for damage to public property does not apply in the case of a reimbursable or revolving fund. Air Force Industrial Fund activity may therefore be reimbursed for damage to vehicles which it loaned to another Air Force unit for use on a project unrelated to the Fund's purpose.

Matter of: Department of the Air Force—Reimbursement of Industrial Fund Agency for Damage to Vehicle, September 29, 1986:

The Acting Deputy Assistant Comptroller for Accounting and Finance, Department of the Air Force, has requested our decision on whether the San Antonio Real Property Maintenance Agency (SARPMA) should be reimbursed for the cost of repairs to two of its vehicles damaged while on loan to another Air Force unit. As explained below, we concluded that reimbursement in this case is authorized.

Facts

SARPMA is an administrative subdivision of the Air Force Industrial Fund established by the Secretary of Defense under the authority of 10 U.S.C. § 2208 (1982). It loaned two of its pick-up trucks to a base-level unit at Lackland Air Force Base, called the Prime Base Engineering Emergency Force (BEEF) team, which needed them for a project unrelated to SARPMA's mission. There was no formal agreement and no provisions to reimburse SARPMA for use of the vehicles. The vehicles were damaged while in the custody of the BEEF team. SARPMA sought to be reimbursed for the repair costs ($650.07) from appropriations for the project on which the trucks had been used. In view of the traditional prohibition against inter- or intra-agency tort liability, the Office of the Staff Judge Advocate, Air Force Accounting and Finance Center, considered the matter sufficiently doubtful to warrant this decision.

Discussion

The Air Force Industrial Fund, technically termed a "working capital fund," is a type of revolving fund. Initially capitalized by Congress, it provides services generally on a reimbursable basis. 10 U.S.C. § 2208(c). SARPMA provides real property maintenance services, its primary customers being military bases. The issue in this case arises because loaning the vehicles to the BEEF team was outside the scope of the services SARPMA normally provides and thus not covered by its standard reimbursement procedures.

Reimbursement to an Air Force Industrial Fund is based on a rate which is stabilized for each fiscal year.[1] Repair of Fund property is generally classified as an indirect cost[2] and factored into the rate. Thus, if SARPMA cannot be reimbursed for the damage in this case, the repair cost will be allocated among and borne by SARPMA's customers.

It has long been the rule that "where a Federal agency damages property of another Federal agency, funds available to the first may not be used to pay claims for damages by the second." 46 Comp. Gen. 586, 587 (1966). The rule is recognized in Air Force regulations (AFR 112-1, para. 18-10). The prohibition applies equally to transactions between elements of the same department or agency.

The prohibition is based primarily on the concept that "property of the various agencies * * * is not the property of separate entities but rather of the Government as a single entity, and there can be no reimbursement by the Government for damages to or loss of its own property." 46 Comp. Gen., *supra*, at 587. In cases involving the loan of personal property, a further reason for the prohibition is that repair of the damaged property upon its return to the lending agency will benefit primarily the lending agency, and thus is not within the purposes for which the appropriations of the borrowing agency were made. *E.g.*, 30 Comp. Gen. 295, 296 (1951). A major exception is where reimbursement for damages has been provided for in an agreement under the Economy Act (31 U.S.C. § 1535) or similar statutory authority. 30 Comp. Gen. 295, *supra*.

It is our opinion, however, that even in the absence of an Economy Act or similar agreement, the prohibition should not apply where the fund that would be charged with the cost of repair if reimbursement were not permitted is a reimbursable or revolving fund.

In 3 Comp. Gen. 74 (1923), we considered whether the Department of the Interior should reimburse the Reclamation Fund for the use and depreciation of supplies and equipment purchased and charged to the Reclamation Fund, which the Department had used to conduct investigations funded under another appropriation. In holding that the Reclamation Fund should be reimbursed, we said:

> The general rule is that where a branch of the service permits the use of equipment by another there is no authority to demand a return or compensation based on the use alone. [citation omitted.] This applies equally with respect to interbureau matters; however, the rule is predicated on appropriations not reimbursable. The reclamation fund is reimbursable, an the use of equipment purchased therefrom is on a somewhat different basis, the equipment being an asset which should not be permitted to be depreciated from use on other than objects for which the fund was created. 3 Comp. Gen. at 75.

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[1] Department of Defense Regulation 7410.4-R, ch. 9, sec. E (April 1982).
[2] *Id.*, ch. 10, sec. I.6.

What we said in 3 Comp. Gen. 74 with respect to depreciation applies equally, in our view, to the repair costs in this case. SARPMA's customers should not bear the costs resulting from use of the vehicles "on other than objects for which the fund was created."

Accordingly, we conclude that SARPMA should be reimbursed from the appropriate Lackland account. The voucher submitted with the request for decision in this case may therefore, if otherwise correct, be certified for payment.

[B-221594]

Transportation—Overcharges—Deduction Reclaims—Review

Where a carrier issued a rate tender to the United States Government, but the Military Traffic Management Command (MTMC) returned it to the carrier because of formal defects and the carrier never refiled the tender with MTMC, General Services Administration (GSA), in its audit function, could not use the tender's rates as a basis for determining overcharges on shipments tendered by components of the Department of Defense (DOD). When MTMC, as the Department of Defense's traffic manager, rejected the tender, it terminated the power of all DOD agencies to accept the tender's terms. Therefore, GSA's deduction action, taken on the basis of the rejected tender's rates, was improper.

Matter of: Riss International, September 29, 1986:

Riss International (Riss), a motor carrier, asks the Comptroller General to review deduction action taken by the General Services Administration (GSA) to recover overcharges allegedly collected by Riss for the transportation of numerous shipments by Department of Defense components. The GSA's collection action was based on an audit determination that lower rates offered in Riss Tender No. ICC 1544 (Tender 1544) were applicable. Riss, however, argues that Tender 1544 was not applicable because it had been rejected by the Department of Defense. We agree with Riss and conclude that GSA's audit determination was invalid.

Facts

Government Bill of Lading (GBL) No. S-5692241[1] illustrates the material facts, which are not in dispute, and the erroneous audit determination. The Army issued the GBL to Riss for the transportation of 131 boxes of "Freight All Kinds," weighing 27,792 pounds, from Plymouth, Indiana, to the new Cumberland Army Depot, Pennsylvania. Riss received the shipment on September 7, 1983, and collected $942 for transportation services, whereas GSA determined that the charges should have been only $721.25 and collected the difference of $220.75 as overcharges.

The basis for GSA's determination is Tender 1544. The tender shows that Riss issued it to the United States Government, effective January 15, 1983, under 49 U.S.C. § 10721 (1982).

[1] The GSA's report addressed two GBL shipments. The other shipment, received by Riss on August 23, 1983, involved S-5694340.

Riss filed Tender 1544 with the Military Traffic Management Command (MTMC) in January 1983. MTMC returned the tender to Riss, with MTMC Form 25B, dated February 17, 1983, requesting revision concerning two details—clarification of point locator codes and whether rates shown were in dollars and cents or cents only. Riss never refiled the tender with MTMC. In addition to MTMC, the record shows that the tender was sent to the Government Printing Office, the United States Postal Service, and to GSA. Apparently the latter agencies did not return the tender to Riss.

Riss contends that even though Tender 1544 was filed with GSA, that agency, in its audit function, could not apply Tender 1544 rates to shipments tendered to Riss by a DOD component because MTMC terminated the offer by returning the tender to Riss on February 17, more than 6 months before the transportation was performed.

The GSA contends that MTMC's return of the tender did not constitute a rejection of the offer since the defects cited on the Form 25 were not major. GSA argues that the required Standard Point Locator Code designations are required simply for use in MTMC's data processing, and the question of whether the rates were intended as dollars and cents or only cents relates to mere form. The foundation of GSA's audit position is the principle that a tender represents a continuing offer empowering the government to make a series of independent acceptances until terminated by the carrier.

Discussion

Under very similar circumstances we held that MTMC's return of a carrier's tender operates as a rejection of the offer, which may not later be accepted. See *Starflight, Inc.*, B-212279, November 13, 1984, modified on other grounds by *Starflight, Inc.*, B-212279, September 2, 1986. We believe that decision is controlling here. In *Starflight*, as here, MTMC returned the tender to the carrier for formal deficiencies. We hold that, in the absence of evidence that MTMC approved the tender before the transportation was performed, MTMC's reasons for returning a carrier's tender are irrelevant, and the return terminates the power to later accept the lower rates offered therein. Since the Commander, MTMC, has the authority to perform all traffic management functions for DOD, MTMC's act of returning the tender deprived all DOD components, including the Army, from accepting its rates. See Military Traffic Management Regulation DLAR 4500.3, paragraph 101004.

Our holding does not conflict with the rules that tenders are continuing offers to enter into a series of contracts. We agree with GSA that this is a well-established principle of long standing. See *O.K. Trucking Company*, 53 Comp. Gen. 747 (1974); and *Providence Philadelphia Dispatch, Inc.*, B-189961, May 26, 1978; and 39 Comp.

Gen. 352 (1959). However, the principle is inapplicable here because when MTMC returned Tender 1544, the carrier's offer of lower rates terminated and with it the power of all DOD agencies to later accept them, in the absence of subsequent refiling and MTMC approval. *Starflight, Inc.*, B-212279, September 2, 1986. Since the offer was terminated on February 17, the Army was without power to accept the rates on September 7.

We recognize that tenders offered to the government generally grant the power to all governmnent agencies to accept their rates. See *Trans Country Van Lines*, 52 Comp. Gen. 927 (1973). However, we agree with Riss that even though Tender 1544 was issued to the United States Government and Riss filed the tender with GSA, GSA could not apply the tender's lower rates in its audit of DOD bills because MTMC as DOD's traffic manager rejected the carrier's offer before any DOD transportation agent could accept its terms.[2]

Accordingly, GSA's audit determination was invalid, and all similar claims arising from the controversy should be settled consistent with this decision, in the absence of proof that Riss refiled the tender and MTMC approved it.

[2] MTMC's rejection of Tender 1544, of course, would not affect its application to shipments made by agencies not subject to the traffic management jurisdiction of MTMC unless those agencies too had rejected it.

INDEX DIGEST

(OCTOBER 1, 1985–SEPTEMBER 30, 1986)

Page

ACCOUNTABLE OFFICERS

Disbursing officers (*See also* **DISBURSING OFFICERS**)

Liability

Generally

Under the Federal Claims Collection Standards 4 CFR 101 *et seq.*, collections received from a recipient of an improper payment who is both individually liable for some improper payment and jointly and severably liable with an accountable officer for other improper payments should be credited first to the payments for which the recipient is individually liable unless the recoveries are identified as repayments of the joint indebtedness 858

Requests for relief for losses incurred in the routine business operation of the Tax Lien Revolving Fund of the Internal Revenue Service (IRS) (those where the cost of redeeming property financed out of the fund exceeds the resale price received for the property which is deposited to the Fund) are inappropriate for consideration under 31 U.S.C. 3527(a) since such losses do not constitute "physical losses or deficiency" for the purpose of this relief statute. Request for relief for illegal, erroneous, or incorrect payments are for consideration under 31 U.S.C. 3527(c) or 3528. However, mere fact that subsequent sale does not recover the amount spent by IRS for redemption does not by itself serve to make the redemption an "illegal, improper, or incorrect" payment 881

Physical Losses, etc. of Funds, Vouchers, etc.

Cashiers, etc.

Consistent with interagency agreements between the Interior and Labor Departments and Labor and the Department of Defense, Interior Department imprest fund cashiers receiving monies from Army disbursing officers for payments to Job Corps enrollees are responsible, accountable and liable in the same manner as other imprest fund cashiers consistent with Section 22 of title 7 of the General Accounting Office's Policy and Procedures Manual, Volume I, 4-3000 of the Treasury Fiscal Requirements Manual and the Labor Department's Job Corps Handbook No. 630 666

Employee Liability

Upon reconsideration, the clerk of a Federal district court is granted relief from financial liability (pursuant to 31 U.S.C. 3527 (1982)) for the unexplained physical loss of U.S. currency entrusted as evidence to his subordinates. Relief is granted because it is not clear that the clerk's negligence (as compared to that of his subordinates) was the proximate cause of the loss 838

178-403 O - 87 - 4 : QL 3

ACCOUNTABLE OFFICERS—Continued Page
Employee Liability—Continued
What Constitutes
Requests for relief for losses incurred in the routine business operation of the Tax Lien Revolving Fund of the Internal Revenue Service (IRS) (those where the cost of redeeming property financed out of the fund exceeds the resale price received for the property which is deposited to the Fund) are inappropriate for consideration under 31 U.S.C. 3527(a) since such losses do not constitute "physical losses or deficiency" for the purpose of this relief statute. Request for relief for illegal, erroneous, or incorrect payments are for consideration under 31 U.S.C. 3527(c) or 3528. However, mere fact that subsequent sale does not recover the amount spent by IRS for redemption does not by itself serve to make the redemption an "illegal, improper, or incorrect" payment 881
Without Negligence or Fault
Upon reconsideration, the clerk of a Federal district court is granted relief from financial liability (pursuant to 31 U.S.C. 3527 (1982)) for the unexplained physical loss of U.S. currency entrusted as evidence to his subordinates. Relief is granted because it is not clear that the clerk's negligence (as compared to that of his subordinates) was the proximate cause of the loss 876
Relief
Debt Collection
Diligence in Pursuing
Relief is granted Army disbursing official under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division 811
Relief is granted Army disbursing official under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and recertified checks. Proper procedures were followed in the issuance of the recertified check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division 812

ACCOUNTABLE OFFICERS—Continued Page

Relief—Continued

Illegal or Erroneous

Evidence

Requests for relief for losses incurred in the routine business operation of the Tax Lien Revolving Fund of the Internal Revenue Service (IRS) (those where the cost of redeeming property financed out of the fund exceeds the resale price received for the property which is deposited to the Fund) are inappropriate for consideration under 31 U.S.C. 3527(a) since such losses do not constitute "physical losses or deficiency" for the purpose of this relief statute. Request for relief for illegal, erroneous, or incorrect payments are for consideration under 31 U.S.C. 3527(c) or 3528. However, mere fact that subsequent sale does not recover the amount spent by IRS for redemption does not by itself serve to make the redemption an "illegal, improper, or incorrect" payment 881

Illegal or Erroneous Payments

Without Fault or Negligence

Relief is granted Army disbursing official under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and recertified checks. Proper procedures were followed in the issuance of the recertified check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division..... 811

Relief is granted Army disbursing official under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division 812

Lack of Due Care, etc.

Relief Denied

Relief granted Army disbursing official under 31 U.S.C. 3527(c) is denied where the officer paid fraudulent travel voucher after learning that one of the recipients of fraudulent payments had admitted the fraud and the means by which the fraud was accomplished to a subordinate of the officer. Relief granted for payments before this admission when investigation did not uncover fraud..... 858

An accountable officer faced with questionable vouchers, based on the fact that a criminal investigation into fraudulent claims is being conducted, does not exercise reasonable care by relying on advice from authorities within his agency in lieu of seeking an advance decision from General Accounting Office (GAO)..... 858

ACCOUNTABLE OFFICERS—Continued Page
Relief—Continued
Negligence
What Constitutes
Upon reconsideration, the clerk of a Federal district court is granted relief from financial liability (pursuant to 31 U.S.C. 3527 (1982)) for the unexplained physical loss of U.S. currency entrusted as evidence to his subordinates. Relief is granted because it is not clear that the clerk's negligence (as compared to that of his subordinates) was the proximate cause of the loss 876
Requirements for Granting
Relief for Army disbursing officer under 31 U.S.C. 3527(c) is denied where the officer paid fraudulent travel voucher after learning that one of the recipients of fraudulent payments had admitted the fraud and the means by which the fraud was accomplished to a subordinate of the officer. Relief granted for payments before this admission when investigation did not uncover fraud 858
An accountable officer faced with questionable vouchers, based on the fact that a criminal investigation into fraudulent claims is being conducted, does not exercise reasonable care by relying on advice from authorities within his agency in lieu of seeking an advance decision from General Accounting Office (GAO) 858
If a disbursing officer complies with appropriate Department of Treasury and service regulations, request for relief will not be denied solely on the ground that the amount of a check is not written in words 299

ADMINISTRATIVE PROCEDURES ACT
Rulemaking
Propriety
The Bureau of Land Management of the Department of the Interior issued an instruction memorandum capping liquidated damages assessments established by 43 C.F.R. 3163.3 for noncompliance with the Bureau's requirements for onshore Federal and Indian oil and gas activities. Change in computation of assessment amounts mandated by regulations is effective only when instituted by rulemaking under 5 U.S.C. 553. Accordingly, the instruction memorandum is ineffective to make this change 439

Page

ADVERTISING

Commerce Business Daily

Automatic Data

Processing Equipment

Orders Under ADP Schedule

Unreasonable

Less Costly Alternative

Protest against Navy's issuance of a purchase order to nonmandatory General Services Administration (GSA) schedule contractor for maintenance of certain automated data processing equipment is sustained where *Commerce Business Daily* (CBD) synopsis did not contain an accurate description of Navy's minimum needs as required by GSA regulations and it appears potential offerors could meet those needs at substantially lower cost to the government 654

Newspapers, Magazines, etc.

Authorization Requirement

Imprest funds are available to pay the costs of recruitment advertising so long as that advertising is authorized under 44 U.S.C. 3702 and the payment otherwise meets applicable requirements for imprest fund payments 806

Delegation of Authority

Where the authority under 44 U.S.C. 3702 to authorize publication of advertisements in newspapers has been properly delegated to Internal Revenue Service contracting officers, exercise of that authority in any written form satisfies the statute even though under internal agency procedures, the wrong form may have been used. In any event, the authorization requirement of 44 U.S.C. 3702 is not a limitation of the method by which the advertising may be procured 806

AGENTS

Government

Authority

Government Liability

A Civil Service annuitant claims entitlement to compensation in addition to his annuity for temporary full-time duties allegedly performed following his retirement. He states that he was never appointed to a position following his retirement, but contends that his supervisor accepted his offer to continue working after retirement, and said that he would find a way to pay him. The claim is denied. Under 31 U.S.C. 1342, an officer or employee of the government is prohibited from accepting the voluntary services of an individual. Further, the government is not bound by the unauthorized acts of its agents, even where the agent may be unaware of the limitations on his authority 21

AGENTS—Continued Page
Government—Continued
Government Liability for Acts Beyond Authority
Civilian Personnel Matters
A new appointee to a manpower shortage position was issued travel orders erroneously authorizing reimbursement for temporary quarters subsistence expenses, real estate expenses and miscellaneous expenses as though he were a transferred employee. After travel was completed, his orders were corrected to show entitlement only to travel, travel per diem and movement of household goods, as authorized for manpower shortage position. The claimant asserts entitlement to full reimbursement, arguing that the advice received when hired and the travel orders issued are consistent, with private sector practices. The claim is denied. Under 5 U.S.C. 5723 (1982), the travel and transportation rights of a manpower shortage appointee are strictly prescribed. Regardless of whether the error was committed orally or in writing, the government is not bound by any agent's or employee's acts which are contrary to governing statute or regulations 679
Erroneous Information
Under applicable Department of Defense regulations, an employee separated from an overseas position is entitled to onward transportation of household goods stored in the United States provided shipment to a final destination is begun within 2 years from the date of separation. Where the employee was unable to provide a delivery date or destination within 2 years from the date of separation, contracts with Government transportation officers concerning shipment did not meet the requirement to begin shipment within the requisite period. Erroneous advice that the 2-year period began to run from the date the employee's goods reached the continental U.S. does not provide a basis to have them delivered at Government expense..... 392

AGRICULTURE DEPARTMENT
Farmers Home Administration
Loans
Eligibility
In 1983, the Congress deleted a statutory provision which limited eligibility for loans under section 504 of the Housing Act of 1949 to individuals who could not qualify for loans under sections 502 or 503. However, FmHA regulations continue to reflect that limitation on eligibility, General Accounting Office (GAO) recommends, pursuant to 31 U.S.C. 720 that FmHA amend its regulations 423
Interest on Government Equity
When Pub. L. No. 98-181 was enacted in 1983, it removed specific statutory authority of the Farmers Home Administration (FmHA) to establish interest rates within prescribed limits for two types of rural housing loans, but left intact FmHA's authority to continue to make such loans. Neither the statutory language nor the legislative history indicates that Congress intended to terminate these loan programs or to authorize FmHA to make loans on an interest-free basis. Accordingly, the Administrator has the discretion to establish whatever interest rates he believes would be appropriate for these programs..... 423

AGRICULTURE DEPARTMENT—Continued Page

Price Support Programs

Deficiency Payments

Section 120 of the Omnibus Budget Reconciliation Act of 1982 provided that any debts that might result from advance deficiency payments made to farmers who participated in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs were to be repaid to the U.S. on or before Sept. 30, 1984. However, that provision would not preclude the Department of Agriculture from exercising appropriate discretion to select the best means to collect those debts, including temporary suspension of collection until an administrative offset could be accomplished, pursuant to the Federal Claims Collection Act of 1966, as amended, and the Federal Claims Collection Standards 245

Farmers who signed Department of Agriculture form "ASCS-477" in order to participate in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs entered into contracts that obligated them to comply with and be bound by agency regulations providing for the assessment of interest (without the need for further notice before interest could accrue) on delinquent debts arising under those programs. Consequently, interest should be assessed and collected (pursuant to the agency's regulations and the Federal Claims Collection Standards) on debts arising under those programs, regardless of the fact that Agriculture has not individually notified each debtor that interest be paid on those debts 245

The decision of the Department of Agriculture to defer the collection of debts arising from excessive advance payments made to farmers who participated in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs was not adequately supported by findings and other evidence that complies with the requirements of the Federal Claims Collection Standards 245

ALLOWANCES

Military Personnel

Overseas Allowances (*See* **STATION ALLOWANCES, Military Personnel**)

ANTI-DEFICIENCY ACT (*See* **APPROPRIATIONS, Deficiencies, Anti-Deficiency Act**)

APPOINTMENTS

Absence of Formal Appointment

Reimbursement for Service Performed

Denied

A Civil Service annuitant claims entitlement to full compensation, in addition to his annuity, for temporary full-time duties allegedly performed following his retirement. Under the provisions of 5 U.S.C. 8344(a), the salary of a retired Civil Service annuitant must be reduced by the amount of his annuity during any period of actual employment. However, since the claimant states that he was not appointed to a position following retirement, which statement has been confirmed by the agency's personnel office, he is not entitled to any compensation, reduced or otherwise, for the period in question 21

APPOINTMENTS—Continued Page
Absence of Formal Appointment—Continued
Reimbursement for Service Performed—Continued
Denied—Continued
A Civil Service annuitant claims entitlement to compensation in addition to his annuity for temporary full-time duties allegedly performed following his retirement. He states that he was never appointed to a position following his retirement, but contends that his supervisor accepted his offer to continue working after retirement, and said that he would find a way to pay him. The claim is denied. Under 31 U.S.C. 1342, an office or employee of the government is prohibited from accepting the voluntary services of an individual. Further, the government is not bound by the unauthorized acts of its agents, even where the agent may be unaware of the limitations on his authority 21
Career Conditional
Travel to First Duty Station
A new appointee to a manpower shortage position was issued travel orders erroneously authorizing reimbursement for temporary quarters subsistence expenses, real estate expenses and miscellaneous expenses as though he were a transferred employee. After travel was completed, his orders were corrected to show entitlement only to travel, travel per diem and movement of household goods, as authorized for manpower shortage position. The claimant asserts entitlement to full reimbursement, arguing that the advice received when hired and the travel orders issued are consistent with private sector practices. The claim is denied. Under 5 U.S.C. 5723 (1982), the travel and transportation rights of a manpower shortage appointee are strictly prescribed. Regardless of whether the error was committed orally or in writing, the government is not bound by any agent's or employee's acts which are contrary to governing statute or regulations 679
Manpower Shortage Category
Travel Expenses (*See* TRAVEL EXPENSES, First Duty Station, Manpower Shortage)
Presidential
"Vacancies Act" Restrictions
Provisions of the Vacancies Act, 5 U.S.C. 3345-49 (1982), govern the filling of vacancies in those offices which require Senate confirmation in the Department of Health and Human Services, except where there is specific statutory authority to fill such vacancies. The Vacancies Act applies to the position of Under Secretary, and various Assistant Secretary positions, and the positions of Deputy Inspector General, Commissioner on Aging, Administrator of the Health Care Financing Administration, and Commissioner of Social Security. The Vacancies Act limits acting appointments to fill such positions to 30-days duration 626
Actions by individuals occupying offices pursuant to the Vacancies Act which are taken subsequent to expiration of 30-day time limitation set forth in 5 U.S.C. 3348 are of uncertain validity. Accordingly, at the end of the 30-day period, such individuals should refrain from taking any further action in an acting capacity 626

Page

APPROPRIATIONS
Augmentation
Details
Improper
Proposed transfer of 15 to 20 National Labor Relations Board administrative law judges to Department of Labor on nonreimbursable basis under the authority in section 3344 of title 5, which provides for transfers, but does not indicate whether the transferring or receiving agency is to pay for the judges, is improper. Where a detail is authorized by statute, but the statute does not specifically authorize the detail to be carried out on a nonreimbursable basis, the detail cannot be done on that basis. Nonreimbursable details contravene the law that appropriations be spent only on the objects for which appropriated, 31 U.S.C. 1301(a), and unlawfully augment the appropriation of the receiving agency. 635
Services Between Agencies
Proposed transfer of 15 to 20 National Labor Relations Board administrative law judges to Department of Labor on nonreimbursable basis under the authority in section 3344 of title 5, which provides for transfers, but does not indicate whether the transferring or receiving agency is to pay for the judges, is improper. Where a detail is authorized by statute, but the statute does not specifically authorize the detail to be carried out on a nonreimbursable basis, the detail cannot be done on that basis. Nonreimbursable details contravene the law that appropriations be spent only on the objects for which appropriated, 31 U.S.C. 1301(a), and unlawfully augment that appropriation of the receiving agency. 635
Authorization
Expiration
Expenditures Beyond
Fiscal year 1986 funds appropriated to the Treasury Secretary to purchase Fund Anticipation Notes used to finance the Department of Transportation's Redeemable Preference Share Program, are available to buy Notes and thus continue the rail improvement projects financed under the Program in 1986, despite the expiration of the Program's organic authority on September 30, 1985. A specific appropriation for an expired program provides a sufficient legal basis to continue that program, absent a contrary expression of congressional intent 524
Unobligated balances in the Rail Fund lapsed under the provisions of the 1984 DOT appropriations act, but obligated balances remain available to liquidate outstanding obligations 524

APPROPRIATIONS—Continued Page
Authorization—Continued
Programs, etc.
Without Authorization
Fiscal year 1986 funds appropriated to the Treasury Secretary to purchase Fund Anticipation Notes used to finance the Department of Transportation's Redeemable Preference Share Program, are available to buy Notes and thus continue the rail improvement projects financed under the Program in 1986, despite the expiration of the Program's organic authority on September 30, 1985. A specific appropriation for an expired program provides a sufficient legal basis to continue that program, absent a contrary expression of congressional intent. 524
Availability
Advance Payments (*See* PAYMENTS, Advance)
Contracts
Amounts Recovered Under Defaulted Contracts
Faulty design by an architect-engineer (A-E) caused the Air Force to incure additional corrective expenses in the ensuing construction contract. The corrective expenses—added costs paid to construction contractor plus added amounts paid to Army Corps of Engineers for supervision and administration (S&A)—were charged to Air Force's 1982 5-year Military Construction appropriation. In 1985, Government recovered the amount of the additional costs from the A-E. Since the appropriation charged was still available for obligation at the time of the recovery, it may be reimbursed from the recovery to the extent of the additional costs actually incurred. However, portion of recovery representing S&A expenses in excess of amount actually charged Air Force must be deposited as miscellaneous receipts.....
Educational Programs
General Accounting Office (GAO) will not question HUD's use of appropriated funds to obtain a certificate of authority to grant continuing education credits to attendees of seminars HUD conducts, provided HUD administratively determines such expenditure constitutes a necessary expense. 797
Expenses Incident to Specific Purposes
Necessary Expenses
If an agency determines that a reception with refreshments, as provided in the Federal Personnel Manual, would materially enhance the effectiveness of an awards ceremony conducted under authority of the Government Employees' Incentive Awards Act, the cost of those refreshments may be considered a "necessary expense" for purposes of 5 U.S.C. 4503. As such, the cost may be charged to operating appropriations without regard to "reception and representation" limits 738
General Accounting Office (GAO) will not question HUD's use of appropriated funds to obtain a certificate of authority to grant continuing education credits to attendees of seminars HUD conducts, provided HUD administratively determines such expenditure constitutes a necessary expense 797

APPROPRIATIONS—Continued Page

Availability—Continued

Expenses Incident to Specific Purposes—Continued

Necessary Expenses—Continued

The Equal Employment Opportunity Commission (EEOC) appropriation is not available to pay employment taxes on amounts distributed to employees from back pay judgment paid to the EEOC in enforcement actions brought by the EEOC. Appropriations can be used only for their intended purposes. Payment of these taxes cannot be viewed as a "necessary expense" under EEOC's appropriations because it would not contribute to fulfilling the purposes for which those appropriations were made 800

Federal Executive Boards

The General Accounting Office agrees with the Veterans Administration's legal analysis that a general Government-wide Appropriation Act fiscal year restriction (currently contained in section 608 of the Treasury, Postal Service, and General Government Appropriation Act for fiscal year 1986, H.R. 3036) on the use of appropriated funds for interagency financing of boards or commissions "which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality," applies to the Federal Executive Boards since the Boards do not have statutory approval for interagency financing. However, single agency financing of the Boards is not prohibited by the restriction 689

Medical Fees

Physical Examinations

An individual not employed by the Government, but invited to participate in an exercise with the Naval Ocean Research and Development Activity, Department of the Navy, claimed the cost of a required physical examination on her claim for travel expenses. The cost of a physical examination necessary to participate in an exercise may not be paid as travel expense; however, as in the case of an employee, when a physical examination is undergone for the benefit of the Government, the cost of the examination may be reimbursed to the invitee 677

Refreshments

If an agency determines that a reception with refreshments, as provided in the Federal Personnel Manual, would materially enhance the effectiveness of an awards ceremony conducted under authority of the Government Employees' Incentive Awards Act, the cost of those refreshments may be considered a "necessary expense" for purposes of 5 U.S.C. 4503. As such, the cost may be charged to operating appropriations without regard to "reception and representation" limits 738

APPROPRIATIONS—Continued Page
Availability—Continued
Revolving Fund Replacements
Internal Revenue Service (IRS) operating appropriations are not available for transfer to Tax Lien Revolving Fund to restore Fund's funding level which has been reduced as a result of the amounts IRS pays from the Fund in order to redeem property subject to junior tax liens in favor of the Government exceeding the amount received by the IRS and deposited to the Fund when the property is sold. The Fund is the appropriation specifically available to IRS for redeeming property subject to junior tax liens in favor of Government. Therefore, more general appropriation available to IRS for operations may not be used to finance this activity. Thus, that subsequent sale does not recover the amount spent by IRS for redemption does not by itself serve to make the redemption an "illegal, improper, or incorrect" payment 881
State Imposed Fees
Unless expressly waived by statute, a Federal agency is not liable for a civil fine or penalty by reason of sovereign immunity. Therefore, appropriated funds cannot be used to pay a penalty imposed by the Boston City Fire Department for answering false alarms resulting from a malfunction of a fire alarm system in a Veterans Administration Medical Center 61
Telephones
Use of appropriated funds to install telephone equipment in the residences of Internal Revenue Service employees to be used for portable computer data transmission is prohibited by 31 U.S.C. 1348(a)(1) (1982). However, there are circumstances, involving telephone service of limited use or when there are numerous safeguards and the service is essential, when the prohibition has been held inapplicable. Here, IRS has demonstrated the essential nature of the service, and an exception to the prohibition is warranted. Prior to installing the equipment, IRS should establish safeguards to prevent misuse 835
Traffic Lights
Needed traffic signals may be installed at government expense if private entities requesting a signal would be charged for installation in similar circumstances, and the government is the primary beneficiary of the light. 61 Comp. Gen. 501 (1982). City's determination that light does not meet its priority criteria means that a private entity would be charged for signal installation on the same basis. Fact that the building where the signal will be installed is leased by GSA from a private owner does not shift the primary benefit of the signal installation to the lessor, because the government will have full benefit of increased safety for its employees for the remainder of the lease term 847

APPROPRIATIONS—Continued Page

Continuing Resolutions

Authorizing Legislation Absent

Where statutory test program permitting the Defense Logistics Agency to apply a price differential of up to 2.2 percent in favor of bids submitted by labor surplus area concerns expired at the end of fiscal year 1985 and was not extended by the House Joint Resolution making continuing appropriations for fiscal year 1986, agency properly declined to apply price differential where bids were solicited and opened during fiscal year 1985 but where contract was not "made"—awarded—until after fiscal year 1985's expiration when continuing resolution was in effect 318

Agency's refusal to apply a percentage differential in evaluating price offered by labor surplus area concern was proper where statutory authority to do so had expired as of time of award, and was consistent with the provisions of the solicitation relating to evaluation of bids, which specifically warned bidders that "if no legislation is in effect at time of award which authorizes the payment of a price differential, no evaluation factor will be added to the others submitted." 318

Restrictions

Permanency

Words of Futurity in Resolutions

Federal judge requests reexamination of prior decisions concerning effect of section 140 of Public Law 97-92, an amendment which bars pay increases for federal judges except as specifically authorized by Congress. Although the sponsor of section 140 now says that the amendment was not intended to be permanent legislation but was to expire with the appropriation act to which it was attached, we hold that section 140 is permanent legislation in view of congressional intent expressed at the time of passage of section 140 and subsequently 352

Defense Department

Annual Provision *v.* Permanent Legislation

Section 8097 of the Department of Defense Appropriations Act, 1986, Pub. L. No. 99-190, 99 Stat. 1185, 1219 (1986), does not constitute permanent legislation. A provision contained in an appropriation act may not be construed as permanent legislation unless the language or nature of the provision makes it clear that such was the intent of the Congress. Here, the provision in question includes no words of futurity and the provision is not unrelated to the purposes of the Act. Further, the provision is not rendered ineffectual by a finding that it is not permanent 588

Contracts

Statutory Restrictions

Protest contending that the award of an architectural and engineering (A-E) contract for work to be performed in Alaska to a non-Alaska firm violates section 8078 of the Department of Defense (DOD) Appropriations Act of 1986, which requires, under certain circumstances, that firms which perform work in Alaska hire Alaskan residents, is denied. The act does not preclude the award of A-E contracts for work to be performed in Alaska to non-Alaskan firms, but, in effect, requires non-Alaskan firms to hire Alaskan residents for work performed in Alaska under DOD contracts 626

APPROPRIATIONS—Continued Page
Defense Department—Continued
Contracts—Continued
Statutory Restrictions—Continued
Air Force awarded contract for prototype strategic weapons loaders (munitions lift trailers) to Pacific Car and Foundry Company, Despite House Armed Services Committee denial of reprogramming within RDT&E appropriation account from another program element to the Armament/Ordnance program element. Instead, funding was obtained from other projects with the Armament/Ordnance program element. DOD reprogramming procedures were not violated since neither DOD Directive 7250.5, nor DOD Instruction 7250.10 cover this type of transaction 360
Air Force awarded contract for prototype strategic weapons loaders (munitions lift trailers) to Pacific Car and Foundry Company. Conference Committee on DOD Authorization Act, 1986, Pub. L. No. 99-145, deleted provision in Senate bill which specifically authorized use of prior year funds for this purpose. The Act made no reference to the contract. Failure to specifically authorize funds did not constitute denial of funding which might otherwise be available 360
Reprogramming Proposal
Objections by Congressional Committee
Air Force awarded contract for prototype strategic weapons loaders (munitions lift trailers) to Pacific Car and Foundry Company, despite House Armed Services Committee denial of reprogramming within RDT&E appropriation account from another program element to the Armament/Ordnance program element. Instead, funding was obtained from other projects with the Armament/Ordnance program element. DOD reprogramming procedures were not violated since neither DOD Directive 7250.5, nor DOD Instruction 7250.10 cover this type of transaction 360
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Research and Development Projects
Merger of Accounts
Air Force awarded contract for prototype strategic weapons loaders (munitions lift trailers) to Pacific Car and Foundry Company, Despite House Armed Services Committee denial of reprogramming within RDT&E appropriation account from another program element to the Armament/Ordnance program element. Instead, funding was obtained from other projects with the Armament/Ordnance program element. DOD reprogramming procedures were not violated since neither DOD Directive 7250.5, nor DOD Instruction 7250.10 cover this type of transaction 360

APPROPRIATIONS—Continued Page

Defense Department—Continued

Research and Development Projects—Continued

Merger of Accounts—Continued

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Deficiencies

Anti-Deficiency Act

Federal Aid, Grants, etc.

The Department of Education administers a variety of entitlement programs within the Guaranteed Student Loan Program. In recording and reporting obligations, the Department should: (1) treat loan guarantees as contingent liabilities, recording obligations as default payments are required; and (2) record obligations under subsidy provisions of the program based on best estimates of payment requirements, making any adjustments as they become necessary. Since both types of obligations are authorized by law, recording such mandatory obligations, even if in excess of available funds, would not violate the Antideficiency Act..... 4

Loans Guaranteed in Excess of Appropriations

The Department of Education administers a variety of entitlement programs within the Guaranteed Student Loan Program. In recording and reporting obligations, the Department should: (1) treat loan guarantees as contingent liabilities, recording obligations as default payments are required; and (2) record obligations under subsidy provisions of the program based on best estimates of payment requirements, making any adjustments as they become necessary. Since both types of obligations are authorized by law, recording such mandatory obligations, even if in excess of available funds, would not violate the Antideficiency Act..... 4

Obligations Authorized by Law

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Fiscal year

Availability beyond Contracts

Amendments (*See* **APPROPRIATIONS, Fiscal year, Availability Beyond, Contracts, Modification**)

APPROPRIATIONS—Continued Page

Fiscal year—Continued

Availability beyond Contracts—Continued

Modification

Modification of a cost reimbursement contract occurring in fiscal year 1985, which increased the amount of the original contract ceiling price and which did not represent an antecedent liability enforceable by the contractor is properly chargeable to appropriations available when the modification was approved by the contracting officer; that is, fiscal year 1985 appropriations 741

Performance Extension

The Environmental Protection Agency may not issue a nonseverable work assignment under a cost-reimbursement, level of effort, term contract where the effort furnished will extend beyond the contract's initial period of performance into an option period. The Federal Acquisition Regulation requires that term contracts be "for a specified level of effort for a stated period of time." Further, issuance of work assignment which could not be performed until the next fiscal year would violate the bona fide need rule 153

Service Contracts

The Environmental Protection Agency may not issue a nonseverable work assignment under a cost-reimbursement, level of effort, term contract where the effort furnished will extend beyond the contract's initial period of performance into an option period. The Federal Acquisition Regulation requires that term contracts be "for a specified level of effort for a stated period of time." Further, issuance of a work assignment which could not be performed until the next fiscal year would violate the bona fide need rule 153

Bona Fide **Needs For Obligation**

The entire amount of the original cost reimbursement contract between the Veterans Administration and the contractor for a needs assessment study of Vietnam-era veterans was properly charged to fiscal year 1984 appropriations, the appropriations available when the contract was executed, since the study was a *bona fide* need of fiscal year 1984 741

The Environmental Protection Agency may not issue a nonseverable work assignment under a cost-reimbursement, level of effort, term contract where the effort furnished will extend beyond the contract's initial period of performance into an option period. The Federal Acquisition Regulation requires that term contracts be "for a specified level of effort for a stated period of time." Further, issuance of a work assignment which could not be performed until the next fiscal year would violate the bona fide need rule 153

Interagency Activities

Joint Committee Study Programs (*See* **BOARDS, COMMITTEES, AND COMMISSIONS, Interagency Participation, Fund Contributions)**

APPROPRIATIONS—Continued Page
Limitations
Compensation
Federal Judges
Pub. L. 97-92 Effect
Federal judge requests reexamination of prior decisions concerning effect of section 140 of Public Law 97-92, an amendment which bars pay increases for federal judges except as specifically authorized by Congress. Although the sponsor of section 140 now says that the amendment was not intended to be permanent legislation but was to expire with the appropriation act to which it was attached, we hold that section 140 is permanent legislation in view of congressional intent expressed at the time of passage of section 140 and subsequently 352
Miscellaneous Receipts (*See* MISCELLANEOUS RECEIPTS)
Necessary Expenses Availability
(*See* APPROPRIATIONS, Availability, Expenses Incident To Specific Purposes, Necessary Expenses)
Obligation
Definite Commitment
Unobligated balances in the Rail Fund lapsed under the provisions of the 1984 DOT appropriation act, but obligated balances remain available to liquidate outstanding obligations 524
Unobligated Balances
Unobligated balances in the Rail Fund lapsed under the provisions of the 1984 DOT appropriation act, but obligated balances remain available to liquidate outstanding obligations 524
Refund of Expenditures
Disposition
Rebates from Travel Management Centers redistributed to paying Federal agency may be retained by agency for credit to its own appropriation and does not need to be deposited into the Treasury as miscellaneous receipts. This does not constitute an illegal augmentation of appropriations in that these rebates are adjustments of previous amounts disbursed and therefore qualify as "refunds" under regulations permitting such refunds to be retained by the agency 601
Restrictions
Bona Fide Needs
The entire amount of the original cost reimbursement contract between the Veterans Administration and the contractor for a needs assessment study of Vietnam-era veterans was properly charged to fiscal year 1984 appropriations, the appropriations available when the contract was executed, since the study was a *bona fide* need of fiscal year 1984 741
Compensation
Limitations (*See* APPROPRIATIONS, Limitations, Compensation)

APPROPRIATIONS—Continued Page
Transfers
Propriety
Internal Revenue Service (IRS) operating appropriations are not available for transfer to Tax Lien Revolving Fund to restore Fund's funding level which has been reduced as a result of the amounts IRS pays from the Fund in order to redeem property subject to junior tax liens in favor of the Government exceeding the amount received by the IRS and deposited to the Fund when the property is sold. The Fund is the appropriation specifically available to IRS for redeeming property subject to junior tax liens in favor of Government. Therefore, more general appropriation available to IRS for operations may not be used to finance this activity. Thus, absent any statutory authority authorizing transfer, the only way IRS could replenish losses to the Fund would be for it to specifically request appropriations from Congress for this purpose 881
What Constitutes Appropriated Funds
Special Deposit Accounts
Where Congress authorizes the collection or receipt of certain funds by an agency and has specified or limited their use or purpose, the authorization constitutes an appropriation, and protects arising from procurements involving those funds are subject to GAO bid protest jurisdiction 25
User Fees
Where Congress authorizes the collection or receipt of certain funds by an agency and has specified or limited their use or purpose, the authorization constitutes an appropriation, and protects arising from procurements involving those funds are subject to GAO bid protest jurisdiction 25
ARCHITECT AND ENGINEERING CONTRACTS (*See* CONTRACTS, Architect, Engineering, etc. Services)
ARCHITECT, ENGINEERING, ETC. SERVICES
Contractor Selection Base
"Brooks Bill" Application (*See* CONTRACTS, Architect, Engineering, etc. Services, Procurement Practices)
ASSIGNMENT OF CLAIM
Contracts
Payments (*See* CONTRACTS, Payments, Assignment)
ATTORNEYS
Fees
Bids, etc.
Preparation Costs
When a protest is without merit, GAO will deny a claim for attorney's fees and bid preparation costs 74
AUTOMATIC DATA PROCESSING SYSTEMS (*See* EQUIPMENT, Automatic Data Processing Systems)
AUTOMOBILES
Vehicles
Generally (*See* VEHICLES)

Page

BIDDERS

Debarment

Affiliates of Debarred Firm

Eligibility

The Federal Acquisition Regulation, 48 C.F.R. 9.406-1(b), provides that a debarring official may extend the decision to debar a contractor to all of its affiliates only if each affiliate is specifically named on the notification of proposed debarment. The failure of the debarring official to comply with this requirement is a mere procedural defect, not affecting the validity of the proposed debarment of the affiliate, where the affiliate is otherwise on notice of proposed action and is afforded the opportunity to respond 530

Contract Award Eligibility

Business Affiliates

The Federal Acquisition Regulation, 48 C.F.R. 9.406-1(b), provides that a debarring official may extend the decision to debar a contractor to all of its affiliates only if each affiliate is specifically named on the notification of proposed debarment. The failure of the debarring official to comply with this requirement is a mere procedural defect, not affecting the validity of the proposed debarment of the affiliate, where the affiliate is otherwise on notice of proposed action and is afforded the opportunity to respond 530

Proposed Debarment

Suspension of Contractor by One Agency Effect

A firm proposed for debarment from government contracting generally is precluded from receiving government contracts pending a final debarment decision 530

Extension

Where actions of a debarred firm following an initial debarment so warrant, the debarment may be extended in order to protect the government's interests 530

Invitation Right

Failure to Solicit Bids

Incumbent Contractor

Where contracting agency did not provide protester/incumbent contractor with the solicitation, in spite of incumbent contractor's numerous requests that agency procurement officials do so, incumbent contractor was improperly excluded from the competition of the Competition in Contracting Act of 1984, which requires "full and open competitive procedures." 401

Incumbent Contractor

Where contracting agency did not provide protester/incumbent contractor with the solicitation, in spite of incumbent contractor's numerous requests that agency procurement officials do so, incumbent contractor was improperly excluded from the competition of the Competition in Contracting Act of 1984, which requires "full and open competitive procedures." 401

Responsibility (*See* **CONTRACTORS, Responsibility**)

Page

BIDS

Acceptance or Rejection

Alternate Bids

When a bidder submits a bid offering either of two products, one of which will meet the specifications and the other of which will not, the government is not precluded from accepting that option which meets the solicitation's requirements..... 130

Alternate

Acceptability (*See* BIDS, Alternative)

When a bidder submits a bid offering either of two products, one of which will meet the specifications and the other of which will not, the government is not precluded from accepting that option which meets the solicitation's requirements..... 130

Ambiguous

Two Possible Interpretations

Clarification Prejudicial to Other Bidders

Rejection of Bid

Bid which contains an inconsistency between item prices and total bid price and is therefore susceptible to more than one bid price interpretation, one of which may make the bid high, must be rejected as ambiguous..... 76

Amendments (*See* BIDS, Invitation for bids, Amendments)

Bonds (*See* BONDS, Bid)

Cancellation (*See* BIDS, Invitation for bids, Cancellation)

Collusive Bidding

Allegation Unsupported by Evidence

Mere fact that individual bidders are partners and share common business address does not establish that they engaged in price collusion in violation of their Certificates of Independent Price Determination..... 150

Competitive System

Compliance Requirements

Where contracting agency did not provide protester/incumbent contractor with the solicitation, in spite of incumbent contractor's numerous requests that agency procurement officials do so, incumbent contractor was improperly excluded from the competition of the Competition in Contracting Act of 1984, which requires "full and open competitive procedures."..... 401

Exclusion of Current Contractors

Where contracting agency did not provide protester/incumbent contractor with the solicitation, in spite of incumbent contractor's numerous requests that agency procurement officials do so, incumbent contractor was improperly excluded from the competition of the Competition in Contracting Act of 1984, which requires "full and open competitive procedures."..... 401

Multiple Basis

There is no blanket prohibition against partners and their partnership competing on the same procurement..... 150

BIDS—Continued Page
Competitive System—Continued
Preservation of System's Integrity
It is the bidder's responsibility to assure timely arrival of its bid at the place of bid opening, and a bid that is late because the bidder failed to allow sufficient time for delivery of the bid may not be considered for award. The fact that bids had not been opened when the late bid was received is irrelevant, since the importance of maintaining the integrity of the competitive bidding system outweighs any monetary savings that might be obtained by considering a late bid 71
Contracts
Generally (*See* CONTRACTS)
Correction
Initialing Requirement
A bidder's failure to initial charges in a bid is a matter of form that may be considered an informality and waived if the bid leaves no doubt as to the intended price 23
Mistakes (*See* BIDS, Mistakes, Correction)
De minimis Rule
Bid mistake (*See* BIDS, Mistakes, *De minimis* Rule)
Double bidding (*See* BIDS, Multiple)
Errors (*See* BIDS, Mistakes)
Estimates of Government
Basis of Estimate
Government is not bound to utilize historical cost data for materials where estimate of additional savings generated by switch to new procurement method is not found unreasonable 41
Evaluation
Foreign Country End Products
For purpose of applying a statutorily-prescribed differential in the evaluation of bids offering foreign-manufactured "extra high voltage power equipment," Tennessee Valley Authority erred in adopting a definition of that term recited in the statement of the conference managers accompanying the conference committee report on the legislation where the managers' statement indicates they intended to repeat the definition used by the Department of Commerce but erroneously understood it 745
Invitation for Bids
Amendments
Acknowledgement
Constructive Acknowledgement
Constructive acknowledgement exception to the general rule requiring bidders formally to acknowledge solicitation amendments may not be invoked when there is substantial doubt that the bidder is aware of the entire amendment and the changes required by it 265
Failure to Acknowledge
Constructive acknowledgement exception to the general rule requiring bidders formally to acknowledge solicitation amendments may not be invoked when there is substantial doubt that the bidder is aware of the entire amendment and the changes required by it 265

BIDS—Continued Page
Invitation for Bids—Continued
Failure to Acknowledge—Continued
Bid Nonresponsive
Bidder's failure formally to acknowledge a material amendment that, among other things, changes bid opening to an earlier date, may not be waived as a minor informality when the only evidence that the bidder received the amendment is the fact that its bid and bid bond include the earlier date. Bidders may be expected to prepare their bids before the actual due date, and thus an earlier-dated bid does not clearly show that the bidder is aware of and bound to the other changes required by the amendment 265
Materiality Determination
Bidder's failure formally to acknowledge a material amendment that, among other things, changes bid opening to an earlier date, may not be waived as a minor informality when the only evidence that the bidder received the amendment is the fact that its bid and bid bond include the earlier date. Bidders may be expected to prepare their bids before the actual due date, and thus an earlier-dated bid does not clearly show that the bidder is aware of and bound to the other changes required by the amendment 265
Waiver
Significance of Amendment
Bidder's failure formally to acknowledge a material amendment that, among other things, changes bid opening to an earlier date, may not be waived as a minor informality when the only evidence that the bidder received the amendment is the fact that its bid and bid bond include the earlier date. Bidders may be expected to prepare their bids before the actual due date, and thus an earlier-dated bid does not clearly show that the bidder is aware of and bound to the other changes required by the amendment 265
Failure to Issue by Agency
Where a material change occurs after issuance of a solicitation for area management broker services, the procuring agency, i.e., the Department of Housing and Urban Development, is required to issue a written amendment to the solicitation so that bidders are properly apprised of the change. Oral advice at prebid conference and/or at bid opening is not sufficient for this purpose 66
Nonreceipt
Bidder's Risk
Bidder's failure formally to acknowledge a material amendment that, among other things, changes bid opening to an earlier date, may not be waived as a minor informality when the only evidence that the bidder received the amendment is the fact that its bid and bid bond include the earlier date. Bidders may be expected to prepare their bids before the actual due date, and thus an earlier-dated bid does not clearly show that the bidder is aware of and bound to the other changes required by the amendment 265
Constructive acknowledgement exception to the general rule requiring bidders formally to acknowledge solicitation amendments may not be invoked when there is substantial doubt that the bidder is aware of the entire amendment and the changes required by it 265
Discarding all bids (*See* BIDS, Invitation for bids, Cancellation)

BIDS—Continued Page

Invitation for Bids

Amendments

Failure to Acknowledge

Bid Responsive

A bidder's failure to acknowledge an amendment that adds two containers to each of five previously-scheduled deliveries of containers is not a material deviation requiring rejection of the bid as nonresponsive. Rather, it may be treated as a minor informality that may be cured after bid opening when the bidder has submitted a price for and is obligated to provide the correct total number of containers and the effect on price, if any, of the change made by the amendment is negligible 255

Bid Nonresponsive

A bid must be rejected as nonresponsive although the bidder indicates its awareness of one aspect of a solicitation amendment, *i.e.*, the fact that the bid opening had been extended, where this action does not clearly indicate that the bidder received or even had knowledge of the other substantive changes made by the amendment 160

Waived as Minor Informality

A bidder's failure to acknowledge an amendment that adds two containers to each of five previously-scheduled deliveries of containers is not a material deviation requiring rejection of the bid as nonresponsive. Rather, it may be treated as a minor informality that may be cured after bid opening when the bidder has submitted a price for and is obligated to provide the correct total number of containers and the effect on price, if any, of the change made by the amendment is negligible 255

Material to Contract

A solicitation amendment is material where the requirements aided by the amendment, although not affecting the overall price of performance, will affect the quality of the product being procured in more than a trivial manner 160

Cancellation

After Bid Opening

Defective Solicitation

Protest is sustained where Invitation for Bids (IFB's) flawed evaluation scheme makes it impossible to determine which bid represents the lowest cost to the government 173

Due to special experience requirement in invitation for bids (IFB), which agency determined was not necessary to meet its needs, only one of five actual bidders was eligible for award and other potential bidders were excluded from competing. Canceling the IFB after bid opening in order to resolicit without the experience requirement therefore was proper since both actual and potential bidders would be prejudiced by award under the original IFB 470

BIDS—Continued Page
Invitation for Bids—Continued
Cancellation—Continued
After Bid Opening—Continued
Justification
Inaccurate Specifications
Due to special experience requirement in invitation for bids (IFB), which agency determined was not necessary to meet its needs, only one of five actual bidders was eligible for award and other potential bidders were excluded from competing. Canceling the IFB after bid opening in order to resolicit without the experience requirement therefore was proper since both actual and potential bidders would be prejudiced by award under the original IFB 470
Defective
Where a solicitation for indefinite quantities of oxygen solicits prices for gaseous and liquid oxygen supplies, but provides that the contractor may provide whichever type of oxygen it prefers, evaluation based on the prices for both types of oxygen provides no assurance that the low evaluated price will result in the lowest actual cost to the government and, thus, provides no valid basis for award 823
A solicitation which calls for bidders to submit option prices must state whether the evaluation will include or exclude option prices to allow for the submission of bids on an equal basis 640
Evaluation Criteria
An invitation for bids and the award of fixed-rate, labor-hour, indefinite-quantity requirements contract for temporary clerical services is defective where the method of evaluating bids only involved the numerical averaging of hourly rates for each line item and not the extension or "weighting" of the line item prices by the government's best estimate of the quantities of hours required to determine the bid that would result in the lowest ultimate cost to the government 640
Protest is sustained where Invitation for Bids (IFB's) flawed evaluation scheme makes it impossible to determine which bid represents the lowest cost to the government 173
Evaluation Procedure
An invitation for bids and the award of fixed-rate, labor-hour, indefinite-quantity requirements contract for temporary clerical services is defective where the method of evaluating bids only involved the numerical averaging of hourly rates for each line item and not the extension or "weighting" of the line item prices by the government's best estimate of the quantities of hours required to determine the bid that would result in the lowest ultimate cost to the government 640
Protest is sustained where Invitation for Bids (IFB's) flawed evaluation scheme makes it impossible to determine which bid represents the lowest cost to the government 173

BIDS—Continued Page
Invitation for Bids—Continued
Specifications
Defective
Where a solicitation for indefinite quantities of oxygen solicits prices for gaseous and liquid oxygen supplies, but provides that the contractor may provide whichever type of oxygen it prefers, evaluation based on the prices for both types of oxygen provides no assurance that the low evaluated price will result in the lowest actual cost to the government and, thus, provides no valid basis for award 823
Descriptive Literature Requirement
Descriptive literature clause requirement under Federal Acquisition Regulation relating to sealed bid invitations for bids is not applicable to request for proposals under negotiated procurement 418
Minimum Needs Requirement
Administrative Determination
Reasonableness
Options clause is not unduly restrictive of competition because of risk to bidders resulting from political and economic instability of countries in which weather data necessary for contract performance will be collected where agency establishes *prima facie* support that clause is reasonably related to its needs for continuous service on long-term basis and protester fails to demonstrate that use of options places undue risk on bidders 164
The fact that only one responsive bid was received from a firm within the area covered by a solicitation's geographic restriction does not demonstrate that the agency was not justified in imposing the restriction to begin with, as the reasonableness of the decision to impose the restriction must be determined on the basis of the information available at the time the decision was made. Further, the procurement was not a sole source acquisition since the agency solicited nine firms within the geographically restricted area that could potentially meet its needs, and although only one responsive bid was received, it is clear that other facilities within the restricted area could meet the agency's requirements. 757
Overstatement of Minimum Needs
Time period between award and commencement of performance is unduly restrictive of competition where agency has not provided *prima facie* support that 30-day startup period is reasonably related to its minimum needs and, in fact, acknowledges that longer startup period is required for bidders without established communication circuits necessary for contract performance 164
Where a bidder is found to be responsible even though it does not meet definitive responsibility criteria requirements set out in the soliciation, and the agency deletes from subsequent solicitations the requirements for a specific minimum number of years of experience in the same areas of expertise, the definitive responsibility criteria in the first solicitation overstated the agency's minimum needs and unduly restricted competition 510

BIDS—Continued Page
Invitation for Bids—Continued
Specifications—Continued
Restrictive
Options clause is not unduly restrictive of competition because of risk to bidders resulting from political and economic instability of countries in which weather data necessary for contract performance will be collected where agency establishes *prima facie* support that clause is reasonably related to its needs for continuous service on long-term basis and protester fails to demonstrate that use of options places undue risk on bidders 164
Burden of Proving Undue Restriction
The fact that only one responsive bid was received from a firm within the area covered by a solicitation's geographic restriction does not demonstrate that the agency was not justified in imposing the restriction to begin with, as the reasonableness of the decision to impose the restriction must be determined on the basis of the information available at the time the decision was made. Further, the procurement was not a sole source acquisition since the agency solicited nine firms within the geographically restricted area that could potentially meet its needs, and although only one responsive bid was received, it is clear that other facilities within the restricted area could meet the agency's requirements 757
Undue Restriction
Where a bidder is found to be responsible even though it does not meet definitive responsibility criteria requirements set out in the solicitation, and the agency deletes from subsequent solicitations the requirements for a specific minimum number of years of experience in the same areas of expertise, the definitive responsibility criteria in the first solicitation overstated the agency's minimum needs and unduly restricted competition 510
Unduly Restrictive
Time period between award and commencement of performance is unduly restrictive of competition where agency has not provided *prima facie* support that 30-day startup period is reasonably related to its minimum needs and, in fact, acknowledges that longer startup period is required for bidders without established communication circuits necessary for contract performance 164
Late
Bidders Responsibility for Delivery
It is the bidder's responsibility to assure timely arrival of its bid at the place of bid opening, and a bid that is late because the bidder failed to allow sufficient time for delivery of the bid may not be considered for award. The fact that bids had not been opened when the late bid was received is irrelevant, since the importance of maintaining the integrity of the competitive bidding system outweighs any monetary savings that might be obtained by considering a late bid 71

BIDS—Continued Page
Late—Continued
Hand Carried Delay
Evidence
When the only evidence of the time that the bidder's representive arrived at the contracting office consists of a statement of the protester that the representative arrived prior to the bid opening time and a statement of the contracting agency that the representative arrived after that time, the protester has failed to sustain its burden of proving that the bid was not late 71
Mistakes
Contracting Officer's Error Detection Duty
Protest that it was improper for the contracting office to receive bidder's advice concerning possible mistake in bid prior to determining the intended bid or for the contracting officer to advise protester of the apparent mistake prior to requesting verification from the bidder is denied. Since the contracting officer suspected a mistake in bid, he was required to request from the bidder a verification of the bid, calling attention to the suspected mistake. Even if he first informed the protester of the apparent mistake, it has not been shown how this prejudiced the protester 202
Correction
After Bid Opening
Rule
Discrepancy is bid between stated total of lump sum and extended price items and the correct mathematical total of such items may be corrected so as to displace another, otherwise low offer where both the intended bid price and the nature of the mistake are apparent on the face of the bid. Contracting officer did not lack a reasonable basis for determining that—in view of the consistency between the correct mathematical total of the items, the intermediate subtotals of the items and the individual item prices—the bidder intended its bid price to be the correct mathematical total rather than the stated total of the items 202
Clerical Error
Where a bid's consistent pricing pattern is discernible, General Accounting Office (GAO) will allow correction of the omission of an option price for one item added by amendment in order to prevent an obvious clerical error of omission from being converted to a matter of responsiveness, since it is clear that the bidder intended to obligate itself to provide the item 167
Denial
Acceptance of Contracts at Initial Bid Price
Where low bid for the supply of grocery bags is 18 to 23 percent less than the second low bid on various items for which the low bidder alleges its bid was mistaken, but the allegation of mistake is essentially unsupported by any evidence, it is within the contracting agency's discretion to make award on the basis of the bid as originally submitted since under the circumstances there is no adverse effect on the competitive bidding system 186

BIDS—Continued Page
Mistakes—Continued
Correction—Continued
Evidence of Error
Sufficiency
Where low bid for the supply of grocery bags in 18 to 23 percent less than the second low bid on various items for which the low bidder alleges its bid was mistaken, but the allegation of mistake is essentially unsupported by any evidence, it is within the contracting agency's discretion to make award on the basis of the bid as originally submitted since under the circumstances there is no adverse effect on the competitive bidding system 186
Intended Bid Price
Established in Bid
Discrepancy in bid between stated total of lump sum and extended price items and the correct mathematical total of such items may be corrected so as to displace another, otherwise low offer where both the intended bid price and the nature of the mistake are apparent on the face of the bid. Contracting officer did not lack a reasonable basis for determining that—in view of the consistency between the correct mathematical total of the items, the intermediate subtotals of the items and the individual item prices—the bidder intended its bid price to be the correct mathematical total rather than the stated total of the items 202
Obvious Error
Where a bid's consistent pricing pattern is discernible, General Accounting Office (GAO) will allow correction of the omission of an option price for one item added by amendment in order to prevent an obvious clerical error of omission from being converted to a matter of responsiveness, since it is clear that the bidder intended to obligate itself to provide the item 167
Propriety
Where a bid's consistent pricing pattern is discernible, General Accounting Office (GAO) will allow correction of the omission of an option price for one item added by amendment in order to prevent an obvious clerical error of omission from being converted to a matter of responsiveness, since it is clear that the bidder intended to obligate itself to provide the item 167
De minimis Rule
Failure to provide a duplicate copy of the bid is a minor informality or irregularity 23
A bidder's failure to initial changes in a bid is a matter of form that may be considered an informality and waived if the bid leaves no doubt as to the intended price 23
Evidence of Error
Lacking
Where low bid for the supply of grocery bags is 18 to 23 percent less than the second low bid on various items for which the low bidder alleges its bid was mistaken, but the allegation of mistake is essentially unsupported by any evidence, it is within the contracting agency's discretion to make award on the basis on the bid as originally submitted since under the circumstances there is no adverse effect on the competitive bidding system 186

BIDS—Continued Page
Mistakes—Continued
Evidence of Error—Continued
Sufficiency
Where low bid for the supply of grocery bags is 18 to 23 percent less than the second low bid on various items for which the low bidder alleges its bid was mistaken, but the allegation of mistake is essentially unsupported by any evidence, it is within the contracting agency's discretion to make award on the basis of the bid as originally submitted since under the circumstances there is no adverse effect on the competitive bidding system 186
Intended Bid Price Uncertainty
Bid Rejection
Bid which contains an inconsistency between item prices and total bid price and is therefore susceptible to more than one bid price interpretation, one of which may make the bid high, must be rejected as ambiguous 76
Price
Intended Bid Price Uncertainty
Discrepancy in bid between stated total of lump sum and extended price items and the correct mathematical total of such items may be corrected so as to displace another, otherwise low offer where both the intended bid price and the nature of the mistake are apparent on the face of the bid. Contracting officer did not lack a reasonable basis for determining that—in view of the consistency between the correct mathematical total of the items, the intermediate subtotals of the items and the individual item prices—the bidder intended its bid price to be the correct mathematical total rather than the stated total of the items 202
Responsiveness Determination
Where prices where provided for all items and subitems on a bidding schedule, the fact that the contracting officer had to add the individual item prices and fill in the totals the bidder had left blank does not mean the bid was nonresponsive, as the bidder showed his intent to be bound by the pricing of all items and subitems. Failure to add the prices of the items was only a mere clerical error, and the mere mechanical exercise of addition shows the total bid amount intended 23
Verification
Acceptance of Contract at Initial Bid Price
Where low bid for the supply of grocery bags in 18 to 23 percent less than the second low bid on various items for which the low bidder alleges its bid was mistaken, but the allegation of mistake is essentially unsupported by any evidence, it is within the contracting agency's discretion to make award on the basis of the bid as originally submitted since under the circumstances there is no adverse effect on the competitive bidding system 186

BIDS—Continued Page
Mistakes—Continued
Verification—Continued
Bid Price
Where low bid for the supply of grocery bags in 18 to 23 percent less than the second low bid on various items for which the low bidder alleges it bid was mistaken, but the allegation of mistake is essentially unsupported by any evidence, it is within the contracting agency's discretion to make award on the basis of the bid as originally submitted since under the circumstances there is no adverse effect on the competitive bidding system 186
Propriety
Protest that it was improper for the contracting officer to receive bidder's advice concerning possible mistake in bid prior to determining the intended bid or for the contracting officer to advise protester of the apparent mistake prior to requesting verification from the bidder is denied. Since the contracting officer suspected a mistake in bid, he was required to request from the bidder a verification of the bid, calling attention to the suspected mistake. Even if he first informed the protester of the apparent mistake, it has not not been shown this prejudiced the protester 202
Waiver, etc. Error
Failure to provide a duplicate copy of the bid is a minor informality or irregularity 23
A bidder's failure to initial changes in a bid is a matter of form that may be considered an informality and waived if the bid leaves no doubt as to the intended price 23
Multiple
Certificate of Independent Pricing Determination
Mere fact that individual bidders are partners and share common business address does not establish that they engaged in price collusion in violation of their Certificates of Independent Price Determination 150
Propriety
There is no blanket prohibition against partners and their partnership competing on the same procurement 150
Negotiated Procurements (*See* CONTRACTS, Negotiation)
Nonresponsive to Invitation (*See* BIDS, Responsiveness)
Omissions
Prices in Bid
Discernible Pattern Effect
Where a bid's consistent pricing pattern is discernible, General Accounting Office (GAO) will allow correction of the omission of an option price for one item added by amendment in order to prevent an obvious clerical error of omission from being converted to a matter of responsiveness, since it is clear that the bidder intended to obiligate itself to provide the item 167
Preparation
Costs
Noncompensable
When a protest is without merit, GAO will deny a claim for attorney's fees and bid preparation costs 74

BIDS—Continued Page
Preparation—Continued
Costs—Continued
Noncompensable—Continued
Claim for the recovery of bid preparation costs is denied where there has been no reasonable showing that the protester would have had a substantial chance of receiving the award for the agency's utilization of a materially defective method for evaluating bids. 819
Recovery
Claim for the recovery of bid preparation costs is denied where there has been no reasonable showing that the protester would have had a substantial chance of receiving the award but for the agency's utilization of a materially defective method for evaluating bids. 819
Prices
Conflicting
Bid Rejection
Bid which contains an inconsistency between item prices and total bid price and is therefore susceptible to more than one bid price interpretation, one of which may make the bid high, must be rejected as ambiguous 76
Correction
Initialing Requirement
A bidder's failure to initial changes in a bid is a matter of form that may be considered an informality and waived if the bid leaves no doubt as to the intended price 23
Differential to Relieve
Economic Distress
Where statutory test program permitting the Defense Logistics Agency to apply a price differential of up to 2.2 percent in favor of bids submitted by labor surplus area concerns expired at the end of fiscal year 1985 and was not extended by the House Joint Resolution making continuing appropriations for fiscal year 1986, agency properly declined to apply price differential where bids were solicited and opened during fiscal year 1985 but where contract was not "made"—awarded—until after fiscal year 1985's expiration when continuing resolution was in effect 318
Agency's refusal to apply a percentage differential in evaluating price offered by labor surplus area concern was proper where statutory authority to do so had expired as of time of award, and was consistent with the provisions of the solicitation relating to evaluation of bids, which specifically warned bidders that "if no legislation is in effect at time of award which authorizes the payment of a price differential, no evaluation factor will be added to the offers submitted.". 318
Omissions (*See* BIDS, Omissions, Prices in Bids)
Pricing Response Nonresponsive
Where an IFB contemplated the award of a firm, fixed-price requirements contract, a bid accompanied by a cover letter in which the bidder stated that its prices were subject to renegotiation if there were any change in the estimated quantities provided in the IFB was properly rejected as nonresponsive because the statement could reasonably be interpreted as indicating the bidder's intent to offer other than a firm, fixed price 377
Protests (*See* CONTRACTS, Protests)

BIDS—Continued Page

Rejection

Nonresponsive (*See* BIDS, Responsiveness)

Propriety

It is the bidder's responsibility to assure timely arrival of its bid at the place of bid opening, and a bid that is late because the bidder failed to allow sufficient time for delivery of the bid may not be considered for award. The fact that bids had not been opened when the late bid was received is irrelevant, since the importance of maintaining the integrity of the competitive bidding system outweighs any monetary savings that might be obtained by considering a late bid. 71

Bid which contains an inconsistency between item prices and total bid price and is therefore susceptible to more than one bid price interpretation, one of which may make the bid high, must be rejected as ambiguous. 76

Responsiveness

Amendments to invitation

Failure to acknowledge (*See* BIDS, Invitation for bids, Amendment, Failure to Acknowledge)

Bid Guarantee Requirement

A commercial form bid bond which limited the surety's obligation to only the difference between the protester's bid and the lowest amount at which the government might be able to award the contract was properly determined to be inadequate, thus requiring rejection of the protester's bid as nonresponsive, since Standard Form 24 is reasonably read as allowing the government to recover "any cost" of procuring the work from another source, including the additional costs associated with a reprocurement 54

Determination

On Basis of Bid as Submitted at Bid Opening

Bid under small business set-aside which fails to indicate that supplies to be furnished will be manufactured or produced by a small business concern is nonresponsive. Moreover, information obtained after bid opening may not be used to make bid responsive 33

Exceptions taken to Invitation Terms

A commercial form bid bond which limited the surety's obligation to only the difference between the protester's bid and the lowest amount at which the government might be able to award the contract was properly determined to be inadequate, thus requiring rejection of the protester's bid as nonresponsive, since Standard Form 24 is reasonably read as allowing the government to recover "any cost" of procuring the work from another source, including the additional costs associated with a reprocurement 54

Failure to Furnish Something Required

Where a solicitation for surgical evacuators required bid samples to conform to the specifications listed in the solicitation, the agency properly rejected as nonresponsive a bid that was accompanied by a sample that did not meet those specifications. Moreover, the bid cannot be corrected after bid opening to make it responsive 783

Failure to provide a duplicate copy of the bid is a minor informality or irregularity. 23

BIDS—Continued Page
Responsiveness—Continued
Failure to Furnish Something Required—Continued
Manufacturer, Authorized Dealer, etc. Representations
Failure of the low bidder to list specific manufacturers and suppliers of equipment the bidder was required to supply does not require rejection of the bid where the listing requirement was not intended to prevent bid shopping, but rather was intended to insure the use of acceptable suppliers and manufacturers, and the low bidder agreed to use suppliers which had been given prior approval by the procuring agency and were on a list included in the invitation 505
Small Business Representation
Bid under small business set-aside which fails to indicate that supplies to be furnished will be manufactured or produced by a small business concern is nonresponsive. Moreover, information obtained after bid opening may not be used to make bid responsive 33
Nonresponsive Alternative Bid
Effect on Conforming Base Bid or Other Alternative
When a bidder submits a bid offering either of two products, one of which will meet the specifications and the other of which will not, the government is not precluded from accepting that option which meets the solicitation's requirements 130
Offer of Compliance
After Bid Opening
Acceptance Not Authorized
Bid under small business set-aside which fails to indicate that supplies to be furnished will be manufactured or produced by a small business concern is nonresponsive. Moreover, information obtained after bid opening may not be used to make bid responsive 33
Pricing Response
Minor Deviations From IFB Requirements
Bid based on a price per square foot, rather than per linear foot as required by the solicitation, is responsive when the intended price per linear foot is apparent from the face of the bid, the bid commits the contractor to perform the exact thing called for in the solicitation at a fixed price, and no other bidder is prejudiced by the agency's waiver of this defect as a minor irregularity 240
Failure of the low bidder to bid on an option item added by amendment is not a material deviation requiring rejection of the bid as nonresponsive when the option price is not evaluated 255
Where prices were provided for all items and subitems on a bidding schedule, the fact that the contracting officer had to add the individual item prices and fill in the totals the bidder had left blank does not mean the bid was nonresponsive, as the bidder showed his intent to be bound by the pricing of all items and subitems. Failure to add the prices of the items was only a mere clerical error, and the mere mechanical exercise of addition shows the total bid amount intended 23
A bidder's failure to initial changes in a bid is a matter of form that may be considered an informality and waived if the bid leaves no doubt as to the intended price 23

178-403 O - 87 - 5 : QL 3

BIDS—Continued Page
Responsiveness—Continued
Pricing Response—Continued
Nonresponsive to IFB Requirements
Failure to Bid Firm, Fixed Price
Where an IFB contemplated the award of a firm, fixed-price requirements contract, a bid accompanied by a cover letter in which the bidder stated that its prices where subject to renegotiation if there were any change in the estimated quantities provided in the IFB was properly rejected as nonresponsive because the statement could reasonably be interpreted as indicating the bidder's intent to offer other than a firm, fixed price 377
Test to Determine
Unqualified Offer to Meet all Solicitation Terms
Bid based on a price per square foot, rather than per linear foot as required by the solicitation, in responsive when the intended price per linear foot is apparent from the face of the bid, the bid commits the contractor to perform the exact thing called for in the solicitation as a fixed price, and no other bidder is prejudiced by the agency's waiver of this defect as a minor irregularity 240
Where prices were provided for all items and subitems on a bidding schedule, the fact that the contracting officer had to add the individual item prices and fill in the totals the bidder had left blank does not mean the bid was nonresponsive, as the bidder showed his intent to be bound by the pricing of all items and subitems. Failure to add the prices of the items was only a mere clerical error, and the mere mechanical exercise of addition shows the total bid amount intended 23
The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation. The required commitment to the terms of the invitation need not be made in the manner specified by the solicitation; all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirements 505
What Constitutes
The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation. The required commitment to the terms of the invitation need not be made in the manner specified by the solicitation; all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirements 505
Small Business Concerns
Contract Awards (*See* CONTRACTS, Small Business Concerns, Awards)
Specifications (*See* BIDS, Invitation for Bids, Specifications)
Waiver, etc. of Error (*See* BIDS, Mistakes, Waiver, etc. of Error)

Page

BOARDS, COMMITTEES, AND COMMISSIONS
Interagency Participation
Appropriations
Availability
The General Accounting Office agrees with the Veterans Administration's legal analysis that a general Government-wide Appropriation Act fiscal year restriction (currently contained in section 608 of the Treasury, Postal Service, and General Government Appropriation Act for fiscal year 1986, H.R. 3036) on the use of appropriated funds for interagency financing of boards or commission "which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality," applies to the Federal Executive Boards since the Boards do not have statutory approval for interagency financing. However, single agency financing of the Boards is not prohibited by the restriction 689
Interagency Participation
Fund Contributions
The General Accounting Office agrees with the Veterans Administation's legal analysis that a general Government-wide Appropriation Act fiscal year restriction (currently contained in section 608 of the Treasury, Postal Service, and General Government Appropriation Act for fiscal year 1986, H.R. 3036) on the use of appropriated funds for interagency financing of boards or commissions "which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality," applies to the Federal Executive Boards since the Boards do not have statutory approval for interagency financing. However, single agency financing of the Boards is not prohibited by the restriction 689

BONDS
Bid
Defective (*See* BONDS, Bid, Deficiencies)
Deficiencies
Amount
A commercial form bid bond which limited the surety's obligation to only the difference between the protester's bid and the lowest amount at which the government might be able to award the contract was properly determined to be inadequate, thus requiring rejection of the protester's bid as nonresponsive, since Standard Form 24 is reasonably read as allowing the government to recover "any cost" of procuring the work from another source, including the additional costs associated with a reprocurement 54
Bid Rejection
A commercial form bid bond which limited the surety's obligation to only the difference between the protester's bid and the lowest amount at which the government might be able to award the contract was properly determined to be inadequate, thus requiring rejection of the protester's bid as nonresponsive, since Standard Form 24 is reasonably read as allowing the government to recover "any cost" of procuring the work from another source, including the additional costs associated with a reprocurement 54

BONDS—Continued Page
Bid—Continued
Deficiencies—Continued
Criteria for Acceptance
As a general rule, a bid bond which erroneously references another solicitation number is materially defective in the absence of other objective evidence which clearly establishes at the time of bid opening that the bond was intended to cover the bid for which it was actually submitted. If uncertainty exists that the bond is enforceable by the government against the surety, the bond is unacceptable and the bid must be rejected as nonresponsive 871
Form Variances
The use of a commercial form bid bond instead of Standard Form 24 is not *per se* objectionable; rather, the question is whether the commercial form represents a significant departure from the rights and obligations of the parties set forth in the standard form 54
A commercial form bid bond which lifted the surety's obligation to only the difference between the protester's bid and the lowest amount at which the government might be able to award the contract was properly determined to be inadequate, thus requiring rejection of the protester's bid as nonresponsive, since Standard Form 24 is reasonably read as allowing the government to recover "any cost" of procuring the work from another source, including the additional costs associated with a reprocurement 54
Surety
Obligation to Government
Not Established
As a general rule, a bid bond which erroneously references another solicitation number is materially defective in the absence of other objective evidence which clearly establishes at the time of bid opening that the bond was intended to cover the bid for which it was actually submitted. If uncertainty exists that the bond is enforceable by the government against the surety, the bond is unacceptable and the bid must be rejected as nonresponsive 871
Validity
Erroneous Solicitation Number
As a general rule, a bid bond which erroneously references another solicitation number is materially defective in the absence of other objective evidence which clearly establishes at the time of bid opening that the bond was intended to cover the bid for which it was actually submitted. If uncertainty exists that the bond is enforceable by the government against the surety, the bond is unacceptable and the bid must be rejected as nonresponsive 871
Miller Act Coverage
Contract Price Limitation
It is not legally objectionable for a member of a partnership to bid as an individual on several solicitation items, and to include a $25,000 award limitation so that it would not have to secure the Miller Act bond applicable to awards in excess of $25,000, even though its bid, if combined with the partnership's bid, would exceed $25,000 150

BONDS—Continued Page
Responsiveness
Failure to Furnish Something Required
Bonds
Bid
As a general rule, a bid bond which erroneously references another solicitation number is materially defective in the absence of other objective evidence which clearly establishes at the time of bid opening that the bond was intended to cover the bid for which it was actually submitted. If uncertainty exists that the bond is enforceable by the government against the surety, the bond is unacceptable and the bid must be rejected as nonresponsive 871

BUILDINGS
Leases (*See* LEASES)

BUY AMERICAN ACT
Price Differential
Application Propriety
For purpose of applying a statutorily-prescribed differential in the evaluation of bids offering foreign-manufactured "extra high voltage power equipment," Tennessee Valley Authority erred in adopting a definition of that term recited in the statement of the conference managers accompanying the conference committee report on the legislation where the managers' statement indicates they intended to repeat the definition used by the Department of Commerce but erroneously understood it 745

CHECKS
Delivery
Direct to Payee
Generally, Treasury Department Financial Centers should deliver vendor checks directly to payees using United States Postal Service first class mail. However, the Centers may deliver vendor checks to involved agencies for forwarding to payees in cases in which the forwarding agencies determine that there is an administrative, litigative, contractual or ceremonial reason for so doing, provided that the interests of the United States are adequately protected. 81
To Other Than Payee
Generally, Treasury Department Financial Centers should deliver vendor checks directly to payees using United States Postal Service first class mail. However, the Centers may deliver vendor checks to involved agencies for forwarding to payees in cases in which the forwarding agencies determine that there is an administrative, litigative, contractual or ceremonial reason for so doing, provided that the interests of the United States are adequately protected 81

CLAIMS
Assignments
Contracts (*See* CONTRACTS, Payments, Assignments)
Payments (*See* CONTRACTS, Payments, Assignments)
Set-Off (*See* SET-OFF, Contract Payments, Assignments)

CLAIMS—Continued Page
Evidence to Support
Burden of Proof
Claimant's Responsibility
The Forest Service assessed a claim against one of its forest rangers to recover $1,475.15 (plus interest) for unauthorized expenditures which he directed his staff to make in order to expand and improve the building which serves as headquarters for the Jemez District of the Santa Fe National Forest. Pursuant to General Accounting Office (GAO)'s settlement authority under 31 U.S.C. 3702 (1982), and the agency's regulations which provide for assessing financial liability against Forest Service employees, GAO finds that the legal basis of the claim has not been adequately established. Therefore, collection should be terminated 177
Sufficiency
The Forest Service assessed a claim against one of its forest rangers to recover $1,475.15 (plus interest) for unauthorized expenditures which he directed his staff to make in order to expand and improve the building which serves as headquarters for the Jemez District of the Santa Fe National Forest. Pursuant to General Accounting Office (GAO)'s settlement authority under 31 U.S.C. 3702 (1982), and the agency's regulations which provide for assessing financial liability against Forest Service employees, GAO finds that the legal basis of the claim has not been adequately established. Therefore, collection should be terminated 177
Meritorious
Reporting to Congress (*See* CLAIMS, Report to Congress)
Private Property Damages Due To Government Activities (*See* PROPERTY, Private, Damage, Loss, etc., Governmental Liability)
Reporting to Congress
Meritorious Claims Act
Appropriate for Submission
General Accounting Office (GAO) will no longer follow its general policy of not referring erroneous advice cases to Congress under the Meritorious Claims Act, 31 U.S.C. 3702(d). Instead, each such case will be considered for submission based on its individual merits. Accordingly, GAO submits to Congress claim of new appointee to a manpower-shortage position who was erroneously issued travel orders authorizing reimbursement for temporary quarters subsistence expenses, real estate expenses, and miscellaneous expenses where the appointee reasonably relied on this erroneous authorization and incurred substantial costs 679
Statutes of Limitation (*See* STATUTES OF LIMITATION) Claims
Waiver
Debt Collections (*See* DEBT COLLECTIONS, Waiver)

COMMERCE BUSINESS DAILY (*See* ADVERTISTING, *Commerce Business Daily*)

Page

COMPENSATION

Additional

Supervision of Employees

Negotiated Agreements

Civil Service Reform Act, 1978, Effect

Prevailing Wage Practice Consideration

Supervisors of prevailing rate employees seek reconsideration of our prior decision, 64 Comp. Gen. 100 (1984), holding that the supervisors are subject to the statutorily-imposed pay limitation which does not apply to their subordinates, who negotiate their pay increases. We affirm our prior decision since the supervisors are clearly covered by the pay increase limitation and are not specifically excluded from the limitation. Prior decisions involving pay linkage between groups of prevailing rate employees are distinguished since they do not deal with specific statutory pay limitations. Prior court decisions involving prevailing rate employees who are not covered by the statutory pay limitation are also distinguished on the same basis. 434

Aggregate Limitation

Concurrent Military Reservist and Civilian Service

A statutory provision limiting the combined military and civilian compensation of military Reserve technicians to the rate payable for level V of the Executive Schedule should have been applied on a biweekly pay period basis rather than an annual basis, since the statutory language and legislative history indicate that it is to be applied similarly to related statutory pay rate limitations for other employees which are applied on a pay period basis 78

Backpay

Removals, Suspensions, etc.

Deductions from Back Pay (*See* **COMPENSATION, Removals, Suspensions, etc., Deductions from Back Pay**)

Retroactive Promotions

Claim Denied

When an agency assigns employees to the merit pay system and then reassigns them back to the General Schedule system, those employees are not entitled to retroactive pay and within-grade waiting time credit equal to what they would have accrued if they had remained in the General Schedule system, unless administrative error occurred. An Agency that properly converted an employee to merit pay status and then reconverted him to the General Schedule upon its prospective adoption of a new standard of employee coverage under the merit pay system, and properly assigned the employee to comparable pay levels, acted in conformity with the relevant statutes and regulations, and did not commit administrative error. Therefore, the employee is not entitled to additional pay and within-grade waiting time credit based on his claim that he was improperly assigned to the merit pay system 485

COMPENSATION—Continued Page

Collective Bargaining

Authority to Bargain

The Saint Lawrence Seaway Development Corporation proposes an 8-hour shift for its maintenance and marine employees including a 15-minute rest break at 9 a.m. and a paid 20-minute combination rest/meal period at 1 p.m. A noncompensable lunch period may not be extended or shortened by a paid rest period because there exists a legal distinction in both origin and effect between a rest and a meal period. Time for a meal period is not compensable if the employees are not required to perform substantial duties. On the other hand, time for brief rest periods may be authorized without decrease in compensation 357

Collective Bargaining Agreements

Authority to Bargain

A proposal to establish an 8-hour shift with a paid 20-minute combination rest/meal period may not be implemented. It is clear that the purpose of this period is to provide the employees with a duty-free period for the purpose of eating, and there is no indication of any need for a change from the current situation in which the employees are not required to perform substantial duties during the meal period. Accordingly, the employees may not be compensated for the rest/meal period 357

Prevailing Rate Employees

Wage Schedule Adjustments

Statutory Limitations

Supervisors

Supervisors of prevailing rate employees seek reconsideration of our prior decision, 64 Comp. Gen. 100 (1984), holding that the supervisors are subject to the statutorily-imposed pay limitation which does not apply to their subordinates, who negotiate their pay increases. We affirm our prior decision since the supervisors are clearly covered by the pay increase limitation and are not specifically excluded from the limitation. Prior decisions involving pay linkage between groups of prevailing rate employees are distinguished since they do not deal with specific statutory pay limitations. Prior court decisions involving prevailing rate employees who are not covered by the statutory pay limitation are also distinguished on the same basis. 434

Deceased employees (*See* **DECENDENTS' ESTATES, Compensation**)

De facto **Status of Employees** (*See* **OFFICERS AND EMPLOYEES,** *De facto*)

Double

Concurrent Military Reservist and Civilian Service

A statutory provision limiting the combined military and civilian compensation of military Reserve technicians to the rate payable for level V of the Executive Schedule should have been applied on a biweekly pay period basis rather than an annual basis, since the statutory language and legislative history indicate that it is to be applied similarly to related statutory pay rate limitations for other employees which are applied on a pay period basis 78

COMPENSATION—Continued Page

Duty Performance

By Other than Appointee

A Civil Service annuitant claims entitlement to full compensation, in addition to his annuity, for temporary full-time duties allegedly performed following his retirement. Under the provisions of 5 U.S.C. 8344(a), the salary of a retired Civil Service annuitant must be reduced by the amount of his annuity during any period of actual employment. However, since the claimant states that he was not appointed to a position following retirement, which statement has been confirmed by the agency's personnel office, he is not entitled to any compensation, reduced or otherwise, for the period in question..... 21

A Civil Service annuitant claims entitlement to compensation in addition to his annuity for temporary full-time duties allegedly performed following his retirement. He states that he was never appointed to a position following his retirement, but contends that his supervisor accepted his offer to continue working after retirement, and said that he would find a way to pay him. The claim is denied. Under 31 U.S.C. 1342, an officer or employee of the government is prohibited from accepting the voluntary services of an individual. Further, the government is not bound by the unauthorized acts of its agents, even where the agent may be unaware of the limitations on his authority..... 21

Evidence

The Department of Housing and Urban Development proposes to allow an employee with multiple sclerosis to work at home during temporary periods when the employee will not be able to commute to an office because of that illness. While generally Federal employees may not be compensated for work performed at home rather than at their duty stations, under limited circumstances, when actual work performance can be measured against established quantity and quality norms so as to verify time and attendance reports, and there is a reasonable basis to justify the use of a home as a workplace, payment of salaries for work done at home may be authorized under an established and approved program. Thus, if the agency has determined that appropriate measures have been taken to ensure quantity and quality of work done and time and attendance, the employee may be paid for work done at home..... 826

Increases

Limitations

Applicability

Civilian faculty members of the Uniformed Services University of the Health Sciences question whether their pay is subject to statutory pay caps imposed on federal salaries for fiscal years 1979-1981. Although the salaries of the faculty members are set by the Secretary of Defense under 10 U.S.C. 2113(f) to be comparable with other medical schools in the vicinity of the District of Columbia, we hold these salaries are subject to the statutory pay caps imposed by Congress for fiscal years 1979 and 1981. Pay increases for these positions were also limited by administrative determination for fiscal year 1980 to be comparable with other Federal executive pay increases. A recent court decision involving backpay for Senior Executive Service employees is not applicable to these faculty members..... 542

COMPENSATION—Continued Page

Judges

Federal (*See* **COURTS, Judges, Compensation**)

Limitation (*See* **COMPENSATION, Aggregate limitation**)

Negotiation (*See* **COMPENSATION, Collective Bargaining Agreements**)

Overtime

Administrative Workweek

Where General Schedule employees' basic workweek contains hours of work in excess of 8 in a day payable at an overtime rate, these overtime hours may not be counted in determining whether the employees have worked hours in excess of 40 hours in an administrative workweek for purposes of computing "title 5" overtime compensation under 5 U.S.C. 5542 and the implementing regulation, 5 C.F.R. 550.111(a)..... 273

Call-back time (*See* **COMPENSATION, Overtime, Irregular, Unscheduled**)

Entitlement

Where General Schedule employees' basic workweek contains hours of work in excess of 8 in a day payable at an overtime rate, these overtime hours may not be counted in determining whether the employees have worked hours in excess of 40 hours in an administrative workweek for purposes of computing "title 5" overtime compensation under 5 U.S.C. 5542 and the implementing regulation, 5 C.F.R. 550.111(a)..... 273

Fair Labor Standards Act

Computation

An employee who is "nonexempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., must have overtime compensation computed under both title 5 of the United States Code and the FLSA. The employee is then entitled to whichever computation results in the greater total compensation. The claimants here are entitled to payment under the FLSA since their total compensation computed under that Act is greater than under title 5, United States Code..... 273

Fair Labor Standards Act *v.* **Other Pay Laws**

An employee who is "nonexempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., must have overtime compensation computed under both title 5 of the United States Code and the FLSA. The employee is then entitled to whichever computation results in the greater total compensation. The claimants here are entitled to payment under the FLSA since their total compensation computed under that Act is greater than under title 5, United States Code..... 273

Irregular, Unscheduled

Federal employees may be allowed overtime compensation based on the actual time involved for unscheduled overtime work they are called upon to perform at their places of residence, provided the work is of a substantial nature, and procedures are established for verifying the time and performance of the work. Federal Aviation Administration employees may be paid overtime compensation on that basis on occasions when they are called upon to use automated data processing equipment in their homes to adjust malfunctioning navigation instruments located elsewhere..... 49

COMPENSATION—Continued Page
Overtime—Continued
Irregular, Unscheduled—Continued
"Call-Back" Overtime
The minimum 2-hour credit for unscheduled overtime work performed by Federal employees under the "call-back" overtime provisions of 5 U.S.C. 5542(b)(1) is for the purpose of assuring adequate compensation to recalled employees for the particular inconveniences involved in their having to prepare for work and travel back to their work stations. Hence, the minimum 2-hour credit is not available on every occasion an employee performs unscheduled overtime work, notwithstanding that generally all unscheduled work inherently involves a certain amount of personal inconvenience, and employees who are called upon to perform unscheduled overtime work entirely within their homes are therefore ineligible for the statutory 2-hour minimum work credit 49
Traveltime
Administratively Controllable
Entitlement to overtime compensation by Federal employees while in a travel status under 5 U.S.C. 5542(b)(2)(B)(iv) requires that travel result from an event which could not be scheduled or controlled administratively and that there be an immediate official necessity requiring travel in connection with the event. Thus, travel performed by an employee to attend a scheduled event conducted by a licensee of the employee's agency does not qualify as travel to or from an event over which the Government had a total lack of control, and the employee may not be paid overtime compensation for that travel 772
Criteria
Entitlement to overtime compensation by Federal employees while in a travel status under 5 U.S.C. 5542(b)(2)(B)(iv) requires that travel result from an event which could not be scheduled or controlled administratively and that there be an immediate official necessity requiring travel in connection with the event. Thus, travel performed by an employee to attend a scheduled event conducted by a licensee of the employee's agency does not qualify as travel to or from an event over which the Government had a total lack of control, and the employee may not be paid overtime compensation for that travel 772
Uncommon Tours of Duty
Where General Schedule employees' basic workweek contains hours of work in excess of 8 in a day payable at an overtime rate, these overtime hours may not be counted in determining whether the employees have worked hours in excess of 40 hours in an administrative workweek for purposes of computing "title 5" overtime compensation under 5 U.S.C. 5542 and the implementing regulation, 5 C.F.R. 550.111(a) 273
An employee who is "nonexempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., must have overtime compensation computed under both title 5 of the United States Code and the FLSA. The employee is then entitled to whichever computation results in the greater total compensation. The claimants here are entitled to payment under the FLSA since their total compensation computed under that Act is greater than under title 5, United States Code 273

COMPENSATION—Continued Page

Overtime—Continued

Work at Home

The minimum 2-hour credit for unscheduled overtime work performed by Federal employees under the "call-back" overtime provisions of 5 U.S.C. 5542(b)(1) is for the purpose of assuring adequate compensation to recalled employees for the particular inconveniences involved in their having to prepare for work and travel back to their work stations. Hence, the minimum 2-hour credit in not available on every occasion an employee performs unscheduled overtime work, notwithstanding that generally all unscheduled work inherently involves a certain amount of personal inconvenience, and employees who are called upon to perform unscheduled overtime work entirely within their homes are therefore ineligible for the statutory 2-hour minimum work credit 49

Federal employees may be allowed overtime compensation based on the actual time involved for unscheduled overtime work they are called upon to perform at their places of residence, provided the work is of a substantial nature, and procedures are established for vertifying the time and performance of the work. Federal Aviation Administration employees may be paid overtime compensation on that basis on occasions when they are called upon to use automated data processing equipment in their homes to adjust malfunctioning navigation instruments located elsewhere 49

Work in Excess of Daily But Not Weekly Limitation

Where General Schedule employees' basic workweek contains hours of work in excess of 8 in a day payable at an overtime rate, these overtime hours may not be counted in determining whether the employees have worked hours in excess of 40 hours in an administrative workweek for purposes of computing "title 5" overtime compensation under 5 U.S.C. 5542 and the implementing regulation, 5 C.F.R. 550.111(a) 273

An employee who is "nonexempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., must have overtime compensation computed under both title 5 of the United States Code and the FLSA. The employee is then entitled to whichever computation results in the greater total compensation. The claimants here are entitled to payment under the FLSA since their total compensation computed under that Act is greater than under title 5, United States Code 273

COMPENSATION—Continued Page

Periodic Step Increases

Service Credits

When an agency assigns employees to the merit pay system and then reassigns them back to the General Schedule system, those employees are not entitled to retroactive pay and within-grade waiting time credit equal to what they would have accrued if they had remained in the General Schedule system, unless administrative error occurred. An agency that properly converted an employee to merit pay status and then reconverted him to the General Schedule upon its prospective adoption of a new standard of employee coverage under the merit pay system, and properly assigned the employee to comparable pay levels, acted in conformity with the relevant statutes and regulations, and did not commit administrative error. Therefore, the employee is not entitled to additional pay and within-grade waiting time credit based on his claim that he was improperly assigned to the merit pay system 485

Upon Reconversion to General Schedule

After Erroneous Conversion to Merit Pay

Propriety of Agency Action

When an agency assigns employees to the merit pay system and then reassigns them back to the General Schedule system, those employees are not entitled to retroactive pay and within-grade waiting time credit equal to what they would have accrued if they had remained in the General Schedule system, unless administrative error occurred. An agency that properly converted an employee to merit pay status and then reconverted him to the General Schedule upon its prospective adoption of a new standard of employee coverage under the merit pay system, and properly assigned the employee to comparable pay levels, acted in conformity with the relevant statutes and regulations, and did not commit administrative error. Therefore, the employee is not entitled to additional pay and within-grade waiting time credit based on his claim that he was improperly assigned to the merit pay system 485

Prevailing rate employees

Negotiated agreements (*See* **COMPENSATION, Collective Bargaining Agreements**)

Wage Schedule Adjustments

Statutory Limitation

Applicability

Supervisors of prevailing rate employees seek reconsideration of our prior decision, 64 Comp. Gen. 100 (1984), holding that the supervisors are subject to the statutorily-imposed pay limitation which does not apply to their subordinates, who negotiate their pay increases. We affirm our prior decision since the supervisors are clearly covered by the pay increase limitation and are not specifically excluded from the limitation. Prior decisions involving pay linkage between groups of prevailing rate employees are distinguished since they do not deal with specific statutory pay limitations. Prior court decisions involving prevailing rate employees who are not covered by the statutory pay limitation are also distinguished on the same basis. 434

COMPENSATION—Continued Page

Rates

Highest Previous Rate

Administrative Discretion

Employee accepted grade GS–3, step 1 position with Veterans Administration (VA) but seeks retroactive salary adjustment and backpay because the VA did not allow her additional steps in grade GS–3 based on her highest previous rate (grade GS–6, step 8). The employee's claim is denied since (1) payment of the highest previous rate is discretionary with the agencies, (2) applicable VA regulations do not require payment of the highest previous rate in these circumstances, and (3) the VA's determination was not shown to be arbitrary, capricious, or an abuse of discretion. 517

Applicability

Employee accepted grade GS–3, step 1 position with Veterans Administration (VA) but seeks retroactive salary adjustment and backpay because the VA did not allow her additional steps in grade GS–3 based on her highest previous rate (grade GS–6, step 8). The employee's claim is denied since (1) payment of the highest previous rate is discretionary with the agencies, (2) applicable VA regulations do not require payment of the highest previous rate in these circumstances, and (3) the VA's determination was not shown to be arbitrary, capricious, or an abuse of discretion. 517

Removals, Suspensions, etc.

Backpay

Deductions (*See* **COMPENSATION, Removals, Suspensions, etc., Deductions from Back Pay**)

Leave Matters

Lump-sum Payment Deduction

Agency properly deducted from backpay an amount representing the lump-sum annual leave payment made to employee when he was removed. Lump-sum leave payments must be offset from backpay awards. *Vincent T. Oliver,* 59 Comp. Gen. 395 (1980). Waiver is denied because deduction of this amount did not result in a net indebtedness 865

Deductions From Back Pay

Lump-sum Leave Payment

Agency properly deducted from backpay an amount representing the lump-sum annual leave payment made to employee when he was removed. Lump-sum leave payments must be offset from backpay awards. *Vincent T. Oliver,* 59 Comp. Gen. 395 (1980). Waiver is denied because deduction of this amount did not result in a net indebtedness 865

Retirement and Tax Adjustments

The agency's action in offsetting refunded retirement contributions from an employee's backpay award is consistent with Federal Personnel Manual requirements which were sustained in our decision in *Angel F. Rivera,* 64 Comp. Gen. 86 (1984). Therefore, we will not disturb the agency's action, although the issue of whether refunded retirement contributions are deductible from a backpay award is now in litigation. 865

COMPENSATION—Continued Page

Removals, Suspensions, etc.—Continued

Deductions From Back Pay—Continued

Unemployment Compensation

Unemployment compensation benefits must be deducted from backpay awards where state law requires employer, rather than employee, to reimburse the state for overpayments and where appropriate state agency has determined that an overpayment has occurred and has notified employing agency. Here, state agency determined that, since employee would receive backpay for period covered by unemployment compensation, he had been overpaid, and it so notified Veterans Administration (VA). The VA properly deducted the overpayment from backpay. Absent such a state determination and requirements, unemployment compensation should not be deducted from backpay..... 865

Lump-sum Leave Payments (*See* COMPENSATION, Removals, Suspensions, etc, Deductions from Back Pay, Lump-sum Leave Payment)

Severance Pay

Eligibility

Involuntary Separation

Severance pay statute, 5 U.S.C. 5595, is intended to provide a cushion for federal employees who are unexpectedly terminated from their positions, but not for those employees who had an expectation of separation at the time of their appointments. Consistent with this intent, a regulation, 5 C.F.R. 550.704(b)(4)(iii), which denies severance pay to employees of agencies scheduled to expire within 5 years of the employee's date of appointment is valid as applied to agencies which perform an inherently temporary mission and have not been extended. However, the regulation cannot properly be applied to the United States Commission on Civil Rights, which, while literally covered by the regulation, had been in continuous existence for over 20 years at the time the employees seekings severance pay were appointed. Such employees are within the zone of protection intended by the statute since they cannot reasonably be viewed as having an expectation of separation at the time they were appointed..... 753

COMPROMISES

Authority

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

CONTRACTORS

Conflicts of Interest

Organizational

Military and Civilian Procurements

Protest that awardee should not have been awarded a contract because of an organizational conflict of interest is denied where the facts do not demonstrate the existence of circumstances that would preclude the awardee from being objective in performing the contract..... 761

Debarment (*See* BIDDERS, Debarment)

CONTRACTORS—Continued Page

Government Civilian and Military Personnel

Prohibition

An agency may reject an offer, which proposes a social government employee of that agency as a major consultant, even though no actual conflict of interest is found to exist. Because of the longstanding policy against contracting with government employees, the agency has a reasonable basis for application of this restrictive policy to the protester's offer, even though notice of this policy was not given in statute, regulation or the Request for Proposal (RFP)..... 87

Responsibility

Contracting Officer's Affirmative Determination Accepted (*See* **CONTRACTORS, Responsibility, Determination, Review by GAO, Affirmative Finding Accepted**)

Determination

Burden of Proof

Protest that contracting officer failed to comply with Federal Acquisition Regulation 19.602-1(c)(2), by not including a letter from the protester with the agency referral to the Small Business Administration (SBA) for a certificate of competency (COC) determination is dismissed because the contracting officer is not required to refer to SBA information which does not support the contracting officer's determination that the prospective contractor is nonresponsible and because the burden is on the contractor to prove its competency to the SBA through its application for a COC..... 74

Definitive Responsibility Criteria

Where a bidder is found to be responsible even though it does not meet definitive responsibility criteria requirements set out in the solicitation, and the agency deletes from subsequent solicitations the requirements for a specific minimum number of years of experience in the same areas of expertise, the definitive responsibility criteria in the first solicitation overstated the agency's minimum needs and unduly restricted competition..... 510

Review by GAO

Affirmative Finding Accepted

General Accounting Office will not review an affirmative determination of responsibility unless the possibility of fraud or bad faith on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Technical specifications which merely describe the items offerors are to agree to supply in the event they receive the award are not definitive responsibility criteria which instead establish standards related to an offeror's ability to perform the contract..... 663

The General Accounting Office will not review an allegation that an offeror is not responsible because proposed key personnel may be committed to work on another contract, since this allegation does not fall within the exception under which affirmative determinations of responsibility are reviewed..... 205

Protest that awardee will not meet contract requirements concerns affirmative determination of responsibility, which will not be considered except in limited circumstances not present here, or is a matter of contract administration not for consideration under GAO's Bid Protest Regulations..... 109

CONTRACTORS—Continued Page
Responsibility—Continued
Determination—Continued
Small business concerns (*See* CONTRACTS, Small Business Concerns, Awards, Responsibility Determination)
Teaming arrangement (*See* JOINT VENTURES)

CONTRACTS
Advertised Procurements (*See* BIDS)
Amendments
Modifications (*See* CONTRACTS, Modifications)
Appropriation Obligation (*See* APPROPRIATIONS, Obligation)
Architect, Engineering, etc. Services
Appropriation Availability
Protest contending that the award of an architectural and engineering (A-E) contract for work to be performed in Alaska to a non-Alaskan firm violates section 8078 of the Department of Defense (DOD) Appropriations Act of 1986, which requires, under certain circumstances, that firms which perform work in Alaska hire Alaskan residents, is denied. The act does not preclude the award of A-E contracts for work to be performed in Alaska to non-Alaskan firms, but, in effect, requires non-Alaskan firms to hire Alaskan residents for work performed in Alaska under DOD contracts 651
Appropriations
Fiscal year appropriations
Availability Beyond (*See* APPROPRIATIONS, Fiscal Year, Availability Beyond, Contracts)
Architect, Engineering, etc. Services
Contractor Selection Base
"Brooks Bill" Application (*See* CONTRACTS, Architect, Engineering, etc. Services, Procurement Practices)
Performance
Faulty
Faulty design by an architect-engineer (A-E) caused the Air Force to incur additional corrective expenses in the ensuring construction contract. The corrective expenses—added costs paid to construction contractor plus added amounts paid to Army Corps of Engineers for supervision and administration (S&A)—were charged to Air Force's 1982 5-year Military Construction appropriation. In 1985, Government recovered the amount of the additional costs from the A-E. Since the appropriation charged was still available for obligation at the time of the recovery, it may be reimbursed from the recovery to the extent of the additional costs actually incurred. However, portion of recovery representing S&A expenses in excess of amount actually charged Air Force must be deposited as miscellaneous receipts..... 838
Procurement Practices
Brooks Bill Applicability
Protest against an evaluation preference for minority-owned firms contained in a synopsis for a small business set-aside for architect-engineer (A-E) services issued under the Brooks Act, 40 U.S.C. 541-544 (1982), is denied because the procuring agency has statutory authority to give preference to minority-owned or-controlled small business firms under the Small Business Act, 15 U.S.C. 644(q) (1982)..... 828

CONTRACTS—Continued Page
Architect, Engineering, etc. Services—Continued
Procurement Practices—Continued
Brooks Bill Applicability—Continued
Brooks Act procedures for contracting are only to be used for architect-engineer solicitations and are not to be used to procure health support services 1
Procedures
Since the Brooks Act requires contracts with architect-engineer firms of demonstrated competence, and implementing regulations require agencies to consider past performance in terms of cost, quality of work, and compliance with performance schedules, protest based on failure of Commerce Business Daily request for expressions of interest to state that past performance will be evaluated is without merit 784
Evaluation of Competitors
Applicability of Stated Criteria
Protest against an evaluation preference for minority-owned firms contained in a synopsis for a small business set-aside for architect-engineer (A-E) services issued under the Brooks Act, 40 U.S.C. 541-544 (1982), is denied because the procuring agency has statutory authority to give preference to minority-owned or -controlled small business firms under the Small Business Act, 15 U.S.C. 644(q) (1982)... 828
When selection criterion involving equitable distributions of architect-engineer contracts among small and minority business firms that have not previously had government contracts is no longer included in applicable regulations, consideration of this factor is not legally required 784
When protesting architect-engineer firm proposes five individuals as key personnel, specialists, or consultants for a particular project. While awardee plans to do 100 percent of the work himself, agency's evaluation of top three individuals proposed by protester, rather than only one as for awardee, is not improper 784
In procurement conducted under the Brooks Act, 40 U.S.C. 541-544 (1982), the contracting agency is required to consider the location of an architect-engineer firm and its knowledge of the locality of the project—unless application of the criterion would not leave an appropriate number of qualified firms. Higher evaluation score for location closer to project is reasonable 476
Protest that the architect-engineer (A-E) firm selected as the most highly qualified A-E firm did not comply with state licensing laws is denied where the statement of work only required the use of a registered surveyor, the awardee proposed to use a registered surveyor, and a state investigation indicated that the awardee hired licensed surveyors 476
Discussions
The discussions with three architect-engineer (A-E) firms—as to anticipated concepts and the relative utility of alternative methods of approach—required under the Brooks Act, 40 U.S.C. 541-544 (1982), should contribute to making possible a meaningful ranking of the A-E firms. Accordingly, they should occur prior to the selection of the most highly qualified firm. Moreover, they may include questions reasonably related to an evaluation of a firm's qualification 476

CONTRACTS—Continued Page
Architect, Engineering, etc. Services—Continued
Procurement Practices—Continued
Evaluation of Competitors—Continued
Discussions—Continued
Evaluator's inquiry as to cost of protester's equipment, made during discussions which preceded the final ranking of architect-engineer firms, has not been shown to have been an inappropriate concern and in any event did not prejudice the protester where (1) agency reports that question was motivated only by personal interest and that the answer was not considered in evaluation, (2) nothing in record indicates otherwise, and (3) there is no showing that the cost of the equipment—as opposed to the cost of personnel—was such that it would be a substantial factor in determining the likely fee 476
Evaluation Board
Contracting agency did not act unreasonably when it failed to inform the board evaluating the qualifications of architect-engineer firms of the allegation that one firm had failed to fully comply with a requirement in a prior contract for use of a registered surveyor where the question of licensing is unresolved and pending before the state licensing authority 476
Automatic data processing systems
(*See* EQUIPMENT, Automatic data processing systems)
Awards
Effective Date
Where the contracting agency did not transmit any written notice of award to offeror, and informed the offeror that a contract would not be signed until a date when the contracting officer would be available, it should have been clear to the offeror that award had not been made; meetings between the offeror and agency and ancillary unsigned contract documents prepared by the agency indicated only that the agency planned to make an award to the offeror, and were not substitutes for a proper award by the contracting officer 347
Erroneous
Where a solicitation for indefinite quantities of oxygen solicits prices for gaseous and liquid oxygen supplies, but provides that the contractor may provide whichever type of oxygen it prefers, evaluation based on the prices for both types of oxygen provides no assurance that the low evaluated price will result in the lowest actual cost to the government and, thus, provides no valid basis award 823
Multiple
Propriety
Where solicitation permitted multiple awards on the line items in the bid schedule and did not prohibit bids which restricted award to combinations of line items, award properly was made to bidder submitting low total bid even though bid was conditioned on award of certain combination of line items 336
Negotiated contracts (*See* CONTRACTS, Negotiation, Awards)

CONTRACTS—Continued Page
Awards—Continued
Notice
What Constitutes Notice
Where the contracting agency did not transmit any written notice of award to offeror, and informed the offeror that a contract would not be signed until a date when the contracting officer would be available, it should have been clear to the offeror that award had not been made; meetings between the offeror and agency and ancillary unsigned contract documents prepared by the agency indicated only that the agency planned to make an award to the offeror, and were not substitutes for a proper award by the contracting officer 347
Procedures Leading to Award
General Accounting Office Review
Where the contracting agency did not transmit any written notice of award to offeror, and informed the offeror that a contract would not be signed until a date when the contracting officer would be available, it should have been clear to the offeror that award had not been made; meetings between the offeror and agency and ancillary unsigned contract documents prepared by the agency indicated only that the agency planned to make an award to the offeror, and were not substitutes for a proper award by the contracting officer 347
Propriety
Ambiguous Specifications
Where a solicitation for indefinite quantities of oxygen solicits prices for gaseous and liquid oxygen supplies, but provides that the contractor may provide whichever type of oxygen it prefers, evaluation based on the prices for both types of oxygen provides no assurance that the low evaluated price will result in the lowest actual cost to the government and, thus, provides no valid basis for award .....
Separable of Aggregate
Single Award
Propriety
Where solicitation permitted multiple awards on the line items in the bid schedule and did not prohibit bids which restricted award to combinations of line items, award properly was made to bidder submitting low total bid even though bid was conditioned on award of certain combination of line items 336
Small Business Concerns (*See* CONTRACTS, Small Business Concerns)
Termination (*See* CONTRACTS, Termination)
Bid Procedures (*See* BIDS)
Bids
Generally (*See* BIDS)
Bonds (*See* BONDS)
Brooks Act
General Services Administration
Responsibilities Under Act
Automatic Data Processing Equipment Procurement (*See* EQUIPMENT, Automatic Data Processing Systems, General Services Administration, Responsibilities Under Brooks Act)
Brooks Bill Applicability (*See* CONTRACTS, Architect, Engineering, etc. Services)

CONTRACTS—Continued Page

Brooks Act—Continued

General Services Administration—Continued

Responsibilities under Act—Continued

Buy American Act (*See* BUY AMERICAN ACT)

Change Orders

Contract Modification (*See* CONTRACTS, Modification, Change Orders)

Competitive System

Negotiation Procurement (*See* CONTRACTS, Negotiation, Competition)

Correction (*See* CONTRACTS, Modification)

Cost-type

Negotiations (*See* CONTRACTS, Negotiation, Cost-type)

Damages

Liquidated

Actual Damages *v.* Penalty

Provision in the performance requirements summary which permits the government to deduct from the payment to the contractor an amount for the untimely delivery of preliminary audiovisual material for review and editing by agency officials does not impose an impermissible penalty. Although protester claims that the government will suffer no damage so long as the final print is delivered on time as required under the specifications, protester has failed to show that it was unreasonable for the agency to expect that in some instance, the government might suffer administrative inconvenience or insufficient time for a meaningful review if the preliminary materials are not delivered on time 92

Protest that a provision in the performance requirements summary—which permits the government to deduct amounts for unsatisfactory services—imposes an impermissible penalty because the agency selected the same allowable deviation—the permissible number of defects—and the same method of surveillance, by random sampling, for several deduction categories is denied where the protester fails to show that the agency choices were arbitrary, unreasonable or otherwise improper 92

Davis-Bacon Act (*See* CONTRACTS, Labor Stipulations Davis-Bacon Act)

CONTRACTS—Continued Page

Default

Excess Costs

Collection

Disposition

Faulty design by an architect-engineer (A-E) caused the Air Force to incur additional corrective expenses in the ensuing construction contract. The corrective expenses—added costs paid to construction contractor plus added amounts paid to Army Corps of Engineers for supervision and administration (S&A)—were charged to Air Force's 1982 5-year Military Construction appropriation. In 1985, Government recovered the amount of the additional costs from the A-E. Since the appropriation charged was still available for obligation at the time of the recovery, it may be reimbursed from the recovery to the extent of the additional costs actually incurred. However, portion of recovery representing S&A expenses in excess of amount actually charged Air Force must be deposited as miscellaneous receipts..... 838

Reprocurement

Government Procurement Statutes

Applicability

A reprocurement for the account of a defaulted contractor is not subject to the strict terms of the regulations that govern regular federal procurement and will not be disturbed where agency's actions are reasonable; reopening negotiations to permit an additional offeror to submit a proposal, thereby avoiding a sole-source award, is not unreasonable, since it promotes competition and helps assure that the government will receive the most reasonable price 347

Discounts

Computation of Time Period

Saturday, Sunday, and Holidays

When Federal government offices are closed because of a legal holiday and government business is not expected to be conducted, payments falling due on the legal holiday may be made the following day, including payments that are decreased by prompt payment discounts. Where government offices are open, on Inauguration Day or local holidays, payments must be made on the holiday if due..... 53

Prompt Payment

Computation Basis

Saturday, Sunday, and Holidays

When Federal government offices are closed because of a legal holiday and government business is not expected to be conducted, payments falling due on the legal holiday may be made the following day, including payments that are decreased by prompt payment discounts. Where government offices are open, on Inauguration Day or local holidays, payments must be made on the holiday if due..... 53

Equipment (*See* **EQUIPMENT**)

Evaluation

Negotiated procurement (*See* **CONTRACTS, Negotiation, Offers or Proposals, Evaluation**)

CONTRACTS—Continued Page

Extension

After Expiration

Solicitation Pending

Where a contract for visitor reservation services has expired, the contractual relationship which existed is terminated and the issuance of an amendment 4 months after the expiration date to retroactively extend and modify the contract as if it had not expired amounts to a contract award without competition, contrary to the requirements of the Competition in Contracting Act. A protest challenging the amendment is sustained, therefore, and General Accounting Office (GAO) recommends that a competitive procurement for the requirement be conducted 25

In-House Performance *v.* Contracting Out

Cost Comparison

Adequate Documentation Requirement

Neither government nor bidders are required to base their costs on historical data alone since both may rely on the experience and expertise of their employees and managers to determine the least costly method of performing the statement of work 41

Agency In-House-Estimate

Basis

Government is not bound to utilize historical cost data for materials where estimate of additional savings generated by switch to new procurement method is not found unreasonable 41

Interest (*See* **INTEREST, Contracts**)

Labor Stipulations

Davis-Bacon Act

Applicability

Criteria

Under a solicitation for base operations and maintenance, job assignments ordinarily should be categorized in accord with the basic nature of the resulting contract, i.e., service work, and laborers performing those assignments classified as Service Contract Act workers. It is not proper to categorize all job assignments in a given area of activity as covered by the Davis-Bacon Act's minimum wage requirements applicable to construction workers without regard to that Act's $2,000 threshold for each severable construction, reconstruction, renovation, or repair project 290

In a contract for base operations and maintenance covered by the Service Contract Act, agency procedures for managing "project" work, including the use of written work orders and payment only upon inspection and acceptance of the final product, do not establish that the minimum wage requirements of the Davis-Bacon Act for construction workers should apply. Other criteria, such as the $2,000 Davis-Bacon Act threshold for severable projects and whether the service is incidental to maintenance, also must be considered 290

Where solicitation for base operations and maintenance services covered by the Service Contract Act includes routine maintenance of railroad tracks at the installation, such maintenance work should be considered service work covered by the Service Contract Act, rather than construction work under the Davis-Bacon Act 290

CONTRACTS—Continued Page
Labor Stipulations—Continued
Davis-Bacon Act—Continued
Minimum Wage Determinations
Under a solicitation for base operations and maintenance, job assignments ordinarily should be categorized in accord with the basic nature of the resulting contract, i.e., service work, and laborers performing those assignments classified as Service Contract Act workers. It is not proper to categorize all job assignments in a given area of activity as covered by the Davis-Bacon Act's minimum wage requirements applicable to construction workers without regard to that Act's $2,000 threshold for each severable construction, reconstruction, renovation, or repair project 290
In a contract for base operations and maintenance covered by the Service Contract Act, agency procedures for managing "project" work, including the use of written work orders and payment only upon inspection and acceptance of the final product, do not establish that the minimum wage requirements of the Davis-Bacon Act for construction workers should apply. Other criteria, such as the $2,000 Davis-Bacon Act threshold for severable projects and whether the service is incidental to maintenance, also must be considered 290
Wage determinations (*See* CONTRACTS, Labor Stipulations, Davis-Bacon Act, Minimum Wage, etc. Determination)
Minimum Wage Guarantees
Under a solicitation for base operations and maintenance, job assignments ordinarily should be categorized in accord with the basic nature of the resulting contract, i.e., service work, and laborers performing those assignments classified as Service Contract Act workers. It is not proper to categorize all job assignments in a given area of activity as covered by the Davis-Bacon Act's minimum wage requirements applicable to construction workers without regard to that Act's $2,000 threshold for each severable construction, reconstruction, renovation, or repair project 290
In a contract for base operations and maintenance covered by the Service Contract Act, agency procedures for managing "project" work, including the use of written work orders and payment only upon inspection and acceptance of the final product, do not establish that the minimum wage requirements of the Davis-Bacon Act for construction workers should apply. Other criteria, such as the $2,000 Davis-Bacon Act threshold for severable projects and whether the service is incidental to maintenance, also must be considered 290
Where solicitation for base operations and maintenance services covered by the Service Contract Act includes routine maintenance of railroad tracks at the installation, such maintenance work should be considered service work covered by the Service Contract Act, rather than construction work under the Davis-Bacon Act 290
Service Contract Act of 1965
Applicability of Act
Where solicitation for base operations and maintenance services covered by the Service Contract Act includes routine maintenance of railroad tracks at the installation, such maintenance work should be considered service work covered by the Service Contract Act, rather than construction work under the Davis-Bacon Act 290

CONTRACTS—Continued Page

Labor Stipulations—Continued

Minimum Wage, etc. Determinations

Under a solicitation for base operations and maintenance, job assignments ordinarily should be categories in accord with the basic nature of the resulting contract, i.e., service work, and laborers performing those assignments classified as Service Contract Act workers. It is not proper to categorize all job assignments in a given area of activity as covered by the Davis-Bacon Act's minimum wage requirements applicable to construction workers without regard to that Act's $2,000 threshold for each severable construction, renovation, or repair project 290

Solicitation Provisions

Under a solicitation for base operations and maintenance, job assignments ordinarily should be categorized in accord with the basic nature of the resulting contract, i.e., service work, and laborers performing those assignments classified as Service Contract Act workers. It is not proper to categorize all job assignments in a given area of activity as covered by the Davis-Bacon Act's minimum wage requirements applicable to construction workers without regard to that Act's $2,000 threshold for each severable construction, reconstruction, renovation, or repair project 290

Where solicitation for base operations and maintenance services covered by the Service Contract Act includes routine maintenance of railroad tracks at the installation, such maintenance work should be considered service work covered by the Service Contract Act, rather than construction work under the Davis-Bacon Act 290

Walsh-Healey Act

Administration and Enforcement

Department of Labor (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Walsh-Healey Act)

Generally

General Accounting Office (GAO) will not consider whether a bidder satisfies the requirements of the Walsh-Healey Act since such matters, by law, are for the contracting agency's determination, subject to final review by the Small Business Administration (where a small business is involved) and the Department of Labor 336

Labor Surplus Areas

Evaluation Preference

Where statutory test program permitting the Defense Logistics Agency to apply a price differential of up to 2.2 percent in favor of bids submitted by labor surplus area concerns expired at the end of fiscal year 1985 and was not extended by the House Joint Resolution making continuing appropriations for fiscal year 1986, agency properly declined to apply price differential where bids were solicited and opened during fiscal year 1985 but where contract was not "made"—awarded—until after fiscal year 1985's expiration when continuing resolution was in effect 318

CONTRACTS—Continued Page
Labor Surplus Areas—Continued
Evaluation Preference—Continued
Agency's refusal to apply a percentage differential in evaluating price offered by labor surplus area concern was proper where statutory authority to do so had expired as of time of award, and was consistent with the provisions of the solicitation relating to evaluation of bids, which specifically warned bidders that "if no legislation is in effect at time of award which authorizes the payment of a price differential, no evaluation factor will be added to the offers submitted.". 318
Mess Attendant Services
Procurement
Format
Decision sustaining protest against agency's use of negotiated cost-type contract for acquisition of mess services is modified to recommend assessment of overall risks of procurement and determination of propriety of use of cost-type contract. If agency reasonably determines that uncertainty is so great or has such a direct impact on pricing or costs that it directly affects an offeror or bidder's ability to project its costs of performance so as to preclude use of a fixed-price contract, agency may exercise options under current cost-type contract in accordance with Federal Acquisition Regulation 643
Miller Act (*See* BONDS, Miller Act Coverage)
Minority Businesses
Set-asides
Authority
Protest against an evaluation preference for minority-owned firms contained in a synopsis for a small business set-aside for architect-engineer (A-E) services issued under the Brooks Act, 40 U.S.C. 541-544 (1982), is denied because the procuring agency has statutory authority to give preference to minority-owned or -controlled small business firms under the Small Business Act, 15 U.S.C. 644(q) (1982)... 828
Mistakes
Allegation before award (*See* BIDS, Mistakes)
Modification
Beyond Scope of Contract
"Cardinal Change" Doctrine
Where a contract for visitor reservation services has expired, the contractual relationship which existed is terminated and the issuance of an amendment 4 months after the expiration date to retroactively extend and modify the contract as if it had not expired amounts to a contract award without competition, contrary to the requirements of the Competition in Contracting Act. A protest challenging the amendment is sustained, therefore, and General Accounting Office (GAO) recommends that a competitive procurement for the requirement be conducted 25

CONTRACTS—Continued Page
Modification—Continued
Beyond Scope of Contract—Continued
Subject to GAO Review
Where a contract for visitor reservation services has expired, the contractual relationship which existed is terminated and the issuance of an amendment 4 months after the expiration date to retroactively extend and modify the contract as if it had not expired amounts to a contract award without competition, contrary to the requirements of the Competition in Contracting Act. A protest challenging the amendment is sustained, therefore, and General Accounting Office (GAO) recommends that a competitive procurement for the requirement be conducted 25
Change Orders
Propriety
A contractor was issued a change order so that 5-inch vinyl siding was to be used as opposed to 6-inch vinyl siding called for in the specifications. We do not view this change as being substantial so as to be beyond the scope of the contract 130
Within Scope of Contract
A contractor was issued a change order so that 5-inch vinyl siding was to be used as opposed to 6-inch vinyl siding called for in the specifications. We do not view this change as being substantial so as to be beyond the scope of the contract 130
Propriety
The Environmental Protection Agency may not modify a level of effort contract to accommodate a non-severable task extending beyond the original contract period of performance. Since the period of performance is an essential part of a level of effort contract, any change in that term would substantially change the contract such that the contract for which competition was held and the contract to be performed are essentially different. Accordingly, such a contract could not be extended by contract modification 153
Scope of Contract Requirement
A contractor was issued a change order so that 5-inch vinyl siding was to be used as opposed to 6-inch vinyl siding called for in the specifications. We do not view this change as being substantial so as to be beyond the scope of the contract 130
Increased Costs
Appropriation Chargeable
Modification of a cost reimbursement contract occurring in fiscal year 1985, which increased the amount of the original contract ceiling price and which did not represent an antecedent liability enforceable by the contractor is properly chargeable to appropriations available when the modification was approved by the contracting officer; that is, fiscal year 1985 appropriations 741
National Emergency Authority (*See* CONTRACTS, Negotiation, National Emergency Authority)
Negotiated procurements (*See* CONTRACTS, Negotiation)

CONTRACTS—Continued Page

Negotiation

Authority

Designation of Proper Base for Negotiation

Agency decision to use negotiation procedures in lieu of sealed bidding procedures is justified where the basis for award reasonably includes technical considerations in addition to price-related factors..... 242

Agency decision to negotiate for the procurement of hazardous waste disposal services, requesting competitive proposals instead of sealed bids, is appropriate under the Competition in Contracting Act of 1984 where complex requirements demand discussions to assure the quality and safety of performance and award is based on both technical and price-related factors..... 817

Administrative Determination

Advertising v. Negotiation

Agency decision to negotiate for the procurement of hazardous waste disposal services, requesting competitive proposals instead of sealed bids, is appropriate under the Competition in Contracting Act of 1984 where complex requirements demand discussions to assure the quality and safety of performance and award is based on both technical and price-related factors..... 817

Awards

Erroneous

Disclosure of offeror's proposal information required by agency to permit recompetition of improperly awarded contract must be substantially similar, but need not be identical..... 715

Initial Proposal Basis

Propriety

Although an award properly may be made on the basis of initial proposals without discussions in certain circumstances, under the Competition in Contracting Act the award must result in the lowest overall cost to the government and, in fact, must have been made in the absence of any discussions. Thus, where the agency awards a contract to a higher-price offeror and also holds price discussions, the award is not made on an initial proposal basis consistent with the statutory and regulatory requirements..... 195

Agency request for technical information which was required under solicitation but omitted from protester's proposal does not constitute discussions. Having requested and evaluated such technical material, the agency properly awarded on the basis of initial proposals without discussions where the solicitation explicitly provided that award might be made on the basis of initial proposals..... 418

Legality

Protest challenging selection of a higher-priced offeror is denied where the selection is consistent with the evaluation scheme in the solicitation, under which offerors are ranked according to cost per quality point..... 573

Notice

To Unsuccessful Offerors

Allegation of inadequate notice of award is not for consideration since notice requirement does not apply to contracts outside the United States..... 418

CONTRACTS—Continued Page
Negotiation—Continued
Awards—Continued
Propriety
Evaluation of Proposals
While the contracting agency has the responsibility to evaluate proposals in accordance with stated evaluation criteria and to make essentially subjective determinations concerning the adequacy and relative desirability of proposals, General Accounting Office (GAO) independently scrutinizes the contractor selection process to determine if the agency's selection decision was reasonable under the circumstances and in conformance with the evaluation criteria and applicable statutes or regulations 386
Where the evaluation criteria in a solicitation give greater weight to technical merit than cost, the selection of a lower cost offeror whose technical proposal has also been reasonably evaluated as technically superior is required 386
Technical Superiority—Paramount Consideration
Where the evaluation criteria in a solicitation give greater weight to technical merit than cost, the selection of a lower cost offeror whose technical proposal has also been reasonably evaluated as technically superior is required. 386
Upheld
Protest challenging selection of a higher-priced offeror is denied where the selection is consistent with the evaluation scheme in the solicitation, under which offerors are ranked according to cost per quality point. 573
To Other Than Low Offeror
Protest challenging selection of a higher-priced offeror is denied where the selection is consistent with the evaluation scheme in the solicitation, under which offerors are ranked according to cost per quality point. 573
Validity
Protest challenging selection of a higher-priced offeror is denied where the selection is consistent with the evaluation scheme in the solicitation, under which offerors are ranked according to cost per quality point. 573
Competition
Discussion with All Offerors Requirement (*See* CONTRACTS, Negotiation, Offers or Proposals, Discussion with All Offerors Requirement)
Equality of Competition
Lacking
Statements by two procurement officials that a consultant to an offeror learned the relative standing and strengths and weaknesses of competing proposals while he was employed by the government establish a reasonable basis for an agency's determination that the offeror probably received an unfair advantage in submitting its best and final offer. This determination, based on "hard facts" rather than suspicion or innuendo, justified exclusion of the offeror's proposal from further consideration 104

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Exclusion of Incumbent Contract
Justification
Protest that agency failed to obtain full and open competition because the incumbent contractor did not receive a solicitation package and was not otherwise informed by the agency that a new solicitation had been issued is denied where the agency complied with the statutory and regulatory requirements regarding publicizing the procurement and the incumbent had reason to know that its address on the agency's mailing list for the solicitation was incorrect 735
Failure to Solicit Proposals From All Sources
Protest against agency's failure to request an offer from the protester, whose contract had just expired, for a 5-month, emergency contract for essentially the same services is denied where the agency reasonably determined that, based on problems the protester had encountered in an aspect of performance that would be critical to the 5-month contract, the firm was not a protential source 222
Protest that agency failed to obtain full and open competition because the incumbent contractor did not receive a solicitation package and was not otherwise informed by the agency that a new solicitation had been issued is denied where the agency complied with the statutory and regulatory requirements regarding publicizing the procurement and the incumbent had reason to know that its address on the agency's mailing list for the solicitation was incorrect 735
Full and Free Competition Requirement
Awardees' teaming arrangements do not not violate requirement in Competition in Contracting Act of 1984 for "full and open competitive procedures." 405
Protest that agency failed to obtain full and open competition because the incumbent contractor did not receive a solicitation package and was not otherwise informed by the agency that a new solicitation had been issued is denied where the agency complied with the statutory and regulatory requirements regarding publicizing the procurement and the incumbent had reason to know that its address on the agency's mailing list for the solicitation was incorrect 735
Limitation on Negotiation (*See* CONTRACTS, Negotiation, Limitation on Negotiation)
Restriction
Minimum Needs Overstated
Solicitation requirement that ADP service contractor's proposed personnel combine recent battle group experience and experience with "JOTS II Plus" software is unduly restrictive of competition. The restriction limits competition to a sole source of supply, and the agency has not shown convincingly that its needs cannot be met by firms possessing other than the exact experience specified 305

CONTRACTS—Continued Page

Negotiation—Continued

Competition—Continued

Restriction—Continued

Undue Restriction Established

Solicitation requirement that ADP service contractor's proposed personnel combine recent battle group experience and experience with "JOTS II Plus" software is unduly restrictive of competition. The restriction limits competition to a sole source of supply, and the agency has not shown convincingly that its needs cannot be met by firms possessing other than the exact experience specified..... 305

Conflict of Interest Prohibitions

An agency may reject an offer, which proposes a social government employee of that agency as a major consultant, even though no actual conflict of interest is found to exist. Because of the longstanding policy against contracting with government employees, the agency has a reasonable basis for application of this restrictive policy to the protester's offer, even though notice of this policy was not given in statute, regulation or the Request for Proposals (RFP)..... 87

Organizational

Protest that awardee should not have been awarded a contract because of an organizational conflict of interest is denied where the facts do not demonstrate the existence of circumstances that would preclude the awardee from being objective in performing the contract 761

Statements by two procurement officials that consultant to an offeror learned the relative standing and strengths and weaknesses of competing proposals while he was employed by the government establish a reasonable basis for an agency's determination that the offeror probably received an unfair advantage in submitting its best and final offer. This determination, based on "hard facts" rather than suspicion or innuendo, justifies exclusion of the offeror's proposal from further consideration 104

Cost-Type

Technical/Cost Justification

Decision sustaining protest against agency's use of negotiated cost-type contract for acquisition of mess services is modified to recommend assessment of overall risks of procurement and determination of propriety of use of cost-type contract. If agency reasonably determines that uncertainty is so great or has such a direct impact on pricing or costs that it directly affects an offeror or bidder's ability to project its costs of performance so as to preclude use of a fixed-price contract, agency may exercise options under current cost-type contract in accordance with Federal Acquisition Regulation..... 643

Determination and Findings

Basis for Negotiation

Agency decision to use negotiation procedures in lieu of sealed bidding procedures is justified where the basis for award reasonably includes technical considerations in addition to price-related factors..... 242

Propriety of Determination

Agency decision to use negotiation procedures in lieu of sealed bidding procedures is justified where the basis for award reasonably includes technical considerations in addition to price-related factors..... 242

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation (*See* CONTRACTS, Negotiation, Offers or Proposals, Evaluation)
Justification
Agency decision to negotiate for the procurement of hazardous waste disposal services, requesting competitive proposals instead of sealed bids, is appropriate under the Competition in Contracting Act of 1984 where complex requirements demand discussions to assure the quality and safety of performance and award is based on both technical and price-related factors 817
Agency decision to use negotiation procedures in lieu of sealed bidding procedures is justified where the basis for award reasonably includes technical considerations in addition to price-related factors 242
Late Proposals and Quotations
Rejection Propriety
Competitive System
A quotation that is submitted 7 months after the date it was due, and after the agency's repeated solicitation of the offeror during that period, is not a late offer, since it essentially was not submitted in response to the solicitation. The quotation therefore cannot be accepted without first surveying the market and permitting other potential suppliers to submit quotations 500
Limitation of Negotiation
Necessity
Although the Competition in Contracting Act of 1984 authorizes an agency to use noncompetitive procurement procedures in situations of unusual or compelling urgency, the state also requires the agency to solicit offers from as many potential sources as is practicable, and does not recognize a lack of advance planning as a legitimate justification for using such procedures 222
Propriety
Although the Competition in Contracting Act of 1984 authorizes an agency to use noncompetitive procurement procedures in situations of unusual or compelling urgency, the state also requires the agency to solicit offers from as many potential sources as is practicable, and does not recognize a lack of advance planning as a legitimate justification for using such procedures 222
National Emergency Authority
Competition Consideration
In procurements conducted under provisions of the Competition in Contracting Act of 1984 pertaining to mobilization base producers, 10 U.S.C.A. 2304(b)(1)(B), 2304(c)(3), the usual concern for obtaining full and free competition is subject to the needs of industrial mobilization. Agencies properly may exclude a particular source or restrict a procurement to predetermined sources in order to create or maintain their readiness to produce critical supplies in case of a national emergency or to achieve industrial mobilization 59

CONTRACTS—Continued Page
Negotiation—Continued
National Emergency Authority—Continued
Competition Consideration—Continued
Agency's refusal to accept protester as an approved mobilization base producer, so that it can compete in a procurement restricted to such producers, is proper, since the solicitation to be issued is to support the existing mobilization base and there is no need to expand this base. There is no legal requirement that all qualified firms be accepted as mobilization base producers without regard to whether the agency's anticipated needs will be sufficient to support additional producers 59
Restrictions on Negotiation
In procurements conducted under provisions of the Competition in Contracting Act of 1984 pertaining to mobilization base producers, 10 U.S.C.A. 2304(b)(1)(B), 2304(c)(3), the usual concern for obtaining full and free competition is subject to the needs of industrial mobilization. Agencies properly may exclude a particular source or restrict a procurement to predetermined sources in order to create or maintain their readiness to produce critical supplies in case of a national emergency or to achieve industrial mobilization 59
Agency's refusal to accept protester as an approved mobilization base producer, so that it can compete in a procurement restricted to such producers, is proper, since the solicitation to be issued is to support the existing mobilization base and there is no need to expand this base. There is no legal requirement that all qualified firms be accepted as mobilization base producers without regard to whether the agency's anticipated needs will be sufficient to support additional producers 59
Offers or Proposals
Best and Final
Additional Rounds
Auction Technique Not Indicated
Agency issued a stop-work order and reopened negotiations for a second round of best and final offers where, shortly after award, agency discovered that it had incorrectly advised one offeror that its alternate initial proposal was technically unacceptable, thereby precluding a best and final offer submission, when, in fact, the proposal had been found technically acceptable 715
Denial Propriety
Where agency during discussions specifically advised the protester to review its proposed pricing and thereafter disclosed the relative prices of the remaining offerors in requesting the protester to verify its price, agency determination not to reopen negotiations to allow protester to correct a subsequently discovered error will not be questioned since, notwithstanding protester's assertion that agency erred in disclosing relative prices, protester was previously provided an opportunity to review its proposal and further negotiations would result in the use of prohibited auction techniques 542

178-403 O - 87 - 6 : QL 3

CONTRACTS—Continued Page
Negotiation—Continued
Offers or Proposals—Continued
Best and Final—Continued
Additional Rounds—Continued
Possible Price Disclosure
Where agency during discussions specifically advised the protester to review its proposed pricing and thereafter disclosed the relative prices of the remaining offerors in requesting the protester to verify its price, agency determination not to reopen negotiations to allow protester to correct a subsequently discovered error will not be questioned since, notwithstanding protester's assertion that agency erred in disclosing relative prices, protester was previously provided in opportunity to review its proposal and further negotiations would result in the use of prohibited auction techniques. 542
Ambiguous
Clarification Propriety
When protester, claiming that its price was erroneously evaluated, as shown by cost and pricing data submitted with initial proposal, does not submit additional cost and pricing data during several rounds of best and final offers, it is not possible without reopening discussions to determine exactly what price the protester intended to offer in its final submission. Since this would result in the use of prohibited auction techniques, the proposed award to an allegedly higher priced offeror is not subject to objection 62
Discussions
Clarification v. Reopening Negotiations
When protester, claiming that its price was erroneously evaluated, as shown by cost and pricing data submitted with initial proposal, does not submit additional cost and pricing data during several rounds of best and final offers, it is not possible without reopening discussions to determine exactly what price the protester intended to offer in its final submission. Since this would result in the use of prohibited auction techniques, the proposed award to an allegedly higher priced offeror is not subject to objection 62
Mistakes
Correction
Where, before award, a protester points out that its best and final offer may have been erroneously evaluated and argues that cost and pricing data submitted with its initial proposal clearly establishes what price it intended to offer, the protester is in effect claiming a mistake in its proposal and the contracting agency should follow the regulatory procedures applicable to such claims 62
Where, before award, but after the receipt of best and final offers, an offeror claims a mistake in its proposal, regulatory provisions governing the correction of a mistake in a negotiated procurement are not directly applicable although agency can—but it not required to—reopen negotiations with offerors to allow the offeror claiming the mistake to revise its proposal, if the agency determines that it is clearly in the government's best interests to do so 542

CONTRACTS—Continued Page
Negotiation—Continued
Offers or Proposals—Continued
Best and Final—Continued
Mistakes—Continued
Correction—Continued
Where agency during discussions specifically advised the protester to review its proposed pricing and thereafter disclosed the relative prices of the remaining offerors in requesting the protester to verify its price, agency determination not to reopen negotiations to allow protester to correct a subsequently discovered error will not be questioned since, notwithstanding protester's assertion that agency erred in disclosing relative prices, protester was previously provided an opportunity to review its proposal and further negotiations would result in the use of prohibited auction techniques 542
Although an agency may utilize a bidder's worksheets or any other data in a sealed bidding acquisition and permit the upward correction of a bid based on this evidence where the bid is low with or without the correction, protest that correction should be allowed in similar circumstances in a negotiated procurement is without merit since, under the Federal Acquisition Regulation, correction of a mistake which requires resort to evidence outside the RFP is appropriate only if the agency reopens discussions with all competitive range offerors 542
Evaluation
Where, before award, a protester points out that its best and final offer may have been erroneously evaluated and argues that cost and pricing data submitted with its initial proposal clearly establishes what price it intended to offer, the protester is in effect claiming a mistake in its proposal and the contracting agency should follow the regulatory procedures applicable to such claims 62
Prices (*See* CONTRACTS, Negotiation, Prices, Best and Final Offer)
Costs
Denied
Recovery of proposal preparation costs and the costs of pursuing a protest is inappropriate when the protester is afforded an opportunity to compete in a reprocurement 268
Deficient Proposals
Blanket Offer of Compliance
Blanket offer to supply compliant equipment does not satisfy a solicitation requirement for descriptive literature sufficient to permit technical evaluation of the equipment offered 418
Contradictory Evidence Not Submitted
Where protester's initial proposal is found technically unacceptable although capable of being made acceptable, but protester fails to submit a timely response to agency's request for clarification, agency's subsequent exclusion of protester from negotiations with remaining offeror is proper, since without additional information, protester's proposal was technically unacceptable 125
Discussions (*See* CONTRACTS, Negotiation, Offers or Proposals, Discussion with All Offerors Requirement)

CONTRACTS—Continued Page

Negotiation—Continued

Offers or Proposals—Continued

Discussion With All Offerors Requirement

Exceptions

Offers Not Within Competitive Range

Even where discussions are conducted with the sole remaining offeror in the competitive range, no discussions need be held with the protester, who had previously been determined in the competitive range, in a case where the protester's offer proposing an agency employee as a major consultant is rejected because of a potential conflict of interest and the agency reasonably determines that the employee was a primary factor in the protester's high ranking and is integral to the protester's proposal, which cannot readily be changed through negotiations 87

Initial Proposal Basis—Solicitation Provision

Although an award properly may be made on the basis of initial proposals without discussions in certain circumstances, under the Competition in Contracting Act the award must result in the lowest overall cost to the government and, in fact, must have been made in the absence of any discussions. Thus, where the agency awards a contract to a higher-priced offeror and also holds price discussions, the award is not made on an initial proposal basis consistent with the statutory and regulatory requirements 195

"Meaningful" Discussion

Determination by agency personnel conducting the evaluation of proposals that protester had submitted an alternate proposal supports conclusion that protester's proposal, as viewed in its entirety and as reasonably interpreted, included offer of alternate system. Since the contracting officer did not make award on the basis of initial proposals and the alternate proposal was within the competitive range, the requirement for meaningful discussions extended to the alternate proposal 705

Since, as a general rule, contracting agencies must hold discussions with all responsible offerors for a negotiated procurement whose proposals are within the competitive range, an agency acts improperly by not conducting technical discussions and by requesting best and final offers expressly limited to revisions in price proposals only where overall technical considerations were assigned much greater weight than price in the evaluation scheme and the deficiencies noted in the initial technical proposals where suitable for correction through discussion 195

Procuring agency's failure to alert offerors during discussions to the fact that their estimated levels of effort and offered prices are considered unreasonably high does not meet its obligation to conduct meaningful discussions with all offerors within the competitive range. Such discussions with only one of the offerors would also be improper 205

CONTRACTS—Continued Page
Negotiation—Continued
Offers or Proposals—Continued
Discussion With All Offerors Requirement—Continued
What Constitutes Discussion
Agency request for technical information which was required under solicitation but omitted from protester's proposal does not constitute discussions. Having requested and evaluated such technical material, the agency properly awarded on the basis of initial proposals without discussions where he solicitation explicitly provided that award might be made on the basis of initial proposals 418
Revision of Proposal Opportunity
Where an agency communication with the offeror selected for award to correct alleged mistakes in its proposal results in the proposal price being increased in a significant amount, the communication constitutes discussion requiring discussions with all offerors within the competitive range 405
If post-selection discussions have been conducted with the successful offeror regarding an extension of the proposed term of the contract, discussions should have been conducted with other offerors in the competitive range, especially where discussions could potentially affect the offerors' relative standing 415
Evaluation
Administrative Discretion
Evaluation of 37 proposals by a 26-person technical panel where only four of the evaluators read and rated each proposal is not an abuse of agency discretion 109
While the contracting agency has the responsibility to evaluate proposals in accordance with stated evaluation criteria and to make essentially subjective determinations concerning the adequacy and relative desirability of proposals, General Accounting Office (GAO) independently scrutinizes the contractor selection process to determine if the agency's selection decision was reasonable under the circumstances and in conformance with the evaluation criteria and applicable statutes or regulations 386
Best and final (*See* CONTRACTS, Negotiation, Offers or proposals, Best and Final, Evaluation)
Brand Name or Equal
Salient Characteristics-Satisfaction of Requirement
In a brand name or equal procurement, the contracting agency improperly found the awardee's product technically acceptable where it failed to comply with two salient characteristics in the request for proposals. Specifically, the awardee's product (1) did not comply with the requirement for an "impedance meter," where the product offered a device which only measured, but did not register, the data being monitored; and (2) did not comply with the requirement of "digital filtering,—"where the product offered only one of various techniques ("digital smoothing") necessary to provide the full range of capabilities contemplated by digital filtering 145

CONTRACTS—Continued Page
Negotiation—Continued
Offers or Proposals—Continued
Evaluation—Continued
Brand Name or Equal—Continued
Salient Characteristics-Satisfaction of Requirement—Continued
Awardee's noncompliance with salient characteristics set out in a request for proposals may not be waived notwithstanding that awardee's product meets the government's needs, since the characteristics were material to protester's and other potential offerors' decision to compete 490
Competitive Range Exclusion
Reasonableness
Agency's decision to exclude an offeror from the competitive range is proper where the offeror's technical proposal received an average score of 27 points out of a possible 100 and where the agency reasonably considered the offeror's technical proposal to be so deficient as to require major revisions before it could be made acceptable 615
Cost Realism Analysis
Reasonableness
An offerors' proposed cost as adjusted for cost realism cannot be said to be unreasonable where it is virtually identical to the government's original estimate and apparently would be in line with other offerors' proposed costs if those costs were also to be adjusted for cost realism 34
Criteria
Application of Criteria
Evaluation of awardee's proposal under rating plan used to evaluate proposals in three areas, where it was apparently not downgraded, appears to be improper, when the proposal fails to address two areas and in the third area proposes less than the optimum staffing preference indicated in rating plan and solicitation evaluation criteria. Protest is therefore sustained and it is recommended that proposals in the competitive range be rescored and award to highest rated offeror 109
General Accounting Office (GAO) affirms previous decision sustaining protest on basis that the awardee's proposal was not properly evaluated, since it received a maximum score, even though it proposed less than the optimum staffing preference indicated in the solicitation evaluation criteria and in the rating plan used by the agency in scoring proposals 323
Where the evaluation criteria in a solicitation give greater weight to technical merit than cost, the selection of a lower cost offeror whose technical proposal has also been reasonably evaluated as technically superior is required 386

CONTRACTS—Continued Page
Negotiation—Continued
Offers or Proposals—Continued
Evaluation—Continued
Improper
On Basis Other than in RFP
Evaluation of awardee's proposal under rating plan used to evaluate proposals in three areas, where it was apparently not downgraded, appears to be improper, when the proposal fails to address two areas and in the third area proposes less than the optimum staffing preference indicated in rating plan and solicitation evaluation criteria. Protest is therefore sustained and it is recommended that proposals in the competitive range be rescored and award made to highest rated offeror. 109
Life-Cycle Costing
Where a cost ceiling is included in a solicitation for the purpose of comparing life cycle costs for government construction of military family housing with the same costs for contractor construction, and the government's cost is expressed in terms of present value, the cost for contractor construction also must be converted to present value. A proposal that, before discounting, exceeds the cost ceiling should not, therefore, be rejected. 573
Where a solicitation does not specify the inflation rates to be used to evaluate cost proposals for a 19.5 year lease, but merely states that during the term of the lease, maintenance costs will be allowed to escalate according to "Economic Indicators" prepared by the Council of Economic Advisors, the agency is not required to use an average of past indicators for evaluation purposes, but rather if free to use any reasonable index of future inflation 573
Propriety
Evaluation of 37 proposals by a 26-person technical panel where only four of the evaluators read and rated each proposal is not an abuse of agency discretion 109
While the contracting agency has the responsibility to evaluate proposals in accordance with stated evaluation criteria and to make essentially subjective determinations concerning the adequacy and relative desirability of proposals, General Accounting Office (GAO) independently scrutinizes the contractor selection process to determine if the agency's selection decision was reasonable under the circumstances and in conformance with the evaluation criteria and applicable statutes or regulations 386
Protest of agency reevaluation of proposals in response to General Accounting Office (GAO) decisions which sustained protests on grounds that three areas of evaluation were improper is denied where agency reevaluation has not been shown to be unreasonable..... 699
Reasonable
Protest of agency reevaluation of proposals in response to General Accounting Office (GAO) decisions which sustained protests on grounds that three areas of evaluation were improper is denied where agency reevaluation has not been shown to be unreasonable..... 699

CONTRACTS—Continued Page
Negotiation—Continued
Offers or Proposals—Continued
Evaluation—Continued
Technical Acceptability
Administrative Determination
Contracting agencies enjoy a reasonable degree of discretion in determining the acceptability of submitted technical proposals, and General Accounting Office (GAO) therefore will not substitute its judgment for that of the agency by making an independent determination unless the agency's action is clearly shown to be arbitrary or in violation of procurement statutes or regulations 230
Agency issued a stop-work order and reopened negotiations for a second round of best and final offers where, shortly after award, agency discovered that it had incorrectly advised one offeror that its alternate initial proposal was technically unacceptable, thereby precluding a best and final offer submission, when, in fact, the proposal had been found technically acceptable 715
Offeror's Responsibility to Demonstrate
Where protester's initial proposal is found technically unacceptable although capable of being made acceptable, but protester fails to submit a timely response to agency's request for clarification, agency's subsequent exclusion of protester from negotiations with remaining offeror is proper, since without additional information, protester's proposal was technically unacceptable 125
Blanket offer to supply compliant equipment does not satisfy a solicitation requirement for descriptive literature sufficient to permit technical evaluation of the equipment offered 418
Awardee's submission of catalogues for standard model accompanied by cover letter explaining how equipment would be modified to comply with solicitation specifications satisfies the requirement for descriptive literature sufficient to permit technical evaluation 418
Scope of GAO Review
Contracting agencies enjoy a reasonable degree of discretion in determining the acceptability of submitted technical proposals, and General Accounting Office (GAO) therefore will not substitute its judgment for that of the agency by making an independent determination unless the agency's action is clearly shown to be arbitrary or in violation of procurement statutes or regulations 230
Initial Proposal Basis
Authority for Award
Although an award properly may be made on the basis of initial proposals without discussions in certain circumstances, under the Competition in Contracting Act the award must result in the lowest overall cost to the government and, in fact, must have been made in the absence of any discussions. Thus, where the agency awards a contract to a higher-priced offeror and also holds price discussions, the award is not made on an initial proposal basis consistent with the statutory and regulatory requirements 195

CONTRACTS—Continued Page
Negotiation—Continued
Offers or Proposals
Preparation
Costs
Denied
Protester's procurement costs, including reasonable attorneys' fees for pursuit of protest, will not be awarded where the contracting agency did not act improperly and the protest is denied 347
While a protest against the award of a contract to a materially unbalanced offeror was sustained, the protester's subsequent claim for proposal preparation costs and the costs of filing and pursuing the protest is denied where the record shows that the protester did not have a substantial chance of receiving the award and was therefore not unreasonably excluded from the competition because the protester's price proposal was also materially unbalanced, although to a lesser degree 488
Recovery
Protester is entitled to recover the cost of filing and maintaining its protest, including attorney's fees, as well as its proposal preparation costs, where protester was unreasonably excluded from the procurement but corrective action is not feasible in light of agency's decision not to suspend performance during pendency of the protest..... 145
Offerors may reasonably rely on request for proposals as indicating the government's needs. Where, based on such reliance, a protester submits a proposal that is in line for award but is not accepted because the government determines that its needs can be met by significantly less expensive equipment of different type, the protester may recover its proposal preparation costs unless it chooses to compete under the revised RFP 490
Prices
Best and Final Offer
Where awardee's best and final offer price has been disclosed, to eliminate unfair advantage under recompetition, agency may require other offerors to agree to similar disclosure 715
Disclosure
Where awardee's best and final offer price has been disclosed, to eliminate unfair advantage under recompetition, agency may require other offerors to agree to similar disclosure 715
Disclosure of offerors' proposal information required by agency to permit recompetition of improperly awarded contract must be substantially similar, but need not be identical 715
Prices
Unprofitable
Acceptance of a below-cost offer for a fixed-price contract is not itself grounds for protest, and the procuring agency, not the General Accounting Office, is responsible for ensuring that losses from a below-cost offer are not recovered during contract performance..... 205

CONTRACTS—Continued Page
Negotiation—Continued
Prices—Continued
Rejection
An agency may reject an offer, which proposes a social government employee of that agency as a major consultant, even though no actual conflict of interest is found to exist. Because of the longstanding policy against contracting with government employees, the agency has a reasonable basis for application of this restrictive policy to the protester's offer, even though notice of this policy was not given in statute, regulation or the Request for Proposal (RFP) 87
Proposed Technical Approach Insufficiently Proven
Where protester's initial proposal is found technically unacceptable although capable of being made acceptable, but protester fails to submit a timely response to agency's request for clarification, agency's subsequent exclusion of protester from negotiations with remaining offeror is proper, since without additional information, protester's proposal was technically unacceptable 125
Propriety
Agency is not required to refer to the Small Business Administration its determination to exclude an offeror's proposal because of the likelihood of an impropriety or conflict of interest in preparation of the proposal where there is no question as to the offeror's capability to perform or any other traditional element of responsibility 104
Where protester's initial proposal is found technically unacceptable although capable of being made acceptable, but protester fails to submit a timely response to agency's request for clarification, agency's subsequent exclusion of protester from negotiations with remaining offeror is proper, since without additional information, protester's proposal was technically unacceptable 125
Revisions
Equal Opportunity to All Offerors
Where an agency communication with the offeror selected for award to correct alleged mistakes in its proposal results in the proposal price being increased in a significant amount, the communication constitutes discussions requiring discussions with all offerors within the competitive range 405
If post-selection discussions have been conducted with the successful offeror regarding an extension of the proposed term of the contract, discussions should have been conducted with other offerors in the competitive range, especially where discussions could potentially affect the offerors' relative standing 415
Technical Acceptability
Offeror's Responsibility to Demonstrate
Although the burden in a negotiated procurement is on the offeror to submit with its proposal sufficient information for the agency to make an intelligent evaluation, contracting agency's determination that offeror's general offer of compliance and specific responses to the specifications of "[n]oted and accepted" are sufficient is not unreasonable where the solicitation merely required a statement accepting all terms and conditions of the solicitation and provided for simple statements of acknowledgement in response to the specifications 663

CONTRACTS—Continued Page
Negotiation—Continued
Protests
Generally (*See* CONTRACTS, Protests)
Requests for proposals (*See* CONTRACTS, Protests)
Requests for Proposals
Amendment
Required for Changes in RFP
When a determination is made by an agency to change, relax, or otherwise modify its requirements or its selection criteria, the agency should issue a written amendment to the solicitation so that the offerors receive notification of the agency's determination 412
Defective
Ambiguous Terms
Where a solicitation requires offerors to propose a single daily rate for preparing appraisal reports, but is ambiguous as to the meaning of a "Total Daily Rate" and does not estimate the length of time necessary for the work or otherwise relate the daily rate to the price of work orders to be negotiated for each appraisal report, it is deficient since bidders are unable to compete on an equal basis and the rate is not related to the probable cost to the government of competing proposals 549
Deficient
Where a solicitation requires offerors to propose a single daily rate for preparing appraisal reports, but is ambiguous as to the meaning of a "Total Daily Rate" and does not estimate the length of time necessary for the work or otherwise relate the daily rate to the price of work orders to be negotiated for each appraisal report, it is deficient since bidders are unable to compete on an equal basis and the rate is not related to the probable cost to the government of competing proposals 549
Evaluation Criteria
When a determination is made by an agency to change, relax, or otherwise modify its requirements or its selection criteria, the agency should issue a written amendment to the solicitation so that the offerors receive notification of the agency's determination 412
Ambiguity Allegation
Unsubstantiated
Protest that solicitation fails to specify the relative importance of cost in the procuring agency's evaluation is denied where provisions of the request for proposals regarding the extent to which cost will be independently considered in the evaluation are unambiguous..... 290
Cost
Protest that solicitation fails to specify the relative importance of cost in the procuring agency's evaluation is denied where provisions of the request for proposals regarding the extent to which cost will be independently considered in the evaluation are unambiguous..... 290
Price Consideration
Relative Importance
Protest that solicitation fails to specify the relative importance of cost in the procuring agency's evaluation is denied where provisions of the request for proposals regarding the extent to which cost will be independently considered in the evaluation are unambiguous..... 290

CONTRACTS—Continued Page

Negotiation—Continued

Requests for Proposals—Continued

Evaluation Criteria—Continued

Technical Merit

Relative Importance

Where the evaluation criteria in a solicitation give greater weight to technical merit than cost, the selection of a lower cost offeror whose technical proposal has also been reasonably evaluated as technically superior is required 386

Failure to Solicit

Protest against agency's failure to request an offer from the protester, whose contract had just expired, for a 5-month, emergency contract for essentially the same services is denied where the agency reasonably determined that, based on problems the protester had encountered in an aspect of performance that would be critical to the 5-month contract, the firm was not a potential source 222

Labor Stipulations (*See* CONTRACTS, Labor Stipulations, Solicitation Provisions)

Minimum Needs

Administrative Determination

Contracting agency's burden of providing rational support for restriction that engine rebuilding services be provided by the manufacturer or its authorized affiliates has not been met where the agency has not shown that the capabilities to provide the services are limited to those sources. An agency must use advance planning and market research to prepare specifications that achieve full and open competition and include restrictions only to the extent necessary to meet its needs 191

Proposal Submitted Defective

Blanket Offer of Compliance

Blanket offer to supply compliant equipment does not satisfy a solicitation requirement for descriptive literature sufficient to permit technical evaluation of the equipment offered 418

Quantity Estimates

Best Available Information Requirement

Protest that solicitation contains insufficient information for offerors intelligently to estimate material costs is denied where the record shows that offerors have been given access to all information reasonably available to the agency and that the information, together with the offeror's business knowledge and experience, should permit them to prepare proposals intelligently and on an equal basis. The mere presence of risk in a solicitation does not make the solicitation inappropriate, and specifications are not rendered materially deficient because the agency's prior cost experience cannot be fully determined from the solicitation 290

CONTRACTS—Continued Page

Negotiation—Continued

Requests for Proposals—Continued

Requirements Statement Sufficiency

Protest that solicitation contains insufficient information for offerors intelligently to estimate material costs is denied where the record shows that offerors have been given access to all information reasonably available to the agency and that the information, together with the offeror's business knowledge and experience, should permit them to prepare proposals intelligently and on an equal basis. The mere presence of risk in a solicitation does not make the solicitation inappropriate, and specifications are not rendered materially deficient because the agency's prior cost experience cannot be fully determined from the solicitation 290

Restrictive of Competition

Solicitation requirement that ADP service contractor's proposed personnel combine recent battle group experience and experience with "JOTS II Plus" software is unduly restrictive of competition. The restriction limits competition to a sole source of supply, and the agency has not shown convincingly that its needs cannot be met by firms possessing other than the exact experience specified 305

Specifications

Conformability of Equipment, etc. Offered

Administrative Determination

The term "state-of-the-art" may be narrowly applied as a solicitation requirement to mean only that each offeror's product be its latest design, rather than to mean adherence to an industry-wide technological standard, so long as the end result is not the submission of offers with such differing levels of technology that competition on a materially similar baseline is effectively precluded 230

Descriptive Literature

Descriptive literature clause requirement under Federal Acquisition Regulation relating to sealed bid invitations for bids is not applicable to request for proposals under negotiated procurement 418

Blanket offer to supply compliant equipment does not satisfy a solicitation requirement for descriptive literature sufficient to permit technical evaluation of the equipment offered 418

Awardee's submission of catalogues for standard model accompanied by cover letter explaining how equipment would be modified to comply with solicitation specifications satisfies the requirement for descriptive literature sufficient to permit technical evaluation 418

Minimum Needs

Overstated

Contracting agency's burden of providing rational support for restriction that engine rebuilding services be provided by the manufacturer or its authorized affiliates has not been met where the agency has not shown that the capabilities to provide the services are limited to those sources. An agency must use advance planning and market research to prepare specifications that achieve full and open competition and include restrictions only to the extent necessary to meet its needs 191

CONTRACTS—Continued Page
Negotiation—Continued
Requests for Proposals—Continued
Specifications—Continued
Minimum Needs—Continued
Overstated—Continued
Solicitation requirement that ADP service contractor's proposed personnel combine recent battle group experience and experience with "JOTS II Plus" software is unduly restrictive of competition. The restriction limits competition to a sole source of supply, and the agency has not shown convincingly that its needs cannot be met by firms possessing other than the exact experience specified 305
Quantity Estimates
Best Available Information Requirement
Protest by incumbent contractor that workload estimates in solicitatin are defective because they differ from the current workload is denied where protester fails to show that the estimates are not based on the best information available concerning the agency's anticipated future requirements, otherwise misrepresent the agency's needs or result from fraud or bad faith 92
Restrictive
Agency Determination to Use Less Restrictive Specifications
A protester's presumable interest as a beneficiary of more restrictive specifications is not protectible under General Accounting Office (GAO) bid protest function, which is rather to ensure that the statutory requirements for full and open competition have been met 230
Restrictive
General Accounting Office Recommendation of Less Restriction
Solicitation requirement that ADP service contractor's proposed personnel combine recent battle group experience and experience with "JOTS II Plus" software is unduly restrictive of competition. The restriction limits competition to a sole source of supply, and the agency has not shown convincingly that its needs cannot be met by firms possessing other than the exact experience specified 305
Inability to Meet
Contracting agency's burden of providing rational support for restriction that engine rebuilding services be provided by the manufacturer or its authorized affiliates has not been met where the agency has not shown that the capabilities to provide the services are limited to those sources. An agency must use advance planning and market research to prepare specifications that achieve full and open competition and include restrictions only to the extent necessary to meet its needs 191

CONTRACTS—Continued Page
Negotiation—Continued
Requests for Proposals—Continued
Specifications—Continued
Restrictive—Continued
Undue Restriction Not Established
Protest that solicitation requirement for timely performance of services notwithstanding variations in the workload is unduly burdensome because the provision for an adjustment in the delivery schedule in the event of saturation does not define when an adjustment is required is denied. The protester neither alleges nor shows that the general requirement for timely performance notwithstanding variations in the workload is not part of the agency's requirements; GAO is aware of no requirement that agencies set forth in their solicitation the precise basis for adjustments; and nothing in the provision interferes with the contractor's right to seek relief under the disputes clause in the solicitation 92
Clause in solicitation for audiovisual services which imposes liability on contractor for the costs reasonably incurred by the government—the cost of reshooting the film—as a result of the loss of exposed film is not unduly burdensome. Although the agency failed to place a definite limit on the potential liability of the contractor, the Federal Acquisition Regulation, 48 CFR 45.103(a) (1984), generally provides that contractors are responsible and liable for government property in their possession, and the solicitation included estimates of the agency's annual requirements for different types of audiovisual productions and required offerors to propose a specific cost for the most frequently used elements in audiovisual productions 92
GAO is aware of no basis upon which to object to provisions in solicitation for audiovisual services, for adjusting downward the price for a particular audiovisual production in the event that the contractor utilizes fewer personnel than the number which it proposed to use when negotiating the price for that production and which formed the basis of the agreed price 92
Requests for Quotations (*See* CONTRACTS, Requests for Quotations)
Small Business Concerns (*See* CONTRACTS, Small Business Concerns, Awards)
Two-Step Procurement (*See* CONTRACTS, Two-Step Procurement)
Options
Price Comparison Prior to Exercising Option
When contracting agency decides to issue a request for proposals (RFP) for the purpose of deciding whether to exercise existing options, RFP must advise offerors that their offers will be compared with the options, in order to ensure competition on an equal basis. In view of the discretionary nature of the decision to exercise an option, however, RFP need not describe the factors on which the option exercise decision will be based in the same detail as the evaluation criteria used to compare offers under the RFP with each other 831

CONTRACTS—Continued Page
Options—Continued
Solicitation Provisions
Evaluation of Options
When contracting agency decides to issue a request for proposals (RFP) for the purpose of deciding whether to exercise existing options, RFP must advise offerors that their offers will be compared with the options, in order to ensure competition on an equal basis. In view of the discretionary nature of the decision to exercise an option, however, RFP need not describe the factors on which the option exercise decision will be based in the same detail as the evaluation criteria used to compare offers under the RFP with each other 831
Payments
Assignment
The Defense Logistics Agency (DLA), which erroneously paid certain contract proceeds to the contractor-assignor rather than to the assignee. The assignee complied with all requirements of the Assignment of Claims Act, 31 U.S.C. 3727. DLA could not discharge its payment obligation under the contract by paying the contractor. A letter from the assignee to the contractor; after the erroneous payment, releasing the assignee's interest in the contract does not revoke the assignment or otherwise extinguish the assignee's right to payment in these circumstances 598
Set-Off
"No Set-Off" Clause
Assignee bank has priority over the Internal Revenue Service for payment of contract proceeds even though tax debt matured before assignee satisfied requirements of Assignment of Claims Act, 31 U.S.C. 3727, since contract included a no setoff clause, the assignment was made to finance the contract, and the assignor still owes the assignee bank more than the amount of the contract proceeds..... 554
Conflicting Claims
Assignee/Surety *v.* Government
As there was no formal takeover agreement between the performing surety and the contracting Federal agency providing therefore, the surety's priority over the Government to unexpended contract balances for satisfying its performance bond obligations would not include unpaid earnings due the contractor that accrued prior to the surety taking over performance of the defaulted contract 29
Assignee *v.* I.R.S.
Assignee bank has priority over the Internal Revenue Service for payment of contract proceeds even though tax debt matured before assignee satisfied requirements of Assignment of Claims Act, 31 U.S.C. 3727, since contract included a no setoff clause, the assignment was made to finance the contract, and the assignor still owes the assignee bank more than the amount of the contract proceeds..... 554
Surety *v.* Government
As there was no formal takeover agreement between the performing surety and the contracting Federal agency providing therefore, the surety's priority over the Government to unexpended contract balances for satisfying its performance bond obligations would not include unpaid earnings due the contractor that accrued prior to the surety taking over performance of the defaulted contract 29

CONTRACTS—Continued Page

Payments—Continued

Conflicting Claims—Continued

Surety v. Internal Revenue Service

The order of priority for the payment of remaining contract balances held by a contracting Federal agency are first, the surety on its performance bond, including taxes required to be paid under the bond, minus any liquidated damages owed the Government as provided in the contract; second, the IRS for the tax debt owed by the contractor; and, last, the surety on its payment bond 29

Contractor v. Surety

Subrogation Rights

A surety called upon to answer for its principal's default is subrogated to any funds due or to become due under the contract and this subrogation right relates back to the date of the bond. Therefore, a performance bond surety which completed contract performance after the contractor's default, has priority to proceeds of Armed Services Board of Contract Appeals award over the prime contractor and the contractor's assignee bank 719

Past due accounts

Interest (*See* INTEREST, Payment Delay, Contracts)

Late Charges

Government Liability

Contract Provisions

The Army should include Prompt Payment Act interest penalties when it makes late payments to public utility companies that do not have a tariff-authorized late charge. The Act requires that interest penalties be added to late payments made to "any business concern." Utilities are not excluded from the definition of this term. Our decision in 63 Comp. Gen. 517 (1984) concerned a public utility which had adopted tariff-authorized late charges and other express payment terms. We held only that, just as is the case with other contractors, such express terms take precedence over provisions in the Act which were intended to provide contractors with a substitute penalty when none was provided in the contract 842

Surety of Defaulted Contractor

Entitlement

A surety called upon to answer for its principal's default is subrogated to any funds due or to become due under the contract and this subrogation right relates back to the date of the bond. Therefore, a performance bond surety which completed contract performance after the contractor's default, has priority to proceeds of Armed Services Board of Contract Appeals award over the prime contractor and the contractor's assignee bank 719

As there was no formal takeover agreement between the performing surety and the contracting Federal agency providing therefore, the surety's priority over the Government to unexpended contract balances for satisfying its performance bond obligations would not include unpaid earnings due the contractor that accrued prior to the surety taking over performance of the defaulted contract 29

CONTRACTS—Continued Page
Payments—Continued
Surety of Defaulted Contractor—Continued
Entitlement—Continued
"Unexpended Contract Balance"
Entitlement of Surety
As there was no formal takeover agreement between the performing surety and the contracting Federal agency providing therefore, the surety's priority over the Government to unexpended contract balances for satisfying its performance bond obligations would not include unpaid earnings due to the contractor that accrued prior to the surety taking over performance of the defaulted contract 29
Proposals (*See* CONTRACTS, Negotiation, Offers or Proposals)
Protests
Abandoned
Where an agency, in its report to GAO, rebuts an argument raised in the protest and the protester fails to respond to the agency's rebuttal in its comments on the agency report, the argument is deemed abandoned 828
Abeyance Pending Court Action
General Accounting Office (GAO) will dismiss a protest to the extent that it raises an issue which is before a court of competent jurisdiction and the court has not expressed interest in GAO's opinion 831
Administrative Actions
Outside Scope of Protest Procedures
General Accounting Office (GAO) will not consider under its bid protest jurisdiction allegations that an agency has not complied with the renewal provisions of the Cable Communications Policy Act of 1984, 47 U.S.C.A. 521, *et seq.* (West Supp. 1985), because that act expressly provides for judicial resolution of such disputes 313
Allegations
Not Prejudicial
Protest against technical requirement for telephone system to provide for vice digitization in the telephone is denied where protester states it could address requirement and there is no evidence that it impaired protester's ability to compete 380
Protester was not prejudiced by the failure of the solicitation to state whether an annual cost ceiling represented anticipated actual expenditures where the protester did not rely on the cost ceiling in formulating its price proposal 573
Unsubstantiated
Protest that awardee should not have been awarded a contract because of an organizational conflict of interest is denied where the facts do not demonstrate the existence of circumstances that would preclude the awardee from being objective in performing the contract 761

CONTRACTS—Continued Page
Protests—Continued
Allegations—Continued
Unsubstantiated—Continued
Protest by incumbent contractor that workload estimates in solicitation are defective because they differ from the current workload is denied where protester fails to show that the estimates are not based on the best information available concerning the agency's anticipated future requirements, otherwise misrepresent the agency's needs or result from fraud or bad faith 92
The fact that historical data contained in an IFB may have been inaccurate and thus not suitable alone as a basis for estimating performance costs is not a sustainable protest where it is not shown that data provided was not the best objective data available at that time ... 41
Protest that restriction for rebuilding truck engines to engine's manufacturer and its authorized affiliates unduly restricts competition lacks merit where the protester was extended an opportunity to submit an explanation of its capabilities at the planning stages of the procurement, but declined to do so 191
Protest that the contracting agency disclosed the protester's offered price to another offeror, resulting in that offeror submitting the lowest cost proposal, is denied where the allegation is unsupported in the record, and where the record discloses other reasons for the competitor's low offer 347
Protest by incumbent contractor that workload estimates in solicitation are defective because they differ from the current workload is denied where protester fails to show that the estimates are not based on the best information available concerning the agency's anticipated future requirements, otherwise misrepresent the agency's needs, or result from fraud or bad faith 558
Authority to Consider
Claims of possible patent infringement do not provide a basis for the General Accounting Office (GAO) to object to an award since questions of patent infringement are not encompassed by GAO's bid protest function 663
Where Congress authorizes the collection or receipt of certain funds by an agency and has specified or limited their use or purpose, the authorization constitutes an appropriation, and protests arising from procurements involving those funds are subject to GAO bid protest jurisdiction 25
Protest challenging agency's decision not to award a contract under a solicitation issued in accordance with the procedures set out in OMB Circular A-76 falls within the definition of protest in the Competition in Contracting Act since the act does not require that an award be proposed at the time a protest is filed and a proposed award within the statutory definition is contemplated when a solicitation is issued for cost comparison purposes. Review of such a protest is consistent with congressional intent to strengthen existing General Accounting Office (GAO) bid protest function 41

CONTRACTS—Continued Page
Protests—Continued
Authority to Consider—Continued
General Accounting Office (GAO) will consider protests of competitive selections of no cost, no fee travel management services contractors under GAO's bid protest authority under the Competition in Contracting Act since the selections are procurements of contracts for services 109
Since General Accounting Office (GAO) decides protests that involve procurements of property or services by a federal agency, the award by a federal agency of franchise contract for cable television services is subject to GAO's bid protest jurisdiction 313
Protest concerning NASA request for carriers' rate tenders for marine transportation services is dismissed since the request was issued under authority of the Transportation Act of 1940, as amended, 49 U.S.C. 10721 (1982) and the agency did not obtain such services under the government's procurement system so that a government bill of lading will serve as the basis for payment 328
The United States Postal Service is not subject to the General Accounting Office's bid protest jurisdiction under the Competition in Contracting Act of 1984 as a result of the statutory provision (39 U.S.C. 410) exempting the Postal Service from any federal procurement law not specifically made applicable to it 584
Activities Not Involving Federal Procurement
General Accounting Office has no authority to consider a protest of the award of a contract by the Government of Egypt to be financed under the Foreign Military Sales program because the solicitation was issued and the award made by other than federal agency 504
Contract Administration Matters
Whether awardee will meet its contractual obligations to the government is a matter of contract administration, which is the responsibility of the procuring agency and is not encompassed by the General Accounting Office's bid protest function 663
Whether a contract requirement is met during performance of the contract is a matter of contract administration which General Accounting Office (GAO) will not consider 651
Letter received from awardee after award concerns contract administration and does not constitute improper discussions 109
Protest against agency actions during the protester's contract performance concerns contract administration and is for consideration by the procuring agency, not General Accounting Office (GAO) 222
Housing and Urban Development Department Procurements
Under the Competition in Contracting Act of 1984, the General Accounting Office's bid protest authority extends to procurements by the Department of Housing and Urban Development for management of properties acquired through insurance of mortgages or loans under the National Housing Act 66
Nonappropriated Fund Activity Procurements
Although a procurement is for a nonappropriated fund activity, when it is conducted by the Air Force, a federal agency, the General Accounting Office has jurisdiction under the Competition in Contracting Act of 1984 to decide a bid protest concerning an alleged violation of the procurement statutes and regulations 240

CONTRACTS—Continued Page
Protests—Continued
Authority to Consider—Continued
Tennessee Valley Authority Procurements
Tennessee Valley Authority (TVA) subject to the bid protest jurisdiction of the General Accounting Office under the Competition in Contracting Act of 1984 (CICA) since TVA comes within the statutory definition of a federal agency subject to CICA 745
Basis for Protest Requirement
Protester's assertion that it was unaware of the requirement to file protest with General Accounting Office (GAO) within 10 working days after protester learned of adverse agency action on its protest initially filed with procuring agency is not a basis for consideration of the protest since the protester is charged with constructive notice of GAO's Bid Protest Regulations through their publication in the Federal Register 17
Burden of Proof
On Protester
When the only evidence of the time that the bidder's repesentative arrived at the contracting office consists of a statement of the protester that the repesentative arrived prior to the bid opening time and a statement of the contracting agency that the representative arrived after that time, the protester has failed to sustain its burden of proving that the bid was not late 71
Protest by incumbent contractor that workload estimates in solicitation are defective because they differ from the current workload is denied where protester fails to show that the estimates are not based on the best information available concerning the agency's anticipated future requirements, otherwise misrepresent the agency's needs, or result from fraud or bad faith 558
Conflict in Statement of Protester and Contracting Agency
When the only evidence of the time that the bidder's representative arrived at the contracting office consists of a statement of the protester that the representative arrived prior to the bid opening time and a statement of the contracting agency that the representative arrived after that time, the protester has failed to sustain its burden of proving that the bid was not late 71
Contract Administration
Not for Resolution by GAO
Whether awardee will meet its contractual obligations to the government is a matter of contract administration, which is the responsibility of the procuring agency and is not encompassed by the General Accounting Office's bid protest function 663
Whether a contract requirement is met during performance of the contract is a matter of contract administration which General Accounting Office (GAO) will not consider 651
Letter received from awardee after award concerns contract administration and does not constitute improper discussions 109
Protest against agency actions during the protester's contract performance concerns contract administration and is for consideration by the procuring agency, not General Accounting Office (GAO) 222

CONTRACTS—Continued Page

Protests—Continued

Federal Government Matters Requirement

General Accounting Office has no authority to consider a protest of the award of a contract by the Government of Egypt to be financed under the Foreign Military Sales program because the solicitation was issued and the award made by other than a federal agency 504

General Accounting Office Authority

Under the Competition in Contracting Act of 1984, the General Accounting Office's bid protest authority extends to procurements by the Department of Housing and Urban Development for management of properties acquired through insurance of mortgages or loans under the National Housing Act 66

General Accounting Office Function

Free and Full Competition Objective

A protester's presumable interest as a beneficiary of more restrictive specifications is not protectible under General Accounting Office (GAO) bid protest function, which is rather to ensure that the statutory requirements for full and open competition have been met 230

Remedial Relief

The Competition in Contracting Act requires the General Accounting Office to disregard the costs of contract termination and recompetition in making recommendations where it determines that an award was not in accord with applicable statutes and regulations after the procuring agency determines that continued performance is in the government's best interest although the protest was filed within 10 days of award 205

General Accounting Office Procedures

Constructive Notice

Protester's assertion that it was unaware of the requirement to file protest with General Accounting Office (GAO) within 10 working days after protester learned of adverse agency action on its protest initially filed with procuring agency is not a basis for consideration of the protest since the protester is charged with constructive notice of GAO's Bid Protest Regulations through their publication in the Federal Register 17

Date Basis of Protest Made Known to Protester

Where a protester is aware of the basis for a protest issue at the time of initial protest filing but does not raise the issue until it submits its comments on the agency report, the protest issue is untimely raised and will not be considered by GAO 386

Filing Protest With Agency

General Accounting Office (GAO) will not waive regulatory requirement that protester provide contracting officer with a copy of its protest within 1 day of filing where the agency otherwise did not have specific knowledge concerning the protest's details so that it would be able to file a responsive report within the statutorily-required timeframe 552

CONTRACTS—Continued Page
Protests—Continued
General Accounting Office Procedures—Continued
New Issues
Unrelated to Original Protest Basis
Where a protester is aware of the basis for a protest issue at the time of initial protest filing but does not raise the issue until it submits its comments on the agency report, the protest issue is untimely raised and will not be considered by GAO 386
Not Waivable by Agencies, etc.
Procuring agency's delay in providing portions of the procurement record relevant to a protest issue is inconsistent with its obligation under the Competition in Contracting Act of 1984 to submit a complete report to the General Accounting Office (GAO), including all relevant documents. GAO will not consider the untimely submission since to do so would delay resolution of the protest 205
Piecemeal Development of Issues by Protester
Dismissal of a protest for failure to include a detailed statement of the protest grounds is affirmed where the protester furnished its details for the first time in its reconsideration request filed 1 month after the original deficient protest was filed 212
General Accounting Office (GAO's) Bid Protest Regulations, 4 C.F.R. 21.1(c)(4) (1985), require that an initial protest set forth a detailed statement of the legal and factual protest grounds and do not contemplate a piecemeal presentation of arguments or information even where they relate to the original grounds for protest. Where, however, the initial protest called into question the accuracy of all the workload estimates in a solicitation and the agency possessed sufficient information to take comprehensive corrective action or otherwise to fully respond to the protest, then a subsequently submitted specific enumeration of defective estimates is timely 558
Reconsideration Requests
Additional Evidence Submitted
The General Accounting Office (GAO) sustains a protest on reconsideration where the agency failed to provide GAO with a copy of a memorandum, prepared while the protest was pending, that reversed its determination that the protester's proposal to provide an aircraft part could not be evaluated without a final assembly drawing used by the previous supplier. Since the memorandum establishes that the agency's initial rejection of the protester's proposal was unreasonable, GAO recommends resolicitation if delivery schedules permit 457
Available But Not Previously Provided to GAO
Dismissal of a protest for failure to include a detailed statement of the protest grounds is affirmed where the protester furnished its details for the first time in its reconsideration request filed 1 month after the original deficient protest was filed 212
Eligible Party Requirement
A contract awardee adversely affected by a prior General Accounting Office (GAO) decision is not eligible to request reconsideration of that decision where the firm was notified of the original protest but chose not to exercise its right to comment on the issues raised in the protest 34

CONTRACTS—Continued Page
Protests—Continued
General Accounting Office Procedures—Continued
Reconsideration Requests—Continued
Error of Fact or Law
Established
The General Accounting Office (GAO) sustains a protest on reconsideration where the agency failed to provide GAO with a copy of a memorandum, prepared while the protest was pending, that reversed its determination that the protester's proposal to provide an aircraft part could not be evaluated without a final assembly drawing used by the previous supplier. Since the memorandum establishes that the agency's initial rejection of the protester's proposal was unreasonable, GAO recommends resolicitation if delivery schedules permit..... 457
Not Established
Prior decision is affirmed where new information relied on in request for reconsideration provides no valid basis for modifying or overruling the prior decision..... 757
Prior decision, which held that the agency's source selection improperly deviated from the solicitation's established evaluation scheme absent a compelling justification in the record to support the selection, is affirmed where the agency's request for reconsideration fails to establish convincingly that the prior decision contains errors of law or of fact which warrant its reversal or modification..... 34
Dismissal of protest is affirmed where request for reconsideration does not establish that the decision was based on error of law or fact. 132
Request for reconsideration of the balance of the original protest is denied where the protester raises no new facts or legal arguments which were not considered during the pendency of the original protest and where the protester fails to show an error of law or fact with regard to those issues..... 184
The General Accounting Office (GAO) denies a request for reconsideration of a decision and affirms that decision recommending termination of an incumbent's contract because the agency should have allowed waiver of the protester's mistake claim, where the incumbent's request fails to establish convincingly that the prior decision contains errors of law or of fact that warrant its reversal or modification..... 300
General Accounting Office (GAO) affirms previous decision sustaining protest on basis that the awardee's proposal was not properly evaluated, since it received a maximum score, even though it proposed less than the optimum staffing preference indicated in the solicitation evaluation criteria and in the rating plan used by the agency in scoring proposals..... 323
Dismissal of original protest, for failure to timely comment on agency report, is affirmed despite protester's assertion that it received the report late (after the due date of the report). The protester was on notice of obligation to notify General Accounting Office (GAO) that it had not received the report by the due date, but failed to advise GAO timely that it received the report late..... 330

CONTRACTS—Continued Page

Protests—Continued

General Accounting Office Procedures—Continued

Reconsideration Requests—Continued

Request for Conference

Denied

Request for reconsideration based on the allegation that our Office's denial of a bid protest conference request resulted in an erroneous decision predicted on inadequate facts is denied where the request was submitted with the protester's comments on the agency report, making the scheduling of a conference within 5 days after the report's receipt, in accordance with General Accounting Office (GAO) Bid Protest Regulations, a practical impossibility, and where the protester had full opportunity to present its position in writing 184

Timeliness

Protester alleges that request for reconsideration was untimely because it relied on the caption on the first page of a decision of the Comptroller General of the United States and the caption provided an insufficient address for protester's courier to effectuate delivery. Nevertheless, dismissal of request for reconsideration is affirmed because protester did not use the address prescribed in our Bid Protest Regulations, 4 C.F.R. 21.1(b) 15

Timeliness of Comments on Agency's Report

General Accounting Office (GAO) will not reopen a protest file that was closed because the protester failed to file comments or express continued interest in the protest within 7 working days after receipt of the agency report as required by the Bid Protest Regulations. Protester's response to the contracting agency's decision on its prior agency protest may not be considered as comments on the agency's protest report to GAO because the response, submitted 24 days prior to the agency report due date, does not address the agency's detailed response to the GAO protest 625

General Accounting Office (GAO) will not consider a new protest of solicitation improprieties prior to bid opening where an earlier, essentially indentical protest was dismissed for failure to comment on the agency report 13

Failure of an agency simultaneously to furnish a copy of a protest report to the protester and to GAO does not warrant rejection of the report where the protester is not prejudiced by the agency's noncompliance with this procedural requirement 160

Dismissal of original protest, for failure to timely comment on agency report, is affirmed despite protester's assertion that it received the report late (after the due date of the report). The protester was on notice of obligation to notify General Accounting Office (GAO) that it had not received the report by the due date, but failed to advise GAO timely that it received the report late 330

CONTRACTS—Continued Page
Protests—Continued
General Accounting Office Procedures—Continued
Timeliness of Comments on Agency's Report—Continued
Additional Information Supporting Timely Submission
General Accounting Office (GAO's) Bid Protest Regulations, 4 C.F.R. 21.1(c)(4) (1985), require that an initial protest set forth a detailed statement of the legal and factual protest grounds and do not contemplate a piecemeal presentation of arguments or information even where they relate to the original grounds for protest. Where, however, the initial protest called into question the accuracy of all the workload estimates in a solicitation and the agency possessed sufficient information to take comprehensive corrective action or otherwise to fully respond to the protest, then a subsequently submitted enumeration of defective estimates is timely 558
Adverse Agency Action Effect
Protest filed with General Accounting Office (GAO) before resolution of an initial protest filed with the contracting agency is timely under Bid Protest Regulations..... 160
Subsequent protest to General Accounting Office (GAO) which was not filed within 10 working days of actual knowledge of initial adverse agency action is dismissed as untimely. Earlier receipt by GAO of information copy of letter which was addressed to the contracting officer and did not include a clear indication of a desire for a decision by GAO did not constitute a protest to GAO..... 200
Protest filed with General Accounting Office (GAO) within 10 working days after adverse agency action on protest at that level (contracting agency proceeded to accept best and final offers) is timely and, thus, will be considered..... 347
Date Basis of Protest Made Known to Protester
Protest concerning agency's failure to solicit protester filed more than 10 working days after bid opening is untimely since the protest was not filed within 10 working days after the basis for protest was known or should have been known, whichever was earlier, as required by Bid Protest Regulations..... 109
A protest of the use of an oral solicitation and of deficiencies in the oral solicitation should have been filed either prior to the time protester's proposal was submitted or within 10 days of receiving inquiries on its proposal from the agency..... 1
Protest filed more than 10 working days after the protester was apprised that award was made to another bidder is untimely under GAO's Bid Protest Regulations..... 109
Issue regarding agency's technical evaluation of awardee's product first raised in protester's comments on agency report is timely, where protester first had access to awardee's proposal when the agency included it as part of the agency report; protester's comments were filed within 10 days after receiving the report; and agency and awardee had full opportunity to respond to the protester's allegation. 145
Protest filed with General Accounting Office (GAO) before resolution of an initial protest filed with the contracting agency is timely under Bid Protest Regulations..... 160

CONTRACTS—Continued Page
Protests—Continued
General Accounting Office Procedures—Continued
Timeliness of Comments on Agency's Report—Continued
Date Basis of Protest Made Known to Protester—Continued
Subsequent protest to General Accounting Office (GAO) which was not filed within 10 working days of actual knowledge of initial adverse agency is dismissed as untimely. Earlier receipt by GAO of information copy of letter which was addressed to the contracting officer and did not include a clear indication of a desire for a decision by GAO did not constitute a protest to GAO 200
A reconsideration request, filed 1 month after the original protest, is untimely if viewed as an entirely new protest where it sets forth the same grounds on which the original protest was based, since it was not filed in General Accounting Office (GAO) within 10 working days after the protest grounds were known 212
Protest that agency improperly awarded a sole-source contract is dismissed as untimely since it was not filed within 10 days after the protester knew the protest basis 222
Protest issues based upon the terms of a contract are untimely where the protester received a copy of the contract more than 10 days before the protest was filed 309
Protest filed with General Accounting Office (GAO) within 10 working days after adverse agency action on protest at that level (contracting agency proceeded to accept best and final offers) is timely and, thus, will be considered 347
Protest, addressed in manner other than that set forth in section 21.1(b) of General Accounting Office (GAO) Bid Protest Regulations, will not be considered since GAO did not timely receive the protest within 10 working days after initial adverse agency action on the protest to the contracting agency 433
Protest filed more than 10 working days after basis was known is untimely. 4 C.F.R. 21.2(a)(2) (1985) 476
Debriefing Conferences
Issues Providing Protest Basis
Protester may delay filing protest until after debriefing is held where protest is based on information regarding the awardee's proposal and that information was first revealed at the debriefing 490
Furnishing of Information on Protest
Specificity Requirement
General allegation that multiple dissimilar tasks should not have been consolidated under single work category for purposes of calculating payment deduction is untimely to the extent the protester payment deduction is untimely to the extent the protester failed to identify in its intitial protest the specific work categories to which its general allegation applied, since such a determination depends on subjective criteria not defined by the protester and the contracting agency therefore could not reasonably determine which work categories, in the protester's view, were covered by general allegation. 558

CONTRACTS—Continued Page
Protests—Continued
General Accounting Office Procedures—Continued
Timeliness of Comments on Agency's Report—Continued
New Issues
Unrelated to Original Protest Basis
Protester's new and independent ground of protest is dismissed where the later-raised issue does not independently satisfy rules of General Accounting Office (GAO's) Bid Protest Regulations 651
Protest Addressed Incorrectly
Protest, addressed in manner other than that set forth in section 21.1(b) of General Accounting Office (GAO) Bid Protest Regulations, will not be considered since GAO did not timely receive the protest within 10 working days after initial adverse agency action on the protest to the contracting agency 433
Significant Issue Exception
For Application
A protest involving a questionable application of definitive responsibility criteria by the contracting agency raises an issue significant to the procurement system, 4 C.F.R. 21.2(c)(2) (1985), and will be considered on the merits even though it is untimely filed 510
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date for Proposals
A protest of the use of an oral solicitation and of deficiencies in the oral solicitation should have been filed either prior to the time protester's proposal was submitted or within 10 days of receiving inquiries on its proposal from the agency 1
Protester's subsequent allegations that specific workload estimates and specific deduction categories—relating to deductions for unsatisfactory performance from the payments to the contractor—are defective are untimely where not received by General Accounting Office (GAO) until after the closing date for receipt of initial proposals since GAO's Bid Protest Regulations require alleged improprieties apparent prior to the closing date to be filed prior to the closing date. 4 C.F.R. 21.2(a) (1) (1985). Although the protester in its initial protest, filed prior to the closing date, generally alleged that many of the approximately 200 workload estimates and many of the approximately 84 deduction categories were defective, such general allegations do not render subsequent specific allegations timely since our Bid Protest Regulations do not contemplate a piecemeal presentation or development of protest issues 127
Where protest is against alleged impropriety in solicitation and was filed prior to closing date for receipt of initial proposals, protest is timely and for consideration 191
Post-bid opening protest that the Davis-Bacon Act, rather than the Walsh-Healy Act, should have applied to the solicitation is dismissed as untimely filed where the solicitation contained only the clauses mandated by the Federal Acquisition Regulation for referencing the requirements of the Walsh-Healy Act and made no reference to any other labor statute 336
Protest against alleged apparent solicitation impropriety—inclusion of a descriptive literature requirement in a solicitation—is untimely when filed after the closing date for receipt of initial proposal. 418

CONTRACTS—Continued Page
Protests—Continued
General Accounting Office Procedures—Continued
Timeliness of Comments on Agency's Report—Continued
Solicitation Improprieties—Continued
Apparent Prior to Bid Opening/Closing Date for Proposals—Continued
Protester's pre-bid-opening oral complaint to contracting officer that solicitation estimates were faulty did not constitute timely agency protest since oral protests are no longer provided for under the Federal Acquisition Regulation. Therefore, protest to General Accounting Office (GAO) following bid opening, is dismissed as untimely 422
Protest that firm lacks sufficient time to prepare its bid concerns an apparent impropriety in the solicitation and must be filed prior to bid opening in order to be timely 510
Interested Party Requirement
Direct Interest Criterion
A party that submits late Step 1 proposal is not an interested party to protest the evaluation of proposals or any changes in the terms and conditions of the solicitation that occur during or after proposal evaluation when those issues only affect the parties to the competition 619
Where the protester is ineligible for award under a solicitation for engine rebuilding services, GAO need not consider protest of the solicitation's requirement that the contractor use a specific brand of parts 191
Potential Contractors, etc. Not Submitting Bids, etc.
Where contracting agency issues a request for proposals (RFP) soliciting offers for comparison with protester's existing options for the same items, protester, as a potential offeror under the RFP, is an interested party to challenge alleged deficiencies in the RFP 831
Protester Not in Line for Award
A party that submits late Step 1 proposal is not an interested party to protest the evaluation of proposals or any changes in the terms and conditions of the solicitation that occur during or after proposal evaluation when those issues only affect the parties to the competition 619
Where the protester is ineligible for award under a solicitation for engine rebuilding services, GAO need not consider protest of the solicitation's requirement that the contractor use a specific brand of parts 191
Incumbent cable television franchisee is not an interested party to contest provisions in a solicitation issued by an agency for a second franchise where the agency has determined properly that the incumbent franchisee is not eligible for award under the solicitation 313

CONTRACTS—Continued Page
Protests—Continued
Interested Party Requirement—Continued
Small Business Set-Asides
A small business concern that does not participate in the Small Business Administration's program under section 8(a) of the Small Business Act is an interested party to protest another firm's eligibility where the 8(a) subcontract was awarded on a sole-source basis and the protester will be able to compete if its protest is sustained and the reprocurement is not restricted to participants in the 8(a) program 313
Suspended, Debarred, etc. Contractors
Protest is dismissed where debarment proceeding against the protester has been initiated because, pending a debarment decision, the firm is not eligible for government contract awards 503
Moot, Academic, etc. Questions
Award Made to Protester
Allegation that agency improperly relaxed specifications and sought to preclude protester from competition is rendered academic by award to protester 510
Corrective Action Proposed, Taken, etc. by Agency
Where Assistant Secretary of the Army clarifies and updates determination and findings (D&F) to remove any doubt that certain components of the tractors being procured were subject to restrictions on place of manufacture, this renders academic a protest that the restrictions in amended solicitation exceeded the scope of the restrictions in the original D&F justifying negotiation. Moreover, since the protester has not only not alleged that the more extensive production restrictions precluded it from competing for award but in fact has recently submitted a revised offer, the protester apparently retains the opportunity to compete for award and therefore the recovery of the costs of filing and pursuing its protest is inappropriate .. 450
Whether an agency improperly excluded an initial proposal from the competitive range because of its inclusion of an interest rate contingency is academic when the agency in fact evaluates an unsolicited best and final offer from which the contingency has been deleted 573
Protester Not in Line for Award
Protest that second low bid is nonresponsive is academic and not for consideration where the protester has not presented a basis upon which to question a prospective award to the low bidder 505
Nonappropriated Fund Activities
Although a procurement is for a nonappropriated fund activity, when it is conducted by the Air Force, a federal agency, the General Accounting Office has jurisdiction under the Competition in Contracting Act of 1984 to decide a bid protest concerning an alleged violation of the procurement statutes and regulations 240

CONTRACTS—Continued Page
Protests—Continued
Notice
To Contracting Agency
General Accounting Office (GAO) will not waive regulatory requirement that protester provide contracting officer with a copy of its protest within 1 day of filing where the agency otherwise did not have specific knowledge concerning the protest's details so that it would be able to file a responsive report within the statutorily required timeframe 552
Oral
To Procuring Agency
Protester's pre-bid-opening oral complaint to contracting officer that solicitation estimates were faulty did not constitute timely agency protest since oral protests are no longer provided for under the Federal Acquisition Regulation. Therefore, protest to General Accounting Office (GAO), following bid opening, is dismissed as untimely 422
Preparation
Costs
Compensable
Recovery of the costs of filing and pursuing a protest, including attorney's fees, and proposal preparation costs is appropriate where General Accounting Office (GAO) recommends that option to extend contract not be exercised since the protester does not thereby get an opportunity to compete for the basic contract period 1
Protester is entitled to recover the costs of pursuing its protest, including attorneys' fees, where agency, in effect, made an improper sole-source award; GAO considers the incentive of recovering the costs of protesting an improper sole-source award to be consistent with the Competition in Contracting Act's broad purpose of increasing and enhancing competition on federal procurements 25
Protester is entitled to recover the cost of filing and maintaining its protest, including attorney's fees, as well as its proposal preparation costs, where protester was unreasonably excluded from the procurement but corrective action is not feasible in light of agency's decision not to suspend performance during pendency of the protest 145
In the absence of any evidence to support a claim for the costs of bid and proposal preparation and filing and pursuing the protest, the General Accounting Office agrees that the agency's offer of settlement is reasonable with the exception that the claimant is also entitled to be reimbursed for automobile mileage and the time expended to submit its offer 429

CONTRACTS—Continued Page

Protests—Continued

Preparation—Continued

Costs—Continued

Noncompensable

Although original protest was sustained, subsequent claim for the recovery of protest costs on the ground that the recommended corrective action—non-exercise of options and resolicitation—is an ineffective remedy is denied where the protester was largely responsible for the substantial performance of the base year of an improperly awarded contract due to the fact that the firm's submission alleging material defects in the solicitation had been untimely filed, and the General Accounting Office (GAO) only considered the merits of the protest under its "significant issues" exception to its filing requirements because this was the first instance in which the contracting agency was before GAO in a bid protest matter 819

Protester is not entitled to recover the costs of filing and pursuing its successful protest even though the General Accounting Office (GAO) recommended that the protested contracts be awarded to the protester and the protester did not receive the awards. The protester entered into a voluntary agreement with the agency whereby it waived its right to the contract awards in exchange for an alternative, mutually agreeable remedy, and under these circumstances, GAO finds that the protester has obtained a sufficient remedy and is entitled to no further recovery 778

Protester's procurement costs, including reasonable attorneys' fees for pursuit of protest, will not be awarded where the contracting agency did not act improperly and the protest is denied 347

Recovery of proposal preparation costs and the costs of pursuing a protest is inappropriate when the protester is afforded an opportunity to compete in a reprocurement 268

Claim for costs of filing and pursuing protest is denied where remedy afforded protester is an opportunity to compete for award under resolicitation 401

Where Assistant Secretary of the Army clarifies and updates determination and findings (D&F) to remove any doubt that certain components of the tractors being procured were subject to restrictions on place of manufacture, this renders academic a protest that the restrictions in amended solicitation exceeded the scope of the restrictions in the original D&F justifying negotiation. Moreover, since the protester has not only not alleged that the more extensive production restrictions precluded it from competing for award but in fact has recently submitted a revised offer, the protester apparently retains the opportunity to compete for award and therefore the recovery of the costs of filing and pursuing its protest is inappropriate .. 450

While a protest against the award of a contract to a materially unbalanced offeror was sustained, the protester's subsequent claim for proposal preparation costs and the costs of filing and pursuing the protest is denied where the record shows that the protester did not have a substantial chance of receiving the award and was therefore not unreasonably excluded from the competition because the protester's price proposal was also materially unbalanced, although to a lesser degree 488

CONTRACTS—Continued Page
Protests—Continued
Procedures
Bid Protest Procedures (*See* CONTRACTS, Protests, General Accounting Office Procedures)
Contracting Agency Requirements
Procuring agency's delay in providing portions of the procurement record relevant to a protest issue is inconsistent with its obligation under the Competition in Contracting Act of 1984 to submit a complete report to the General Accounting Office (GAO), including all relevant documents. The GAO will not consider the untimely submission since to do so would delay resolution of the protest. 205
Proposal Preparation Costs (*See* CONTRACTS, Negotiation, Offers or Proposals, Preparation, Costs)
Reconsideration (*See* CONTRACTS, Protests, General Accounting Office Procedures, Reconsideration Requests)
Same Issue(s) Raised in Prior Case by Same Protester
General Accounting Office (GAO) will not consider a new protest of solicitation improprieties prior to bid opening where an earlier, essentially indentical protest was dismissed for failure to comment on the agency report 13
Subcontractor Awards
Review by GAO
The General Accounting Office affirms its dismissal of a protest on the grounds that the prime contractor is not acting for the government in awarding subcontracts where the protester has not shown that the prime contractor is principally providing large-scale management services at a government-owned facility 683
Subcontractor selection is not made for the government within the meaning of the exception allowing General Accounting Office review because the prime contractor is not operating a government-owned facility and is not otherwise serving as a mere conduit between the government and the subcontractor 585
Awards "for" Government
The General Accounting Office affirms its dismissal of a protest on the grounds that the prime contractor is not acting for the government in awarding subcontracts where the protester has not shown that the prime contractor is principally providing large-scale management services at a government-owned facility. 683
Subcontractor selection is not made for the government within the meaning of the exception allowing General Accounting Office review because the prime contractor is not operating a government-owned facility and is not otherwise serving as a mere conduit between the government and the subcontractor 585

178-403 O - 87 - 7 : QL 3

CONTRACTS—Continued Page
Protests—Continued
Summary Dismissal
When a Brooks Act procurement is the subject of a protest to the General Services Administration Board of Contract Appeals (GSBCA), General Accounting Office (GAO's) Bid Protest Regulations effectively provide for the dismissal of any protest to GAO involving that same procurement in deference to the binding effect of a GSBCA decision on the federal agency involved, subject to appeal to the United States Court of Appeals for the Federal Circuit. The clear intent of the Competition in Contracting Act of 1984 is to provide for an election of mutually exclusive administrative forums to resolve challenges to Brooks Act procurements 72
Sustained
Corrective Action
Agency which terminated contract after discovering that solicitation understated its requirements and that awardee's product would not meet its needs should reinstate the solicitation and make award to the protester since protester's offer will meet the the agency's actual needs and was the lowest technically acceptable offer under the original solicitation 569
What Constitutes Protest
Protest challenging agency's decision not to award a contract under a solicitation issued in accordance with the procedures set out in OMB Circular A-76 falls within the definition of protest in the Competition in Contracting Act since the act does not require that an award be proposed at the time a protest is filed and a proposed award within the statutory definition is contemplated when a solicitation is issued for cost comparison purposes. Review of such a protest is consistent with congressional intent to strengthen existing General Accounting Office (GAO) bid protest function 41
Inquiries to a contracting agency by a congressional aid regarding rejection of a constituent's bid can reasonably be considered as a protest to the agency where the aide ostensibly represents the interests of the constituent and, while not expressly indicating an intent to protest, adequately conveys the constituent's dissatisfaction to the agency 160
Subsequent protest to General Accounting Office (GAO) which was not filed within 10 working days of actual knowledge of initial adverse agency action is dismissed as untimely. Earlier receipt by GAO of information copy of letter which was addressed to the contracting officer and did not include a clear indication of a desire for a decision by GAO did not constitute a protest to GAO 200
Protester's pre-bid-opening oral complaint to contracting officer that solicitation estimates were faulty did not constitute timely agency protest since oral protests are no longer provided for under the Federal Acquisition Regulation. Therefore, protest to General Accounting Office (GAO), following bid opening, is dismissed as untimely 422
Requests for proposals
Negotiated Procurement (*See* CONTRACTS, Negotiation, Requests for Proposals)

CONTRACTS—Continued Page
Requests for Quotations
Competition
Adequacy
Protest concerning agency's failure to furnish request for quotations to protester under two procurements conducted under simplified small purchase procedures is sustained where, despite agency contention that it was not aware that protester was a potential supplier, record contains clear evidence that agency should have been aware of protester's interest in competing. Agency's actions are not consistent with Competition in Contracting Act requirement that competition for small purchases be obtained to the maximum extent practicable 854
Copy Requested
Failure to Furnish
Protest concerning agency's failure to furnish request for quotations to protester under two procurements conducted under simplified small purchase procedures is sustained where, despite agency contention that it was not aware that protester was a potential supplier, record contains clear evidence that agency should have been aware of protester's interest in competing. Agency's actions are not consistent with Competition in Contracting Act requirement that competition for small purchases be obtained to the maximum extent practicable 854
Preparation of Quotation
Costs
Recovery
In the absence of any evidence to support a claim for the costs of bid and proposal preparation and filing and pursuing the protest, the General Accounting Office agrees that the agency's offer of settlement is reasonable with the exception that the claimant is also entitled to be reimbursed for automobile mileage and the time expended to submit its offer 429
Purchases on Basis of Quotations
Evaluation Propriety
Where a drawing accompanying a timely small purchase quotation from the protester is in need of clarification; the agency does not make award for 7 months after receiving the drawing; and the agency actively solicits the awardee's quote during the delay, the protester should have been given an opportunity during the delay to clarify its drawing 500
Quotations
Rejection
Propriety
Where a request for quotations under small purchase procedures does not contain a clause advising that quotations must be submitted by a certain date to be considered, the contracting agency should have considered the protester's low quotation received prior to award since no substantial activity had transpired towards award and the other offeror would not have been prejudiced 685
Responsibility of Contractors
Determination (*See* CONTRACTORS, Responsibility, Determination)

CONTRACTS—Continued Page

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

Set-asides

Awards to Small Business Concerns (*See* **CONTRACTS, Small Business Concerns, Awards, Set-asides**)

Small Business Concern Awards (*See* **CONTRACTS, Small Business Concerns, Awards**)

Awards

Prior to Resolution of Size Protest

Award to large business under small business set-aside is proper where contracting officer is unaware of SBA determination when it made the award and he has waited more than 10 business days from when SBA received a size protest of the awardee's status and where there has been no showing that the awardee's small business self certification is in bad faith or that contracting officer knew it was not a small business. However, GAO recommends that options not be exercised on large business awardee's contract 109

Responsibility Determination

The bidder, not the contracting officer, has the burden of proving the bidder's competency when applying to the Small Business Administration (SBA) for a Certificate of Competency (COC). General Accounting Office (GAO) will dismiss protests alleging that the contracting officer failed to forward to SBA for its COC determination information tending to show that a contractor is responsible where the contractor had the information, but did not provide it to the SBA when applying for a COC 132

Affirmative Finding Effect

The contracting agency need not make determinations tantamount to affirmative determinations of responsibility on expected small business bidders before deciding to set IFB line items aside for small business. The agency is only obligated to make an informed business judgment that at least two responsible small business bidders will compete and will offer reasonable prices 270

Nonresponsibility Finding

Certificate of Competency Requirement

Protest that contracting officer failed to comply with Federal Acquisition Regulation 19.602-1(c)(2), by not including a letter from the protester with the agency referral to the Small Business Administration (SBA) for a certificate of competency (COC) determination is dismissed because the contracting officer is not required to refer to SBA information which does not support the contracting officer's determination that the prospective contractor is nonresponsible and because the burden is on the contractor to prove its competency to the SBA through its application for a COC 74

Referral to SBA for COC Mandatory Without Exception

Under the Small Business and Federal Procurement Competition Enhancement Act of 1984, contracting agencies must refer to the Small Business Administration nonresponsibility decisions against small business concerns even though small purchase procedures are used 503

CONTRACTS—Continued Page
Set-asides—Continued
Awards—Continued
Review by GAO
Agency is not required to refer to the Small Business Administration its determination to exclude an offeror's proposal because of the likelihood of an impropriety or conflict of interest in preparation of the proposal where there is no question as to the offeror's capability to perform or any other traditional element of responsibility 104
Self-certification
Acceptance
Mere fact that awardee of service contract set aside for small business indicated in bid that it would perform services at facility owned by large business is not sufficient to require contracting officer to challenge self-certification in awardee's bid as its size status, since it is not legally objectionable for a small business to subcontract with a large business on a set-aside contract .....
Award to large business under small business set-aside is proper where contracting officer is unaware of SBA determination when it made the award and he has waited more than 10 business days from when SBA received a size protest of the awardee's status and where there has been no showing that the awardee's small business self certification is in bad faith or that contracting officer knew it was not a small business. However, GAO, recommends that options not be exercised on large business awardee's contract 109
Indication of Error
Contracting Officer's Duty to Investigate, etc.
Mere fact that awardee of service contract set aside for small business indicated in bid that it would perform services at facility owned by large business is not sufficient to require contracting officer to challenge self-certification in awardee's bid as to its size status, since it is not legally objectionable for a small business to subcontract with a large business on a set-aside contract.....
Where, before award, information comes to the attention of the contracting officer which is inconsistent with the small business certification of a bidder that would be low if given the benefit of the 12 percent Buy American Act differential applicable to small businesses, the contracting officer should determine if the bidder's self-certification is correct 373
Set-Asides
Administrative Determination
Reasonable Expectation of Competition
Contracting agency reasonably concluded that adequate small business competition could be expected so as to justify setting aside certain line items in the solicitation exclusively for small business participation where bids from four responsible small businesses were received on identical line items in the prior year's procurement..... 270
The contracting agency need not make determinations tantamount to affirmative determinations of responsibility on expected small business bidders before deciding to set IFB line items aside for small business. The agency is only obligated to make an informed business judgment that at least two responsible small business bidders will compete and will offer reasonable prices..... 270

CONTRACTS—Continued Page
Set-asides—Continued
Self-certification—Continued
Set-Asides—Continued
Propriety
Determination to set aside procurement for full food services at military base under section 8(a) of the Small Business Act may be made after bid opening where agency reasonably determined that cancellation of total small business set-aside procurement and subsequent 8(a) award were clearly in the government's interest due to urgency of the requirement and the necessity of maintaining continuous food services after expiration of incumbent's contract which did not allow sufficient time to complete small business set-aside procurement 729
Contracting agency reasonably concluded that adequate small business competition could be expected so as to justify setting aside certain line items in the solicitation exclusively for small business participation where bids from four responsible small businesses were received on identical line items in the prior year's procurement 270
The contracting agency need not make determinations tantamount to affirmative determinations of responsibility on expected small business bidders before deciding to set IFB line items aside for small business. The agency is only obligated to make an informed business judgment that at least two responsible small business bidders will compete and will offer reasonable prices 270
Determination to set aside procurement for full food services at military base under section 8(a) of the Small Business Act may be made after bid opening where agency reasonably determined that cancellation of total small business set-aside procurement and subsequent 8(a) award were clearly in the government's interest due to urgency of the requirement and the necessity of maintaining continuous food services after expiration of incumbent's contract which did not allow sufficient time to complete small business set-aside procurement 729
Small Business Concern Awards (*See* CONTRACTS, Small Business Concerns, Awards)
Size Status
Protests to Agency
Timeliness
Protest that agency awarded contract despite timely challenge to awardee's small business size status is dismissed where written confirmation or oral size protest was received by the contracting officer more than 5 days after bid opening and was postmarked later than 1 day after the oral protest 825
Small Business Administration's Authority Procurement under 8(a) Program (*See* SMALL BUSINESS ADMINISTRATION, Contracts, Contracting with Other Government Agencies, Procurement under 8(a) Program)

CONTRACTS—Continued Page

Subcontractor

Competition

Applicability of Federal Norm

Procurements "for" Government

Subcontractor selection is not made for the government within the meaning of the exception allowing General Accounting Office review because the prime contractor is not operating a government-owned facility and is not otherwise serving as a mere conduit between the government and the subcontractor 585

The General Accounting Office affirm its dismissal of a protest on the grounds that the prime contractor is not acting for the government in awarding subcontracts where the protester has not shown that the prime contractor is principally providing large-scale management services at a government-owned facility 683

Protests (*See* **CONTRACTS, Protests, Subcontractor Protests**)

Term

Time Extension

The Environmental Protection Agency may not issue a nonseverable work assignment under a cost-reimbursement level of effort, term contract where the effort furnished will extend beyond the contract's initial period of performance into an option period. The Federal Acquisition Regulation requires that term contracts be "for a specified level of effort for a stated period of time." Further, issuance of a work assignment which could not be performed until the next fiscal year would violate the bona fide need rule 153

The Environmental Protection Agency may not modify a level of effort contract to accommodate a non-severable task extending beyond the original contract period of performance. Since the period of performance is an essential part of a level of effort contract, any change in that term would substantially change the contract such that the contract for which competition was held and the contract to be performed are essentially different. Accordingly, such a contract could not be extended by contract modification 153

Termination

Erroneous Award Remedy

The General Accounting Office (GAO) denies a request for reconsideration of a decision and affirms that decision recommending termination of an incumbent's contract because the agency should have allowed waiver of the protester's mistake claim, where the incumbent's request fails to establish convincingly that the prior decision contains errors of law or fact that warrant its reversal or modification 300

Recommendation

The General Accounting Office (GAO) denies a request for reconsideration of a decision and affirms that decision recommending termination of an incumbent's contract because the agency should have allowed waiver of the protester's mistake claim, where the incumbent's request fails to establish convincingly that the prior decision contains errors of law or of fact that warrant its reversal or modification 300

CONTRACTS—Continued Page
Termination—Continued
Resolicitation
Original Evaluation Improper
Agency decision to resolicit after termination of a contract due to procurement irregularities, rather than to make an award under the original solicitation, is not objectionable where the agency intends to revise the evaluation scheme and possibly the purchase description for the equipment being procured..... 268
Revised Specifications
Agency decision to resolicit after termination of a contract due to procurement irregularities, rather than to make an award under the original solicitation, is not objectionable where the agency intends revise the evaluation scheme and possibly the purchase description for the equipment being procured..... 268
Time extension
Term of Contract (*See* CONTRACT, Term, Time Extension)
Transportation Services
Procurement Procedures
Protest of agency reevaluation of proposals in response to General Accounting Office (GAO) decisions which sustained protests on grounds that three areas of evaluation were improper is denied where agency reevaluation has not been shown to be unreasonable..... 699
General Accounting Office (GAO) will consider protests of competitive selections of no cost, no fee travel management services contractors under GAO's bid protest authority under the Competition in Contracting Act since the selections are procurements of contracts for services..... 109
Competitive selections of no cost, no fee travel management contractors by the General Services Administration are subject to the procurement provisions of the Federal Property and Administrative Services Act, as amended by the Competition in Contracting Act. These selections are not distinguishable from those noncompetitive business arrangements for substantially similar services that some agencies have with Scheduled Airline Ticket Offices (SATO's), Therefore, these SATO business arrangements are subject to applicable procurement laws..... 109
Protest concerning NASA request for carriers' rate tenders for marine transportation services is dismissed since the request was issued under authority of the Transportation Act of 1940, as amended, 49 U.S.C. 10721 (1982), and the agency did not obtain such services under the government's procurement system so that a government bill of lading will serve as the basis for payment..... 328
Protest of agency reevaluation of proposals in response to General Accounting Office (GAO) decisions which sustained protests on grounds that three areas of evaluation were improper is denied where agency reevaluation has not been shown to be unreasonable..... 699

CONTRACTS—Continued Page
Two-Step Procurement
Step-One
Offers or Proposals
Discussion With All Offerors Requirement
Late Proposals
A party that submits late Step 1 proposal is not an interested party to protest the evaluation of proposals or any changes in the terms and conditions of the solicitation that occur during or after proposal evaluation when those issues only affect the parties to the competition 619
Specifications
Deficient
Effect
Requirement in request for technical proposals for offers to be submitted on a 5-year lease-to-ownership basis is improper. Satisfaction of objective of acquiring least cost alternative between lease or lease-to-ownership arrangements cannot properly be accomplished without considering alternatives actually submitted in competition, particularly where failure to do so excludes from the competition the local telephone company, able to offer only on a lease basis, without affording it an opportunity to present its best price 380
Minimum Needs Requirement
Administrative Determination
Requirement in request for technical proposals for offers to be submitted on a 5-year lease-to-ownership basis is improper. Satisfaction of objective of acquiring least cost alternative between lease or lease-to-ownership arrangements cannot properly be accomplished without considering alternatives actually submitted in competition, particularly where failure to do so excludes from the competition the local telephone company, able to offer only on a lease basis, without affording it an opportunity to present its best price 380
Types
Level of Effort
The Environmental Protection Agency may not issue a nonseverable work assignment under a cost-reimbursement, level of effort, term contract where the effort furnished will extend beyond the contract's initial period of performance into an option period. The Federal Acquisition Regulation requires that term contracts be "for a specified level of effort for a stated period of time." Further, issuance of a work assignment which could not be performed until the next fiscal year would violate the bona fide need rule 153
Walsh-Healey Act
Labor Stipulations (*See* CONTRACTS, Labor Stipulations, Walsh-Healey Act)

COOPERATIVE AGREEMENTS
Propriety of Use
Statutory Authority (*See* FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977)

Page

CORPORATIONS

Pension Benefit Guaranty Corporation

Authority

The Pension Benefit Guaranty Corporation (PBGC) may not be regarded as exempt from the Government-wide statutory requirements (44 U.S.C. 501, 1701) to satisfy its printing and distribution needs from the Government Printing Office because the statutes and legislative history which created PBGC clearly indicate that Congress intended that, after the first 270 days of the corporation's existence, it would be subject to those requirements 226

Agencies and establishments of the United States Government are required by 44 U.S.C. 502, 1701 to satisfy their printing and distribution requirements through the offices of the Government Printing Office (GPO) unless their enabling legislation confers some statutory exemption from those requirements. Those agencies and establishments which have previously been found exempt from those requirements have been given the statutory authority to determine the character and necessity of their accounts, "notwithstanding the provisions of any other law governing the expenditure of public funds." Since the statutes creating the Pension Benefit Guaranty Corporation (29 U.S.C. 1301 *et seq.*) do not contain such a provisions, that corporation may not be regarded as exempt from the general requirement to use GPO to satisfy its printing and distribution needs 226

COURTS

District of Columbia

Superior Court

The Superior Court of the District of Columbia, although established by Congress under Article I of the Constitution, is more analogous to a state court than to a Federal court for purposes of Title VII of the Civil Rights Act of 1964. Accordingly, and since its employees are not in the competitive service, it is subject to the jurisdiction of the Equal Employment Opportunity Commission under section 706 of the Civil Rights Act, which generally covers state and local governments, rather than section 717 which applies to Federal entities 594

Judges

Compensation

Increases

Comparability Pay Adjustment

Precluded Under Pub. L. 97-92

Federal judge requests reexamination of prior decisions concerning effect of section 140 of Public Law 97-92, an amendment which bars pay increases for federal judges except as specifically authorized by Congress. Although the sponsor of section 140 now says that the amendment was not intended to be permanent legislation but was to expire with the appropriation act to which it was attached, we hold that section 140 is permanent legislation in view of congressional intent expressed at the time of passage of section 140 and subsequently. Prior decisions are affirmed 352

DAMAGES

Claims Between Government Agencies (*See* **DEPARTMENTS AND ESTABLISHMENTS, Damage Claims**)

Page

DEBT COLLECTIONS

Abandonment

Small Amounts, etc.

Propriety

Agencies may, without conducting cost studies, provide that debts of $1 or less that are owed to the United States by Federal civilian and military personel need not be collected. Similarly, refunds of $1 or less that are owed to such personnel need not be paid, unless a specific claim for the refund is made 893

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

Set-off (*See* **SET-OFF**)

Waiver

Authority

Agencies may, on a case-by-case basis, take the anticipated costs of required administrative hearings into consideration when determining whether to compromise or terminate collection of debts owed to the United States pursuant to the Federal Claims Collection Standards, 4 C.F.R. ch. II. However, those costs (like other kinds of administrative costs) should be included only when there is a substantial likelihood that that they will actually be incurred in the particular case 893

Agencies should not consider the anticipated costs of administrative hearings or reviews when establishing minimum debt amounts and points of diminishing returns for their debt collection programs... 893

Civilian Employees

Compensation Overpayments

Employee Unaware of Overpayments

Employee received overpayments of pay because agency failed to deduct full insurance premiums from his pay. Employee is not held at fault for overpayments where premiums stated on leave and earnings statements did not appear unreasonable and employee was unaware that premiums should have been $200 higher per pay period. If the deduction appears reasonable on its face, we are aware of no reason to expect or require an employee to audit the amount shown. Overpayments are waived since the employee could not have been expected to question the correctness of his pay 216

Failure to Deduct Insurance Premiums

Section 8707(d) of Title 5, United States Code, grants an agency the authority to waive the collection of unpaid life insurance deductions, where it fails to withhold the proper amount, if the individual is without fault and recovery would be against equity and good conscience. This waiver authority is not subject to the $500 limit on agency authority in 5 U.S.C. 5584. However, this Office may also consider the waiver of erroneous underwithholding of insurance premiums under the broad waiver authority contained in 5 U.S.C. 5584 216

DEBT COLLECTIONS—Continued Page
Waiver—Continued
Civilian Employees—Continued
Compensation Overpayments—Continued
Failure to Deduct Insurance Premiums—Continued
Employee received overpayments of pay because agency failed to deduct full insurance premiums from his pay. Employee is not held at fault for overpayments where premiums stated on leave and earnings statements did not appear unreasonable and employee was unaware that premiums should have been $200 higher per pay period. If the deduction appears reasonable on its face, we are aware of no reason to expect or require an employee to audit the amount shown. Overpayments are waived since the employee could not have been expected to question the correctness of his pay 216
Leave Payments
Lump-sum Leave Payment
Agency properly deducted from backpay an amount representing the lump-sum annual leave payment made to employee when he was removed. Lump-sum leave payments must be offset from backpay awards. *Vincent T. Oliver*, 59 Comp. Gen. 395 (1980). Waiver is denied because deduction of this amount did not result in a net indebtedness 865
Military Personnel
Pay, etc.
Retired
The widow of a deceased Coast Guard member erroneously received retired pay amounting to $43,281.68 which should have ceased upon the member's death. When the erroneous payments were discovered it appeared the widow was not entitled to a survivor annuity and waiver of the erroneous payment was granted. The service then determined that although the member had elected not to participate in the Survivor Benefit Plan, the service had failed to inform the spouse of that fact and this entitled the widow to receive a full annuity under the Plan. Although the annuity entitlement is retroactive to the date of the member's death, the widow is not entitled to additional payment for the period for which she received the erroneous retired pay which was waived. Since the waiver action was based on incomplete facts, it is modified to apply only to the excess she received over the amount due for the annuity for that period, and the balance is considered as satisfying her annuity entitlement 696
DECEDENTS' ESTATES
Compensation
Disposition Generally
A person newly appointed to the Federal service who has not yet entered on duty does not have the status of a Federal "employee." Consequently, relocation allowances credited to the account of a deceased Veterans Administration appointee are payable to his estate in the manner prescribed for deceased public creditors generally, and may not instead be paid directly to his survivors in the manner otherwise specifically prescribed by statute for settling the accounts of deceased employees 237

Page

DEPARTMENTS AND ESTABLISHMENTS
Damage Claims
Reimbursement Prohibition
Rule that a Federal agency or entity does not pay inter- or intra-agency claims for damage to public property does not apply in the case of a reimbursable or revolving fund. Air Force Industrial Fund activity may therefore be reimbursed for damage to vehicles which it loaned to another Air Force unit for use on a project unrelated to the Fund's purpose 910
The Federal Aviation Administration may not be reimbursed by the Navy for replacement cost of an Instrument Landing System owned by the Government at the El Paso, Texas International Airport which was destroyed by the crash of a Navy aircraft, since property of Government agencies is not the property of the separate entities but rather of the Government as a single entity and there can be no reimbursement by the Government to itself for damage to or loss of its own property. This decision distinguishes 41 Comp. Gen. 235 464
Although the Federal Aviation Administration (FAA) charged the cost of replacement of Instrument Landing System (ILS) to its "Facilities and Equipment (Airport and Airway Trust Fund)" appropriation account which consists of appropriations made to the FAA from the Airport and Airway Trust Fund for the purpose of funding the acquisition, establishment and improvement of air navigation facilities, this does not bring activity within exception to interdepartmental waiver rule recognized by this Office for damage caused to property held in trust by the Government on behalf of particular identifiable beneficiaries in order to protect beneficiaries equitable interest in property. FAA is using Federal funds to repair damage to Government-owned property and is not acting as trustee on behalf of particular group of identifiable beneficiaries in repairing ILS. This decision distinguishes 41 Comp. Gen. 235 464
Services Between
Reimbursement
Required
Proposed transfer of 15 to 20 National Labor Relations Board administrative law judges to Department of Labor on nonreimbursable basis under the authority in section 3344 of title 5, which provides for transfers, but does not indicate whether the transferring or receiving agency is to pay for the judges, is improper. Where a detail is authorized by statute, but the statute does not specifically authorize the detail to be carried out on a nonreimbursable basis, the detail cannot be done on that basis. Nonreimbursable details contravene the law that appropriations be spent only on the objects for which appropriated, 31 U.S.C. 1301(a), and unlawfully augment the appropriation of the receiving agency. 64 Comp. Gen. 370 (1985) affirmed 635

DEPARTMENTS AND ESTABLISHMENTS—Continued Page
Services Between—Continued
Reimbursement—Continued
Required—Continued
Proposed detail of 15 to 20 administrative law judges (ALJs) from the National Labor Relations Board (Board) to the Department of Labor on a nonreimbursable basis for the remainder of fiscal year 1986 does not conform to either of the exceptions in 64 Comp. Gen. 370 (1985) in which we generally found nonreimbursable details to be improper. The exception where the detail has a negligible fiscal impact is a *de minimus* exception for administrative convenience where the detail is for a brief period and the number of persons and costs involved are minimal. The detail of 15 to 20 ALJs and the related amount of salary expenses far exceeds the *de minimus* standard we intended to establish. Furthermore, the detail is not particularly related to the purpose for which the Board's appropriations are provided. Thus the proposed nonreimbursable detail does not fall within the other exception set fourth in 64 Comp. Gen. 370 635

DETAILS
Between Agencies
Non-Reimbursable Details
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DETAILS—Continued Page
Between Agencies—Continued
Reimbursement
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DISBURSING OFFICERS
Lack of Due Care, etc.
Erroneous Payments
Relief Denied
Relief for Army disbursing officer under 31 U.S.C. 3527(c) is denied where the officer paid fraudulent travel voucher after learning that one of the recipients of fraudulent payments had admitted the fraud and the means by which the fraud was accomplished to a subordinate of the officer. Relief granted for payments before this admission when investigation did not uncover fraud 858
Relief
Appropriation Adjustment
Monies returned to Indian, which earlier were improperly recovered, would be repaid from the current lump-sum appropriation to the Bureau of Indian Affairs for "Operation of Indian Programs." Since such repayment would not be improper or incorrect, there is no need for the disbursing officer to request relief under section 3527(c) of title 31 of the United States Code or for this office to grant relief 533

DISBURSING OFFICERS—Continued Page
Relief—Continued
Collection Action Diligency
Relief is granted Army disbursing official under 31 U.S.C. 3527(c) from liability for improper payment resultion for payee's negotiation of both original and recertified checks. Proper procedures were followed in the issuance of the recertified check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division 811
Relief is granted Army disbursing official under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division 812
Eligibility Determination
Relief for Army disbursing officer under 31 U.S.C. 3527(c) is denied where the officer paid fraudulent travel voucher after learning that one of the recipients of fraudulent payments had admitted the fraud and the means by which the fraud was accomplished to a subordinate of the officer. Relief granted for payments before this admission when investigation did not uncover fraud .....
If a disbursing officer complies with appropriate Department of Treasury and Service regulations, request for relief will not be denied solely on the ground that the amount of a check is not written in words 299
Erroneous Payments
Not Result of Bad Faith or Negligence
Relief is granted Army disbursing official under 31 U.S.C 3527(c) from liability for improper payment resulting from payee's negotiation of both original and recertified checks. Proper procedures were followed in the issuance of the recertified check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division 811
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Page

DISTRICT OF COLUMBIA
Courts
Superior Court (*See* COURTS, District of Columbia, Superior)

ECONOMY ACT
Leases
Rent limitation (*See* LEASES, Rent, Limitation, Economy Act Restriction)

ENTERTAINMENT
Refreshments
If an agency determines that a reception with refreshments, as provided in the Federal Personnel Manual, would materially enhance the effectiveness of an awards ceremony conducted under authority of the Government Employees' Incentive Awards Act, the cost of those refreshments may be considered a "necessary expense" for purposes of 5 U.S.C. 4503. As such, the cost may be charged to operating appropriations without regard to "reception and representation" limits..... 738

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Environmental Protection Agency
Authority
Clean Air Act (*See* ENVIRONMENTAL PROTECTION AND IMPROVEMENT, Clean Air Act, Environmental Protection Agency authority)

Clean Air Act
Environmental Protection Agency Authority
State Funding
General Accounting Office (GAO) disagrees with Environmental Protection Agency (EPA) tentative legal conclusion that the highway fund sanction in Part D of the Clean Air Act (42 U.S.C. 7506(a)) can be invoked to penalize either: 1) nonattainment areas that refuse to comply with EPA's call for additional SIP revisions requested per 42 U.S.C. 7410(a)(2)(H) and EPA's Nov. 1983 policy statement; or 2) areas with approved July 1, 1982, SIP revisions (42 U.S.C. 7502(a)(2) and (b)(11) that revoke statutorily required elements of those SIP revisions. The highway fund sanction applies only when EPA finds that the Governor of a nonattainment state has not submitted or at least is not making reasonable efforts to submit a Part D SIP revision containing transportation controls..... 366

Clean Air Act—Continued Page
Environmental Protection Agency—Continued
Environmental Protection Agency Authority—Continued
State Implementation Plans
Revisions
Failure to Revise
General Accounting Office (GAO) disagrees with Environmental Protection Agency (EPA) tentative legal conclusion that the highway fund sanction in Part D of the Clean Air Act (42 U.S.C. 7506(a)) can be invoked to penalize either: 1) nonattainment areas that refuse to comply with EPA's call for additional SIP revisions requested per 42 U.S.C. 7410(a)(2)(H) and EPA's Nov. 1983 policy statement; or 2) areas with approved July 1, 1982, SIP revisions (42 U.S.C. 7502(a)(2) and (b)(11) that revoke statutorily required elements of those SIP revisions. The highway fund sanction applies only when EPA finds that the Governor of a nonattainment state has not submitted or at least is not making reasonable efforts to submit a Part D SIP revision containing transportation controls. B-208593, Dec. 30, 1982, Apr. 21, 1983, and Jan. 7, 1986, *affirmed* 361

EQUAL EMPLOYMENT OPPORTUNITY
Equal Employment Opportunity Act
Applicability
The Superior Court of the District of Columbia, although established by Congress under Article I of the Constitution, in more analogous to a state court than to a Federal court for purposes of Title VII of the Civil Rights Act of 1964. Accordingly, and since its employees are not in the competitive service, it is subject to the jurisdiction of the Equal Employment Opportunity Commission under section 706 of the Civil Rights Act, which generally covers state and local governments, rather than section 717 which applies to Federal entities 594
Commission
Authority
Judgment Payments
The Equal Employment Opportunity Commission (EEOC) is not required to withhold employee payroll taxes or pay employer excise taxes under the Railroad Retirement Tax Act, 26 U.S.C. 3201-3233, when it distributes judgment proceeds to the exployees of railroad companies unless provided for in the judgment 800

EQUIPMENT
Automatic Data Processing Systems
Acquisition, etc.
Federal Supply Schedule
Protest against Navy's issuance of a purchase order to nonmandatory General Services Administration (GSA) schedule contractor for maintenance of certain automated data processing equipment is sustained where *Commerce Business Daily* (CBD) synopsis did not contain an accurate description of Navy's minimum needs as required by GSA regulations and its appears potential offerors could meet those needs at substantially lower cost to the government 654

EQUIPMENT—Continued Page

Automatic Data Processing Systems—Continued

Acquisition, etc.—Continued

Brooks Act Applicability

When a Brooks Act procurement is the subject of a protest to the General Services Administration Board of Contract Appeals (GSBCA), General Accounting Office (GAO's) Bid Protest Regulations effectively provide for the dismissal of any protest to GAO involving that same procurement in deference to the binding effect of a GSBCA decision on the federal agency involved, subject to appeal to the United States Court of Appeals for the Federal Circuit. The clear intent of the Competition in Contracting Act of 1984 is to provide for an election of mutually exclusive administrative forums to resolve challenges to Brooks Act procurements 72

An acquisition of materials, supplies and installation of a local area network (LAN) to be used to transmit information between computers is an acquisition of automatic data processing equipment within the meaning of the Federal Information Resources Management Regulation, 41 C.F.R. 201-2.001 (1985) and the Brooks Act, 40 U.S.C. 759 (1982). Where the General Services Administration has not issued a delegation of procurement authority, actions taken by an agency seeking to acquire materials, supplies and installation of an LAN are unauthorized 258

General Services Administration

Responsibility Under Brooks Act

When a Brooks Act procurement is the subject of a protest to the General Services Administration Board of Contract Appeals (GSBCA), General Accounting Office (GAO's) Bid Protest Regulations effectively provide for the dismissal of any protest to GAO involving that same procurement in deference to the binding effect of a GSBCA decision on the federal agency involved, subject to appeal to the United States Court of Appeals for the Federal Circuit. The clear intent of the Competition in Contracting Act of 1984 is to provide for an election of mutually exclusive administrative forums to resolve challenges to Brooks Act procurements 72

ESTOPPEL

Against Government

Not Established

Under applicable Department of Defense regulations, an employee separated from an overseas position is entitled to onward transportation of household goods stored in the United States provided shipment to a final destination is begun within 2 years from the date of separation. Where the employee was unable to provide a delivery date or destination within 2 years from the date of separation, contracts with Government transportation officers concerning shipment did not meet the requirement to begin shipment within the requisite period. Erroneous advice that the 2-year period began to run from the date the employee's goods reached the continental U.S. does not provide a basis to have them delivered at Government expenses 392

FAIR LABOR STANDARDS ACT

Overtime

Compensation (*See* COMPENSATION, Overtime, Fair Labor

FAIR LABOR STANDARDS ACT—Continued Page
Overtime—Continued
Standards Act)
Fair Labor Standards Act *v.* Other Pay Laws
An employee who is "nonexempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., must have overtime compensation computed under both title 5 of the United States Code and the FLSA. The employee is then entitled to whichever computation results in the greater total compensation. The claimants here are entitled to payment under the FLSA since their total compensation computed under that Act is greater than under title 5, United States Code..... 273
FARMERS HOME ADMINISTRATION (*See* AGRICULTURE DEPARTMENT, Farmers Home Administration)

FEDERAL CLAIMS COLLECTION ACT OF 1966
Authority
Agencies may, on a case-by-case basis, take the anticipated costs of required administrative hearings into consideration when determining whether to compromise or terminate collection of debts owed to the United States pursuant to Federal Claims Collection Standards, 4 C.F.R. ch. II. However, those costs (like other kinds of administrative costs) should be included only when there is a substantial likelihood that they will actually be incurred in the particular case..... 893
Generally
Agencies may, on a case-by-case basis, take the anticipated costs of required administrative hearings into consideration when determining whether to compromise or terminate collection of debts owed to the United States pursuant to the Federal Claims Collection Standards, 4 C.F.R. ch. II. However, those costs (like other kinds of administrative costs) should be included only when there is a substantial likelihood that that they will actually be incurred in the particular case..... 893
Debt Collection
Administrative Responsibility
The decision of the Department of Agriculture to defer the collection of debts arising from excessive advance payments made to farmers who participated in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs was not adequately supported by findings and other evidence that complies with the requirements of the Federal Claims Collection Standards..... 245
The provisions of section 102.2(e) of the Federal Claims Collection Standards do not excuse agencies that collect debts by administrative offset from the need to send written notices to debtors of amounts owed to the U.S. including all the information required by other applicable regulatory provisions..... 245
Before it may temporarily suspend the collection of debts pursuant to section 104.2(b)(2) of the Federal Claims Collection Standards, an agency must properly conclude *both* that the debtor is presently financially unable to pay the debt, but that his future prospect justify giving him more time, and that future collection can be effected through administrative offset or that the temporary suspension of collection is likely to enhance his ability to pay..... 245

FEDERAL CLAIMS COLLECTION ACT OF 1966—Continued Page
Debt Collection—Continued
Administrative Responsibility—Continued
Agencies may, on a case-by-case basis, take the anticipated costs of required administrative hearings into consideration when determining whether to compromise or terminate collection of debts owed to the United States pursuant to the Federal Claims Collection Standards, 4 C.F.R. ch. II. However, those costs (like other kinds of administrative costs) should be included only when there is a substantial likelihood that they will actually be incurred in the particular case.... 893
Agencies should not consider the anticipated costs of administrative hearings or reviews when establishing minimum debt amounts and points of diminishing returns for their debt collection programs... 893
Joint and Severable Liability
Under the Federal Claims Collection Stardards 4 C.F.R. 101 *et seq.*, collections received from a recipient of an improper payment who is both individually liable for some improper payment and jointly and severably liable with an accountable officer for other improper payments should be credited first to the payments for which the recipient is individually liable unless the recoveries are identified as repayments of the joint indebtedness 858
Procedure
Standards
Agency Implementation
Administrative Offset
Section 120 of the Omnibus Budget Reconciliation Act of 1982 provided that any debts that might result from advance deficiency payments made to farmers who participated in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs were to be repaid to the U.S. on the before Sept. 30, 1984. However, that provision would not preclude the Department of Agriculture from exercising appropriate discretion to select the best means to collect those debts, including temporary suspension of collection until an administrative offset could be accomplished, pursuant to the Federal Claims Collection Act of 1966, as amended, and the Federal Claims Collection Standards..... 245
The provisions of section 102.2(e) of the Federal Claims Collection Standards do not excuse agencies that collect debts by administrative offset from the need to send written notices to debtors of amounts owed to the U.S. including all the information required by other applicable regulatory provisions..... 245

Page

FEDERAL EXECUTIVE BOARDS

Compensation

Appropriation Prohibition

The General Accounting Office agrees with the Veterans Administration's legal analysis that a general Government-wide Appropriation Act fiscal year restriction (currently contained in section 608 of the Treasury, Postal Service, and General Government Appropriation Act for fiscal year 1986, H.R. 3036) on the use of appropriated funds for interagency financing of boards or commission "which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality," applies to the Federal Executive Boards since the Boards do not have statutory approval for interagency financing. However, single agency financing of the Boards is not prohibited by the restriction 689

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977

Compliance

Cooperative Agreements

The Council on Environmental Quality has no authority to use its Management fund to provide grants or analogous assistance and therefore cannot enter into a cooperative agreement, which is a form of assistance under 31 U.S.C. 6305 605

Procurement *v.* Cooperative Agreement

Criteria for Determining

A proposed study has been developed and submitted by the National Academy of Sciences to the Council on Environmental Quality for funding at the request of the Environmental Protection Agency. The purpose of the study is to provide information on risks and benefits of certain pesticides to help Federal regulatory agencies, such as EPA, in analyzing prospective regulations. The proper funding mechanism should be a procurement contract, rather than a cooperative agreement, as required by 32 U.S.C. 6303 (1982), since the primary purpose of the study is to acquire information for the direct benefit or use of the Federal Government 605

FINES

Government Liability

Unless expressly waived by statute, a Federal agency is not liable for a civil fine or penalty by reason of sovereign immunity. Therefore, appropriated funds cannot be used to pay a penalty imposed by the Boston City Fire Department for answering false alarms resulting from a malfunction of a fire alarm system in a Veterans Administration Medical Center 61

Page

FOREIGN GOVERNMENTS

American Citizens

Employment

Military Retirees

The prohibition against an officer of the United States accepting emoluments, office, etc., from a foreign government without the consent of Congress in Article I, section 9, clause 8 of the U.S. Constitution, and 37 U.S.C. 908, is applicable to a retired member of U.S Marine Corps, who, under an employment agreement with a domestic corporation, serves as an instructor for, and is subject to the supervision and control of the Royal Saudi Navy, which is the source of the funds for his salary and other emoluments. Since he has not received the required congressional consent, his military retired pay must be withheld 382

FRAUD

False Claims

Referral to Justice

Travel Expenses

Three employees were determined to have filed false travel vouchers and were criminally prosecuted. The Department of Justice entered into a compromise plea agreement with each defendant, which permitted them to enter a quilty plea to a misdemeanor, and in turn they would make restitution of the fraudulent amounts. In response to the question concerning disposition of additional amounts withheld from the employees for those days tainted by fraud, the agency is advised that only the Department of Justice is authorized to compromise fraud claims and since in has done so in this case, monies administratively retained are to be repaid the defendants, without personal pecuniary liability attaching to the finance and accounting officer by virtue of such payment. 31 U.S.C. 3711(d) (1982) 371

FUNDS

Deposit Accounts

Monies received from fines for corpsmember misconduct and sales of arts and crafts objects made by corpsmembers may be deposited in the Corpsmember Welfare Association funds, as required by program regulations. Such funds lose their Federal character and may be spent for association activities 666

Since Job Corps Welfare Association funds are not public funds subject to the statutory restrictions applicable thereto, they need not be maintained in the Treasury or in depositaries designated by the Secretary of the Treasury, and may be kept in local banks 666

Imprest

Availability

Imprest funds are available to pay the costs of recruitment advertising so long as that advertising is authorized under 44 U.S.C. 3702 and the payment otherwise meets applicable requirements for imprest fund payments 806

FUNDS—Continued Page
Imprest—Continued
Losses
Employee Liability
Consistent with interagency agreements between the Interior and Labor Department and Labor and the Department of Defense, Interior Department imprest fund cashiers receiving monies from Army disbursing officers for payments to Job Corps enrollees are responsible, accountable and liable in the same manner as other imprest fund cashiers consistent with Section 22 of title 7 of the General Accounting Office's Policy and Procedures Manual, Volume I, 4-3000 of the Treasury Fiscal Requirements Manual and the Labor Department's Job Corps Handbook No. 630 666
Miscellaneous Receipts (*See* MISCELLANEOUS RECEIPTS)

GENERAL ACCOUNTING OFFICE
Contracts
Protests (*See* CONTRACTS, Protests)
Decisions
Abeyance
Pending Court, Quasi-Judicial, Appellate Board, etc. Action
General Accounting Office (GAO) will dismiss a protest to the extent that it raises an issue which is before a court of competent jurisidiction and the court has not expressed interest in GAO's opinion .....
Jurisdiction
Bids
Protests generally (*See* CONTRACTS, Protests)
Contracts
Nonappropriated Fund Activities
Although a procurement is for a nonappropriated fund activity, when it is conducted by the Air Force, a federal agency, the General Accounting Office has jurisdiction under the Competition in Contracting Act of 1984 of decide a bid protest concerning an alleged violation of the procurement statutes and regulations 240
Performance
Contract Administration Matter
Protest against agency actions during the protester's contract performance concerns contract administration and is for consideration by the procuring agency, not General Accounting Office (GAO) 222
Postal Service, United States
The United States Postal Service is not subject to the General Accounting Office's bid protest jurisdiction under the Competition in Contracting Act of 1984 as a result of the statutory provisions (39 U.S.C. 410) exempting the Postal Service from any federal procurement law not specifically made applicable to it 584
Protests (*See* CONTRACTS, Protests)
Protests Generally (*See* CONTRACTS, Protests)
Walsh-Healey Act

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Contracts—Continued
Postal Service, United States—Continued
General Accounting Office (GAO) will not consider whether a bidder satisfies the requirements of the Walsh-Healey Act since such matters, by law, are for the contracting agency's determination, subject to final review by the Small Business Administration (where a small business is involved) and the Department of Labor 336
Nonappropriated fund activities
Contracts (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, Nonappropriated fund activities)
Patent Infringement
Claims of possible patent infringement do not provide a basis for the General Accounting Office (GAO) to object to an award since questions of patent infringement are not encompassed by GAO's bid protest function 663
Protests generally (*See* CONTRACTS, Protests)
Manuals
Policy and Procedures
Statistical Sampling Procedures
Administrative certification by head of agency or designee that long distance telephone calls are necessary in the interest of the Government may be made on an estimate of the percentage of similar toll calls in the past that have been official calls provided the verification process provides reasonable assurance of accuracy and freedom from abuse 19
Protests
Contracts (*See* CONTRACTS, Protests)
Recommendations
We recommend Watervliet Arsenal, Department of the Army, seek a reconsideration of the determination by the U.S. Army Claims Service that losses of employee-owned tools may not be paid under authority of 31 U.S.C. 3721 since it involves the refusal of the Army to hear an entire class of claims based upon a policy determination that has as far as we can determine never been officially adopted or endorsed by the Department of the Army 790
Contracts
Prior Recommendation
Affirmed
Determination by agency personnel conducting the evaluation of proposals that protester had submitted an alternate proposal supports conclusion that protester's proposal, as viewed in its entirety and as reasonably interpreted, included offer of alternate system. Since the contracting officer did not make award on the basis of initial proposals and the alternate proposal was within the competitive range, the requirement for meaningful discussions extended to the alternate proposal 705

GENERAL ACCOUNTING OFFICE—Continued Page
Recommendations—Continued
Contracts—Continued
Prior Recommendation—Continued
Clarified
Decision sustaining protest against agency's use of negotiated cost-type contract for acquisition of mess services is modified to recommend assessment of overall risks of procurement and determination of propriety of use of cost-type contract. If agency reasonably determines that uncertainty is so great or has such a direct impact on pricing or costs that it directly affects an offeror or bidder's ability to project its costs of performance so as to preclude use of a fixed-price contract, agency may exercise options under current cost-type contract in accordance with Federal Acquisition Regulation 643
Procurement Deficiencies
Correction
The Competition in Contracting Act requires the General Accounting Office to disregard the costs of contract termination and recompetition in making recommendations where it determines that an award was not in accord with applicable statutes and regulations after the procuring agency determines that continued performance is in the government's best interest although the protest was filed within 10 days of award 205
Termination
The General Accounting Office (GAO) denies a request for reconsideration of a decision and affirms that decision recommending termination of an incumbent's contract because the agency should have allowed waiver of the protester's mistake claim, where the incumbent's request fails to establish convincingly that the prior decision contains errors of law or of fact that warrant its reversal or modification 300
Erroneous Awards
Award to Protester if Otherwise Eligible
Agency which terminated contract after discovering that solicitation understated its requirements and that awardee's product would not meet its needs should reinstate the solicitation and make award to the protester since protester's offer will meet the agency's actual needs and was the lowest technically acceptable offer under the original solicitation 569

Page

GENERAL SERVICES ADMINISTRATION

Authority

Government Occupied Buildings

The General Services Administration is authorized to make repairs and alterations to leased buildings without regard to the limitation set forth in Sec. 322 of the Economy Act of 1932, as amended (40 U.S.C. 278a (1982)) upon proper determination since section 201(a)(8) of the Federal Property and Administrative Services Act of 1949, as amended, (40 U.S.C. 490(a)(8), authorizes repairs and alterations to leased premises without regard to limitations when Administrator is otherwise authorized to maintain, operate and protect any building property or grounds inside or outside the District of Columbia and the Administrator of General Services is so authorized both as a result of transfer of authority effected by section 103 of the 1949 Act (40 U.S.C. 753) and by language contained in annual appropriation to GSA which makes funds available to operate, maintain and protect federally-leased buildings 722

General Services Administration (GSA) is not required to obtain prospectus approval for repairs and alterations to leased buildings by section 7(a) of the Public Buildings Act of 1959, as amended (40 U.S.C. 606(a)) since leased buildings are not "public buildings" for purpose of that act and leases are not within meaning of "acquisition" for purpose of the 1959 Act 722

Services for other agencies, etc.

Procurement

Automatic data processing systems (*See* **EQUIPMENT, Automatic Data Processing Systems, Acquisition, etc.**)

HOLIDAYS

Inauguration Day

When Federal government offices are closed because of a legal holiday and government business is not expected to be conducted, payments falling due on the legal holiday may be made the following day, including payments that are decreased by prompt payment discounts. Where government offices are open, on Inauguration Day or local holidays, payments must be made on the holiday if due 53

HIGHWAYS

State Roads

Traffic Lights

Special Benefit to Government

Needed traffic signals may be installed at government expense if private entities requesting a signal would be charged for installation in similar circumstances, and the government is the primary beneficiary of the light. 61 Comp. Gen. 501 (1982). City's determination that light does not meet its priority criteria means that a private entity would be charged for signal installation on the same basis. Fact that the building where the signal will be installed is leased by GSA from a private owner does not shift the primary benefit of the signal installation to the lessor, because the government will have full benefit of increased safety for its employees for the remainder of the lease term 847

Page

INSANE AND INCOMPETENT
Military Personnel
Dependents
Annuity Election for Dependents
Survivor Benefit Plan (*See* PAY, Retired, Survivor Benefit Plan, Mentally Incapacitated Beneficiaries)

INTEREST
Contracts
Delayed Payments by Government
The Defense Logistics Agency may not pay interest on a delayed contract payment to the assignee of a Government contract. Interest is not recoverable against the United States unless it is expressly authorized in the relevant statute or contract 598
Penalty Payments on Overdue Utility Bills
The Army should include Prompt Payment Act interest penalties when it makes late payments to public utility companies that do not have a tariff-authorized late charge. The Act requires that interest penalties be added to late payments made to "any business concern." Utilities are not excluded from the definition of this term. Our decision in 63 Comp. Gen. 517 (1984) concerned a public utility which had adopted tariff-authorized late charges and other express payment terms. We held only that, just as is the case with other contractors, such express terms take precedence over provisions in the Act which ware intended to provide contractors with a substitute penalty when none was provided in the contract 842
The Army's payment as a result of this decision of interest owed on utility bills should include compound interest as required by section 3902(c) of title 31 842
Payment On Past Due Accounts (*See* INTEREST, Payment Delay, Contracts)
Reimbursement Propriety
Provision in interagency agreement between Federal Emergency Management Agency (FEMA) and General Services Administration (GSA) required FEMA to reimburse GSA for "expenses incurred by GSA in providing the requested assistance." Under this provision, FEMA should reimburse GSA for interest penalties incurred under Prompt Payment Act, since late payment interest is an ordinary business expense and thus within scope of reimbursement provision... 795
Debts Owed United States
Notice Effect
Farmers who signed Department of Agriculture form "ASCS-477" in order to participate in the 1983 Feed Grain, Rice, Upland Cotton and Wheat Programs entered into contracts that obligated them to comply with and be bound by agency regulations providing for the assessment of interest (without the need for further notice before interest could accrue) on delinquent debts arising under those programs. Consequently, interest should be assessed and collected (pursuant to the agency's regulations and the Federal Claims Collection Standards) on debts arising under those programs, regardless of the fact that Agriculture has not individually notified each debtor that interest be paid on those debts 245

INTEREST—Continued Page

Indian Affairs

Trust Funds

Consistent with general rule that Government cannot be charged interest without a specific waiver of sovereign immunity either in a statute, treaty, or contract, and decisions of this Office and the United States Claims Court strictly applying the rule, Government cannot be charged interest on monies it pays to Indian notwithstanding Government breached its trust responsibilities to Indian 533

Payment Delay

Contracts

The Army should include Prompt Payment Act interest penalties when it makes late payments to public utility companies that do not have a tariff-authorized late charge. The Act requires that interest penalties be added to late payments made to "any business concern." Utilities are not excluded from the definition of this term. Our decision in 63 Comp. Gen. 517 (1984) concerned a public utility which had adopted tariff-authorized late charges and other express payment terms. We held only that, just as is the case with other contractors, such express terms take precedence over provisions in the Act which were intended to provide contractors with a substitute penalty when none was provided in the contracts .....

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The Defense Logistics Agency may not pay interest on a delayed contract payment to the assignee of a Government contract. Interest is not recoverable against the United States unless it is expressly authorized in the relevant statute or contract 598

Employee Benefits

When the allotment check of an Army employee was not received by his bank, the employee requested that the check is reissued. He did not receive the reissued check until several months later. The Army may not pay interest on the amount of the allotment since interest may only be paid under express statutory or contractual authorization and no such authorization exists under these circumstances 541

Military Personnel

When the allotment check of an Army employee was not received by his bank, the employee requested that the check be reissued. He did not receive the reissued check until several months later. The Army may not pay interest on the amount of the allotment since interest may only be paid under express statutory or contractual authorization and no such authorization exists under these circumstances 541

INTEREST—Continued Page
Payment Delay—Continued
"Penalty"
Government Utility Bills
The Army should include Prompt Payment Act interest penalties when it makes late payments to public utility companies that do not have a tariff-authorized late charge. The Act requires that interest penalties be added to late payments made to "any business concern." Utilities are not excluded from the definition of this term. Our decision in 63 Comp. Gen. 517 (1984) concerned a public utility which had adopted tariff-authorized late charges and other express payment terms. We held only that, just as is the case with other contractors, such express terms take precedence over provisions in the Act which were intended to provide contractors with a substitute penalty when none was provided in the contract 842
The Army's payment as a result of this decision of interest owed on utility bills should include compound interest as required by section 3902(c) of title 31 842

INTERGOVERNMENTAL PERSONNEL ACT
Assignment of Federal Employees
Relocation Expenses
An employee who incurred relocation expenses as the result of an Intergovernmental Personnel Act (IPA) assignment is entitled to a relocation income tax allowance under 5 U.S.C. 5724b (Supp. III, 1985). The IPA relocation expenses are payable under the authority of 5 U.S.C. 5724 and 5724a while the income tax allowance applies to reimbursements or allowances under the same statutes. Prior decisions are distinguished 891

INTERIOR DEPARTMENT
Bureau of Land Management
Authority
Oil and Gas Leasing
The Bureau of Land Management of the Department of the Interior issued an instruction memorandum capping liquidated damages assessments established by 43 C.F.R. 3163.3 for noncompliance with the Bureau's requirements for onshore Federal and Indian oil and gas activities. Change in computation of assessment amounts mandated by regulations is effective only when instituted by rulemaking under 5 U.S.C. 553. Accordingly, the instruction memorandum is ineffective to make this change 439

JOINT VENTURES
Organized for Contracting with Government
Propriety
Awardees' teaming arrangements to not violate requirement in Competition in Contracting Act of 1984 for "full and open competitive procedures" 405
Status
Scheduled Airline Ticket Office proposed by Air Transport Association is a joint venture with capacity to contract with government 109

JOINT VENTURES—Continued Page
Status—Continued
Proof of authority of person who executed proposal to bind the joint venture on a negotiated procurement may be furnished after receipt of proposal or best and final offers 109

JUDGES (*See* COURTS, Judges)

JUSTICE DEPARTMENT
Referrals
False Claims (*See* FRAUD, False Claims, Referral to Justice)

LEASES
Authority
Absent
INS needs to find a way to pay for renovating a facility it now owns over a long period of time because it does not have or expect to have sufficient appropriations to support a contract for the full cost of the repairs, in a single fiscal year. It is no solution for INS to lease its facility to the contractor on a long-term basis in return for repairs and improvements or management of the detention services. In the absence of specific statutory authority, rentals paid to the Government must be in the form of money consideration only. 40 U.S.C. 303b (1982) 339
Mineral
Public Lands
Revenues
When the high bidder for a mineral lease offered by the Bureau of Land Management does not execute a lease, the one-fifth bonus submitted with the bid is forfeited. Section 35 of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. 191), provides that all money received from sales, bonuses, royalties, and rentals are to be distributed under that section. Therefore, the forfeited bonuses are to be distributed in the same manner as other lease proceeds to which section 35 is applicable 570
Federal mineral land lease monies distributed to a county, and used by the county to carry out functions it would otherwise provide and pay for with county revenues, must be deducted from the county's Payment in Lieu of Taxes payments. 31 U.S.C. 6903(b) 849
Multi-county associations of local government, created in accordance with state law, can receive state distributions of Federal mineral lease funds. 30 U.S.C. 191; Utah Code Ann. 63-52-1, 63-52-3, and 11-13-5.5 849
As with direct county receipts of state distributions of Federal mineral lease monies, association expenditures of such monies to provide services for their members which otherwise would be provided by county members with county revenues, must be deducted from the Counties' Payments in Lieu of Taxes payments on a pro data basis 849

LEASES—Continued Page

Propriety

INS needs to find a way to pay for renovating a facility it now owns over a long period of time because it does not have or expect to have sufficient appropriations to support a contract for the full cost of the repairs, in a single fiscal year. It is no solution for INS to lease its facility to the contractor on a long-term basis in return for repairs and improvements or management of the detention services. In the absence of specific statutory authority, rentals paid to the Government must be in the form of money consideration only. 40 U.S.C. 303b (1982) 339

Rent

Adjustment

Cost of Living Indices

Language of a rental adjustment provision in a lease between the lessor and the Federal Aviation Administration allowed but did not require the FAA to deny a rental adjustment because the request for the adjustment was not timely filed. The FAA's denial of the rent adjustment was proper for the 1-year period following the year in which the adjustment was to be made, but not for the entire period before the next adjustment is to be considered 302

Government Facilities

Contractor Retention of Rentals

INS needs to find a way to pay for renovating a facility it now owns over a long period of time because it does not have or expect to have sufficient appropriations to support a contract for the full cost of the repairs, in a single fiscal year. It is no solution for INS to lease its facility to the contractor on a long-term basis in return for repairs and improvements or managment of the detention services. In the absence of specific statutory authority, rentals paid to the Government must be in the form of money consideration only. 40 U.S.C. 303b (1982) 339

Repairs and Improvements

Proposal by the Immigration and Naturalization Service (INS) to renovate Government-owned facility at Terminal Island in San Pedro, Cal., to provide space for detaining aliens by means of a long-term lease-back arrangement raises a fundamental legal problem. In order to lease the facility, which is presently wholly owned by the Government, back from the contractor performing the renovation work, INS must somehow sell or otherwise transfer the facility to the contractor. Nothing in (INS's authorizing statute at 8 U.S.C. 1252(c) provides it with authority to dispose of Government-owned property... 339

INS needs to find a way to pay for renovating a facility it now owns over a long period of time because it does not have or expect to have sufficient appropriations to support a contract for the full cost of the repairs, in a single fiscal year. It is no solution for INS to lease its facility to the contractor on a long-term basis in return for repairs and improvements or management of the detention services. In the absence of specific statutory authority, rentals paid to the Government must be in the form of money consideration only. 40 U.S.C. 303b (1982) 339

LEASES—Continued Page
Rent—Continued
Limitation
Economy Act Restriction
Provision in a lease between the Federal Aviation Administration and the lessor incorporating section 322 of the Economy Act, which limits the amount of rent the Government is authorized to pay and which was suspended on Oct. 1, 1981, is not applicable to rental adjustment period beginning Oct. 1, 1983 302
Repairs and Improvements
Limitations
Exemptions
The General Services Administration is authorized to make repairs and alterations to leased buildings without regard to the limitation set forth in Sec. 322 of the Economy Act of 1932, as amended (40 U.S.C. 278a (1982)) upon proper determination since section 210(a)(8) of the Federal Property and Administrative Services Act of 1949, as amended, (40 U.S.C. 490(a)(8)), authorizes repairs and alterations to leased premises without regard to limitations when Administrator is otherwise authorized to maintain, operate and protect any building property or grounds inside or outside the District of Columbia and the Administrator of General Services is so authorized both as a result of transfer of authority effected by section 103 of the 1949 Act (40 U.S.C. 753) and by language contained in annual appropriation to GSA which makes funds available to operate, maintain and protect federally-leased buildings 722
General Services Administration (GSA) is not required to obtain prospectus approval for repairs and alterations to leased buildings by section 7(a) of the Public Buildings Act of 1959, as amended (40 U.S.C. 606(a)) since leased buildings are not "public buildings" for purpose of that act and leases are not within meaning of "acquisition" for purpose of the 1959 Act 722

LEAVES OF ABSENCE
Annual
Leave Adjustment
An employee timely requested and had approved the use of 72 hours of annual leave at the end of a leave year in order to avoid forfeiture. Shortly thereafter, the employee was involved in a non-job related accident and went on sick leave. Due to a lengthy recuperation period, the employee requested that a portion of the absence be charged to the annual leave subject to forfeiture, rather than sick leave. Such request was granted. In June or July of the succeeding leave year, the employee requested retroactive substitution of sick leave for the excess annual leave used at the end of the preceeding leave year. The request is denied. After annual leave is granted in lieu of sick leave as a matter of choice, thereby avoiding forfeiture of that leave at the end of the leave year under 5 U.S.C. 6304, the employee may not thereafter have sick leave retroactively substituted for such annual leave and have that annual leave recredited solely for the purpose of enhancing the lump-sum leave payment upon separation for retirement nearly a year later 608

178-403 O - 87 - 8 : QL 3

LEAVES OF ABSENCE—Continued Page

Annual—Continued

Substitution for Sick Leave

An employee timely requested and had approved the use of 72 hours of annual leave at the end of a leave year in order to avoid forfeiture. Shortly thereafter, the employee was involved in a non-job related accident and went on sick leave. Due to a lengthy recuperation period, the employee requested that a portion of the absence be charged to the annual leave subject to forfeiture, rather than sick leave. Such request was granted. In June or July of the succeeding leave year, the employee requested retroactive substitution of sick leave for the excess annual leave used at the end of the preceding leave year. The request is denied. After annual leave is granted in lieu of sick leave at the end of the leave year under 5 U.S.C. 6304 the employee may not thereafter have sick leave retroactively substituted for such annual leave and have that annual leave recredited solely for the propose of enhancing the lump-sum leave payment upon separation for retirement nearly a year later 608

Sick

Recredit of Prior Leave

Approved

Federal civilian employees who leave their positions to pursue military careers are eligible under regulation for a recredit of their civil service sick leave after their retirement from military service, if they are reemployed in a civilian capacity by the Government within the following 3 years. Hence, an individual who left civil service employment when called to active military duty, and who was subsequently retired from military service after completing 20 years' active duty, may be allowed a recredit of his civil service sick leave balance upon his reemployment as a civilian 1 year later. The fact that he had a 2-month break in service during his military career is immaterial, since only a break in service in excess of 3 years could have operated to extinguish his leave restoration rights. 430

Reemployment

After Military Service

Federal civilian employees who leave their positions to pursue military careers are eligible under regulation for a recredit of their civil service sick leave after their retirement from military service, if they are reemployed in a civilian capacity by the Government within the following 3 years. Hence, an individual who left civil service employment when called to active military service after completing 20 years' active duty, may be allowed a recredit of his civil service sick leave balance upon his reemployment as a civilian 1 year later. The fact that he had a 2-month break in service during his military career is immaterial, since only a break in service in excess of 3 years could have operated to extinguish his leave restoration rights ... 430

LEAVES OF ABSENCE—Continued Page

Sick—Continued

Substitution for Annual Leave

An employee timely requested and had approved the use of 72 hours of annual leave at the end of a leave year in order to avoid forfeiture. Shortly thereafter, the employee was involved in a non-job related accident and went on sick leave. Due to a lengthy recuperation period, the employee requested that a portion of the absence be charged to the annual leave subject to forfeiture, rather than sick leave. Such request was granted. In June or July of the succeeding leave year, the employee requested retroactive substitution of sick leave for the excess annual leave used at the end of the preceding leave year. The request is denied. After annual leave is granted in lieu of sick leave as a matter of choice, thereby avoiding forfeiture of that leave at the end of the leave year under 5 U.S.C. 6304, the employee may not thereafter have sick leave retroactively substituted for such annual leave and have that annual leave recredited solely for the purpose of enhancing the lump-sum leave payment upon separation for retirement nearly a year later 608

LOANS

Education

Government Insured

Reporting and Recording of Obligations

The Department of Education administers a variety of entitlement programs within the Guaranteed Student Loan Program. In recording and reporting obligations, the Department should: (1) treat loan guarantees as contingent liabilities, recording obligations as default payments are required; and (2) record obligations under subsidy provisions of the program based on best estimates of payment requirements, making any adjustments as they become necessary. Since both types of obligations are authorized by law, recording such mandatory obligations, even if in excess of available funds, would not violate the Anti-deficiency Act 4

Government insured

Education Loans (*See* LOANS, Education, Government Insured)

Student Loans (*See* LOANS, Education, Government Insured)

MEALS

Furnishing

Airplane Travel

Absent specific statutory authority, a Federal agency may not provide meals at Government expense to its officers, employees, or others. This general prohibition extends to in-flight meals served on Government aircraft, although it does not apply to Government personnel in travel status, for whom there is specific statutory authority to provide meals. Hence, the National Oceanic and Atmospheric Administration may not provide cost-free meals to those aboard its aircraft on extended flights engaged in weather research, except for Government personnel in travel status 16

MEALS—Continued Page

Headquarters

Employee was invited to speak at luncheon session of agency training program at her duty station, and she seeks reimbursement of cost of luncheon. Cost of luncheon may be paid under 5 U.S.C. 4110 since the record indicates that (1) the meal was incidental to the training program, (2) attendance at the meal was necessary for full participation in the meeting, and (3) the attendees were not free to take their meals elsewhere. *Gerald Goldberg, et al.*, B-198471, May 1, 1980 143

An employee of the Forest Service who conducted at his duty station a General Management Review meeting with timber associations and other private users of the Mt. Baker-Snoqualmie National Forest may not be reimbursed for the cost of a meal served at the meeting. The general rule is that in the absence of specific statutory authority the Government may not pay for meals of civilian employees at their headquarters. Reimbursement has been allowed where the meal was incident to a formal meeting or conference that included substantial functions separate from the meal. This case did not meet this threshold requirement 508

An employee may not be reimbursed for a meal at his headquarters solely by virtue of having met the three-part test established in *Gerald Goldberg, et al.*, B-198471, May 1, 1980. Rather, the employee must first show that the meal was part of a formal meeting or conference that included not only functions such as speeches or business carried out during a seating at the meal, but also included substantial functions that took place separate from the meal. See *Randall R. Pope and James L. Ryan*, 64 Comp. Gen. 406 (1985) 508

Reimbursement

Expenses Incident to Official Duties

Employee was invited to speak at luncheon session of agency training program at her duty station, and she seeks reimbursement of cost of luncheon. Cost of luncheon may be paid under 5 U.S.C. 4110 since the record indicates that (1) the meal was incidental to the training program, (2) attendance at the meal was necessary for full participation in the meeting, and (3) the attendees were not free to take their meals elsewhere. *Gerald Goldberg, et al.*, B-198471, May 1, 1980 143

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MEALS—Continued Page
Reimbursement—Continued
Expenses Incident to Official Duties—Continued
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MEDICAL TREATMENT
Officers and Employees
Examination, etc.
At Government Expense
An individual not employed by the Government, but invited to participate in an exercise with the Naval Ocean Research and Development Activity, Department of the Navy, claimed the cost of a required physical examination on her claim for travel expenses. The cost of a physical examination necessary to participate in an exercise may not be paid as travel expense; however, as in the case of an employee, when a physical examination is undergone for the benefit of the Government, the cost of the examination may be reimbursed to the invitee 677

MEETINGS
Attendance, etc. Fees
Meals Included
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MERITORIOUS CLAIMS ACT (*See* CLAIMS, Reporting to Congress, Meritorious Claims Act)

Page

MILEAGE

Travel by Privately Owned Automobile

Advantage to Government

Temporary Duty

Army employee whose use of his privately owned vehicle was determined to be advantageous to the Government is entitled to mileage for travel on a daily basis between his place of abode and his alternate duty point under Volume 2 of the Joint Travel Regulations. Under para. C2153 Department of Defense components do not have discretion to limit the payment of mileage to the mileage amount by which his travel to the alternate duty site exceeds the employee's commute between his residence and his permanent duty station..... 127

Between Residence and Temporary Duty Station

Army employee whose use of his privately owned vehicle was determined to be advantageous to the Government is entitled to mileage for travel on a daily basis between his place of abode and his alternate duty point under Volume 2 of the Joint Travel Regulations. Under para. C2153 Department of Defense components do not have discretion to limit the payment of mileage to the mileage amount by which his travel to the alternate duty site exceeds the employee's commute between his residence and his permanent duty station..... 127

Incident to Transfer

Employee who traveled by a longer route and did not travel 300 miles per day in connection with a permanent change of station explains that the route and delay resulted from his wife's illness. The agency may reimburse the employee on the basis of the mileage and time claimed if they determine that the employee has explained to their satisfaction the reasons for the alternate route and delay..... 647

MILITARY PERSONNEL

Acceptance of Foreign Presents, Emoluments, etc.

Foreign Government Employment

Prohibition

The prohibition against an officer of the United States accepting emoluments, office, etc., from a foreign government without the consent of Congress in Article I, section 9, clause 8 of the U.S. Constitution, and 37 U.S.C. 908, is applicable to a retired member of the U.S. Marine Corps, who, under an employment agreement with a domestic corporation, serves as an instructor for, and is subject to the supervision and control of the Royal Saudi Navy, which is the source of the funds for his salary and other emoluments. Since he has not received the required congressional consent, his military retired pay must be withheld..... 382

MILITARY PERSONNEL—Continued Page

Acceptance of Foreign Presents, Emoluments, etc.—Continued

Foreign Government Employment—Continued

Retired Enlisted Members

The prohibition against an officer of the United States accepting emoluments, office, etc., from a foreign government without the consent of Congress in Article I, section 9, clause 8 of the U.S. Constitution, and 37 U.S.C. 908, is applicable to a retired member of the U.S. Marine Corps, who, under an employment agreement with a domestic corporation, serves as an instructor for, and is subject to the supervision and control of the Royal Saudi Navy, which is the source of the funds for his salary and other emoluments. Since he has not received the required congressional consent, his military retired pay must be withheld 382

Retired Officer

Retired Pay Adjustment

The prohibition against an officer of the United States accepting emoluments, office, etc., from a foreign government without the consent of Congress in Article I, section 9, clause 8 of the U.S. Constitution, and 37 U.S.C. 908, is applicable to a retired member of the U.S. Marine Corps, who, under an employment agreement with a domestic corporation, serves as an instructor for, and is subject to the supervision and control of the Royal Saudi Navy, which is the source of the funds for his salary and other emoluments. Since he has not received the required congressional consent, his military retired pay must be withheld 382

Retired Pay Adjustment

Pub. L. 95-105 Effect

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Allowances

Travel (*See* **TRAVEL ALLOWANCES, Military Personnel**)

Dependents

Annuity Election

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

Incompetents

Beneficiary Eligibility

Survivor Benefit Plan (*See* **PAY, Retired, Survivor Benefit Plan, Beneficiary Payments, Mentally Incapacitated Beneficiaries**)

Orders (*See* **ORDERS**)

MILITARY PERSONNEL—Continued Page

Retired

Foreign Government Employment

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Retired Pay (*See* **PAY, Retired**)

Retirement

Temporary Disability Retirement Digest

A former member of the United States Navy who was separated from the service with disability severance pay (10 U.S.C. 1212), has been a civilian employee of the government since 1960. At the time of civilian appointment, has was credited with 6 years, 6 months and 10 days of military years of service for annual leave accrual purposes (5 U.S.C. 6303), which included 3 years, 7 months and 10 days of time spent on the Temporary Disability Retired List (TDRL). The TDRL time is not properly creditable for this purpose. Under 5 U.S.C. 6303(a), and 5 U.S.C. 8332(c)(1)(A), while military service is creditable, the term "military service" is defined in 5 U.S.C. 8331(13) to mean "honorable active service." Since placement of a military member's name on the TDRL list removes his name from the active duty list, he is in a retirement status during that time. Therefore, the employee's civilian service computation date must be reestablished and his annual leave balance adjusted 461

Station Allowances (*See* **STATION ALLOWANCES, Military Personnel**)

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

Waiver of Overpayments (*See* **DEBT COLLECTIONS, Waiver, Military Personnel, Pay, etc.**)

MISCELLANEOUS RECEIPTS

Agency Appropriations *v.* Miscellaneous Receipts

Rebates from Travel Management Centers redistributed to paying Federal agency may be retained by agency for credit to its own appropriation and does not need to be deposited into the Treasury as miscellaneous receipts. This does not constitute an illegal augmentation of appropriations in that these rebates are adjustments of previous amounts disbursed and therefore quality as "refunds" under regulations permitting such refunds to be retained by the agency 601

MISCELLANEOUS RECEIPTS—Continued Page

Agency Appropriations *v.* Miscellaneous Receipts—Continued

Job Corps Center receipts derived from sales of meals, clothing, tool kits, and arts and crafts, and from fines and property damage restitution, may be retained by the Job Corps program and need not be deposited into the Treasury as miscellaneous receipts as normally required by section 3302 of title 31. Section 1551(m) of title 29 allows retention of income generated under the Job Corps program, and the appropriation covering the Job Corps program, for "Training and Employment Services," as provided in the annual Department of Labor appropriations acts, specifically allows reimbursements to be added to it 666

Monies received from agreements between the Weber Basin Job Corps Center, operated by the Department of the Interior, and Utah Davis County School District and Utah State Department of Corrections, may be returned to the Job Corps program rather than deposited into the Treasury as miscellaneous receipts. The monies may be considered both as income generated under the Job Corps program, 29 U.S.C. 1551(m), and as reimbursements which the yearly appropriations acts covering the Job Corps specifically allow to be added to appropriations. As section 1580 of title 29 allows acceptance of state services and facilities for programs under the Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1322, 1370, including the Job Corps program, payments under the agreements may also be made through in-kind services or property 666

Faulty design by an architect-engineer (A-E) caused the Air Force to incur additional corrective expenses in the ensuing construction contract. The corrective expenses—added costs paid to construction contractor plus added amounts paid to Army Corps of Engineers for supervision and administration (S&A)—were charged to Air Force's 1982 5-year Military Construction appropriation. In 1985, Government recovered the amount of the additional costs from the A-E. Since the appropriation charged was still available for obligation at the time of the recovery, it may be reimbursed from the recovery to the extent of the additional costs actually incurred. However, portion of recovery representing S&A expenses in excess of amount actually charged Air Force must be deposited as miscellaneous receipts 838

Agency Appropriations *v.* Miscellaneous Receipts (*See also* **MISCELLANEOUS RECEIPTS, Special Account *v.* Miscellaneous Receipts)**

Rental Collections

When the high bidder for a mineral lease offered by the Bureau of Land Management does not execute a lease, the one-fifth bonus submitted with the bid is forfeited. Section 35 of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. 191), provides that all money received from sales, bonuses, royalties, and rentals are to be distributed under that section. Therefore, the forfeited bonuses are to be distributed in the same manner as other lease proceeds to which section 35 is applicable 570

MISCELLANEOUS RECEIPTS—Continued Page

Special Account *v.* Miscellaneous Receipts

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Special Account *v.* Miscellaneous Receipts (*See also* **MISCELLANEOUS RECEIPTS, Agency Appropriations *v.* Miscellaneous Receipts**)

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MISCELLANEOUS RECEIPTS—Continued Page
Special Account *v.* Miscellaneous Receipts—Continued
Contract Refunds, etc.
Rebates from Travel Management Centers redistributed to paying Federal agency may be retained by agency for credit to its own appropriation and does not need to be deposited into the Treasury as miscellaneous receipts. This does not constitute an illegal augmentation of appropriations in that these rebates are adjustments of previous amounts disbursed and therefore qualify as "refunds" under regulations permitting such refunds to be retained by the agency 601

OFFICERS AND EMPLOYEES
Annual Leave (*See* LEAVES OF ABSENCE, Annual)
Automobile Transportation (*See* TRANSPORATION, Automobiles)
Backpay
Removals, Suspensions, etc.
Deductions from Back Pay (*See* COMPENSATION, Removals, Suspensions, etc., Deductions from Back Pay)
Compensation (*See* COMPENSATION)
Contracting with Government
Public Policy Objectionability
An agency may reject an offer, which proposes a social government employee of that agency as a major consultant, even though no actual conflict of interest is found to exist. Because of the longstanding policy against contracting with government employees, the agency has a reasonable basis for application of this restrictive policy to the protester's offer, even though notice of this policy was not given in statute, regulation or the Request for Proposal (RFP)..... 87
Debt Collections (*See* DEBT COLLECTIONS)
De Facto
Compensation
Retention of Compensation Received
An employee was temporarily and then permanently promoted from a GS-4 position to a GS-5 position. It was later discovered that the promotion was erroneous because she did not meet the general experience requirement of the position to which she was promoted. The error was corrected and a Bill of Collection issued. Because she performed the duties of the GS-5 position based on the apparent authority of the promoting personnel, she is to be regarded as a *de facto* employee and is therefore entitled to retain the compensation of a GS-5..... 528
Criteria
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OFFICERS AND EMPLOYEES—Continued Page

Duties

Performance at Home

The Department of Housing and Urban Development proposes to allow an employee with multiple sclerosis to work at home during temporary periods when the employee will not be able to commute to an office because of that illness. While generally Federal employees may not be compensated for work performed at home rather than at their duty stations, under limited circumstances, when actual work performance can be measured against established quantity and quality norms so as to verify time and attendance reports, and there is a reasonable basis to justify the use of a home as a workplace, payment of salaries for work done at home may be authorized under an established and approved program. Thus, if the agency has determined that appropriate measures have been taken to ensure quantity and quality of work done and time and attendance, the employee may be paid for work done at home 826

Health Services (*See* **MEDICAL TREATMENT, Officers and Employees**)

Leaves of Absence (*See* **LEAVES OF ABSENCE**)

Liability

Government losses

Errors, Neglect of Duty, etc.

Property Damage, etc. (*See* **PROPERTY, Public, Damage, Loss, etc., Accountability of Civilian and Military Personnel, Negligence or Errors in Judgment**)

New Appointments

Relocation Expense

Reimbursement and Allowances

There is no indication in the statutes or regulations governing the relocation of Federal appointees of any intent to deprive reimbursement of expenses incurred in undertaking an authorized move that is interrupted by the appointee's death, and those expenses are allowable to the extent that they do not exceed the reimbursement that would have been payable if the appointee had not died. Hence, reimbursement may be allowed for the expenses of a household goods shipment initiated by a physician newly appointed to a position with the Veterans Administration in furtherance of an authorized move, notwithstanding that he died while the goods were in transit, and the shipment was then recalled. 237

A person newly appointed to the Federal service who has not yet entered on duty does not have the status of a Federal "employee." Consequently, relocation allowances credited to the account of a deceased Veterans Administration appointee are payable to his estate in the manner prescribed for deceased public creditors generally, and may not instead be paid directly to his survivors in the manner otherwise specifically prescribed by statute for settling the accounts of deceased employees. 237

Overseas

Automobile Transportation (*See* **TRANSPORTATION, Automobiles**)

Home Leave

Renewal Agreement Travel Expenses (*See* **TRAVEL EXPENSES, Overseas Employees, Renewal Agreement Travel**)

OFFICERS AND EMPLOYEES—Continued Page

Overseas—Continued

Retirement, Separation, etc.

Return to Other Than Place of Residence

Civilian employees of the Government who are separated from service at an overseas post may be allowed to have privately-owned vehicles which were transported to those posts at Government expense transported to an alternate destination not in the United States or the country in which the employee's actual residence is located. Such transportation is subject to the limitation that the cost may not exceed the constructive cost of having the vehicles shipped to the employee's place of actual residence when transferred to his last duty station overseas and may not be authorized if separation occurred before April 10, 1984, the date of the decision *Thelma I. Grimes*, 63 Comp. Gen. 281 468

Overtime (*See* COMPENSATION, Overtime)

Reduction-in-Force

Reemployment After

Break in Service

Travel and Transportation Expenses

Where an employee, separated by one agency as the result of a reduction in-force, is subsequently hired within the following year by another agency, both the gaining and the losing agency have discretation to pay all, any or none of the individual's relocation expenses. Since it is the Department of Defense's policy for the losing agency to pay these costs, the determination by the Defense Logistics Agency as the gaining agency not to pay these expenses was proper. Where the gaining agency has declined to pay any of such expenses, the losing agency's payment of portion of the employee's relocation expenses is not contingent upon any agreement between the heads of the two agencies involved. 332

Reemployment or Reinstatement

Travel and Transportation Expenses

Where an employee, separated by one agency as the result of a reduction in force, is subsequently hired within the following year by another agency, both the gaining and the losing agency have discretation to pay all, any or none of the individual's relocation expenses. Since it is the Department of Defense's policy for the losing agency to pay these costs, the determination by the Defense Logistics Agency as the gaining agency not to pay these expenses was proper. Where the gaining agency has declined to pay any of such expenses, the losing agency's payment of portion of the employee's relocation expenses is not contingent upon any agreement between the heads of the two agencies involved. 332

Relocation Expenses

Transferred Employees (*See* OFFICERS AND EMPLOYEES, Transfers)

Transferred Employees

Real Estate Expenses (*See* OFFICERS AND EMPLOYEES, Transfers, Real Estate Expenses)

OFFICERS AND EMPLOYEES—Continued Page
Removals, Suspensions, etc.
Compensation (*See* COMPENSATION, Removals, Suspensions, etc.)
Retirement (*See* RETIREMENT, Civilian)
Severance Pay (*See* COMPENSATION, Severance Pay)
Sick Leave (*See* LEAVES OF ABSENCE, Sick)
Subsistence
Per Diem (*See* SUBSISTENCE, Per Diem)
Relocation Expenses for Transferred Employees (*See* OFFICERS AND EMPLOYEES, Transfers, Temporary quarters, Subsistence Expenses)
Transfers
Agency Liability for Expenses of Transfer
An employee involved in an inter-agency transfer in the interest of the government without a break in service, which also involved vested overseas return travel rights from Alaska, is entitled to relocation expenses under 5 U.S.C. 5724 and 5724a. 900
An employee transferred in the interest of the government did not execute a service agreement incident to that transfer. However, lack of such an agreement does not defeat relocation expense reimbursement. The statutory condition to payment of relocation expenses incident to such a transfer is that the employee remain in government service without a break in service for a minimum of 12 months following transfer. So long as that condition is met, relocation expenses may be paid. *Baltazar A. Villarreal,* B-214244, May 22, 1984. Time with a particular agency is not a condition precedent to relocation expense reimbursement. *Finn v. United States,* 192 Ct. Cl. 814 (1970). 900
Ordinarily, all relocation expense reimbursements under 5 U.S.C. 5724 and 5724a associated with an inter-agency transfer are the sole responsibility of the gaining agency. 5 U.S.C. 5724(e). However, where an employee also has vested return travel rights under 5 U.S.C. 5722, these are to be paid by the losing agency so long as return travel is performed before the transfer is effected. *Milton G. Parsons,* 58 Comp. Gen. 783 (1979); 46 Comp. Gen. 628 (1968) 900
Attorney Fees
House Purchase and/or Sale
The Federal Travel Regulations provide that transferred federal employees may be allowed reimbursement of legal expenses associated with the sale of their old residence, including the expenses of advisory and representational services not involving litigation before the courts. A transferred employee may therefore be reimbursed for legal fees reasonably and necessarily paid to obtain representational services to negotiate his release from a mortgage contract in exchange for his conveyance of his ownership of his old residence in a situtation that did not involve foreclosure proceedings or other type of litigation 473

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Dependents

Immediate Family

What Constitutes

Employee was transferred from Washington, D.C., to Ogden, Utah. He had been divorced and legal custody of his daughter had been awarded to his former wife who lived in Claremont, California. Although the daughter had resided with employee for some 10 months prior to employee's transfer, at the time employee reported to his former wife who lived in Claremont, California. Although the daughter had resided with employees for some 10 months prior to employee's transfer, at the time employee reported to his new duty station he was neither accompanied by his daughter nor did she later join him in Utah. Under the Federal Travel Regulations, a dependent must be a member of the employee's household at the time he or she reports for duty. Accordingly, employee may not be reimbursed for the cost of his daughter's travel from his old duty station to his former spouse's home upon his transfer..... 845

Break in Service

Reemployed by Another Agency

Liability for Relocation Expenses

Where an employee, separated by one agency as the result of a reduction in force, is subsequently hired within the following year by another agency, both the gaining and the losing agency have discretion to pay all, any or none of the individual's relocation expenses. Since it is the Department of Defense's policy for the losing agency to pay these costs, the determination by the Defense Logistics Agency as the gaining agency not to pay these expenses was proper. Where the gaining agency has declined to pay any of such expenses, the losing agency's payment of portion of the employee's relocation expenses is not contingent upon any agreement between the heads of the two agencies involved..... 332

Government v. Employee Interest

Employee who was transferred from Idaho Falls, Idaho, to Albany, Oregon, failed to complete 12-month service requirement when he voluntarily retired. The employee had requested retirement for health reasons so that he could return to Albany, Oregon. However, this case is distinguished from those cases where the employee transfers solely for retirement purposes since, here, agency requested employee to remain on duty for approximately 3 months and employee performed necessary and substantial duty at Albany, his new official duty station, prior to his retirement. Compare *James D. Belknap*, B-188597, June 17, 1977. Thus, his transfer is considered to be in the interest of the Government, and his voluntary retirement prior to completion of the 12-month service period may be considered as a valid reason for separation, and his travel and transportation expenses may be paid, subject to a determination by the head of the agency that his separation was for reasons beyond his control, and acceptable to the agency..... 657

House Trailers, Mobile Homes, etc. (*See* TRANSPORTATION, Household Effects, House Trailer Shipments, etc.)

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Leases

Surcharges

A relocated IRS employee is not entitled to reimbursement for a releting fee incurred by the premature settlement of a lease when moving from temporary to permanent quarters at this new duty station since it is a security deposit, as distinguished from a subsistence expense in the nature of rent for lodging, and since it did not occur at the old duty station. The employee may also not be reimbursed for a telephone installation charge in temporary quarters at his new duty station since it is not for a service ordinarily included in the price of a hotel or motel room 805

Employee requests reimbursement for six $10 surcharges incurred incident to month-to-month leases he entered into after learning of his pending relocation. Although the surcharges may not be reimbursed as real estate transaction expenses, they may be paid as miscellaneous expenses, subject to the general limitations established for miscellaneous expense reimbursements. 396

Miscellaneous Expenses

Auto Registration, etc. Expenses

Use taxes, excise taxes, license fees, and related registration costs imposed on boats and trailers brought into the state where the transferred employee's new duty station is located may be reimbursed as part of the miscellaneous expenses allowance. These items are reimbursable because they are substantially the same as those expressly authorized for automobiles and are directly related to the relocation of the employee's residence. They may be reimbursed regardless of the fact the boats and trailers were not transported to the new duty station at Government expense 285

Lease Surcharges (*See* OFFICERS AND EMPLOYEES, Transfers, Leases, Surcharges)

Transfers

Miscellaneous Expenses

Mobile Home Dwelling Purchase, etc.

Subject to the statutory limitation on reimbursement, an employee who transported her double-wide mobile home to her new duty station is entitled to a miscellaneous expense allowance to cover costs of disassembling the mobile home in preparation for shipment and of reassembling and blocking the mobile home at the new residence site. The allowance also covers nonreimbursable deposits for propane gas service and fees for connecting that and other utilities. While the allowance covers state-imposed charges for titling and registration at the new duty station, it does not cover the cost of parts and labor to install wheels and axles necessary to prepare the mobile home for shipment since these were newly acquired items 749

Nonreimbursable Items (*See* OFFICERS AND EMPLOYEES, Transfers, Nonreimbursable Expenses)

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Nonreimbursable Expenses

Lease Execution Expenses

A relocated IRS employee is not entitled to reimbursement for a reletting fee incurred by the premature settlement of a lease when moving from temporary to permanent quarters at this new duty station since it is a security deposit, as distinguished from a subsistence expense in the nature of rent for lodging, and since it did not occur at the old duty station. The employee may also not be reimbursed for a telephone installation charge in temporary quarters at his new duty station since it is not for a service ordinarily included in the price of a hotel or motel room 805

New Items

Subject to the statutory limitation on reimbursement, an employee who transported her double-wide mobile home to her new duty station is entitled to a miscellaneous expense allowance to cover costs of disassembling the mobile home in preparation for shipment and of reassembling and blocking the mobile home at the new residence site. The allowance also covers nonreimbursable deposits for propane gas service and fees for connecting that and other utilities. While the allowance covers state-imposed charges for titling and registration at the new duty station, it does not cover the cost of parts and labor to install wheels and axles necessary to prepare the mobile home for shipment since these were newly acquired items 749

Real Estate Expenses

Attorney Fees (*See* OFFICERS AND EMPLOYEES, Transfers, Attorney Fees, House Purchase and/or Sale)

Construction Costs

Transferred employees may not be reimbursed a transaction privilege tax imposed by Arizona on constructors of new houses even though the tax was passed on to the employee when he purchased a newly constructed residence at his new duty station. Although the tax qualifies as a "transfer tax" within the meaning of Federal Travel Regulations, paragraph 2-6.2d, it was a charge imposed incident to the construction of a new residence, and therefore may not be reimbursed in view of the specific prohibition contained in paragraph 2-6.2d 557

House Title in Name of Another

An employee, between the time he received notice of his transfer and the date he reported to his new duty station, married the woman whose home had been his residence at the time he received notice of his transfer. He may not be reimbursed for real estate expenses associated with the sale of that residence since he did not acquire his interest in the residence prior to the date he was definitely informed of his transfer. At that time he had neither a direct nor a derivative interest in the property and, thus, did not satisfy the requirements of Federal Travel Regulations paragraph 2-6.1c. 53 Comp. Gen. 90 (1973) is overruled 282

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Real Estate Expenses—Continued
Interim Financing Loans
Transferred employees sold residence at old duty station, received $5,000 cash and accepted a second mortgage from the purchaser. In order to obtain sufficient funds to purchase a residence at his new official station, employee later assigned his interest in and to 120 monthly installments under the second mortgage and received the sum of $12,000. The transaction entered into by the employee was an "interim personal financing loan." It was not a loan secured by the employee's interest in his old residence, and thus was not a part of the total financial package in the purchase of a residence at his new duty station. Hence, the costs incurred in securing assignment of the second mortgage are not reimbursable 157
Loan Origination Fee
A transferred employee claimed a 3 percent loan origination fee but the agency limited reimbursement to 1 percent, based on HUD's advice that a 1 percent loan origination fee is customary nationwide. However, HUD's advice was limited to FHA-insured loans and did not apply to the employee's conventional mortgage. We hold that the employee is entitled to reimbursement for a 3 percent loan origination fee because he has demonstrated by a Federal Home Loan Bank's survey of local lenders that a 3 percent fee was customary in the locality for the particular type of conventional financing involved 447
Loan Processing
Second Mortgage on Old Residence
Proceeds Applied to House Purchase
Transferred employee sold residence at old duty station, received $5,000 cash and accepted a second mortgage from the purchaser. In order to obtain sufficient funds to purchase a residence at his new official station, employee later assigned his interest in and to 120 monthly installments under the second mortgage and received the sum of $12,000. The transaction entered into by the employee was an "interim personal financing loan." It was not a loan secured by the employee's interest in his old residence, and thus was not a part of the total financial package in the purchase of a residence at his new duty station. Hence, the costs incurred in securing assignment of the second mortgage are not reimbursable 157
Refinancing
Transferred employee sold residence at old duty station, received $5,000 cash and accepted a second mortgage from the purchaser. In order to obtain sufficient funds to purchase a residence at his new official station, employee later assigned his interest in and to 120 monthly installments under the second mortgage and received the sum of $12,000. The transaction entered into by the employee was an "interim personal financing loan." It was not a loan secured by the employee's interest in his old residence, and thus was not a part of the total financial package in the purchase of a residence at his new duty station. Hence, the costs incurred in securing assignment of the second mortgage are not reimbursable 157

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Real Estate Expenses—Continued

Reimbursement

Transferred employee sold residence at old duty station, received $5,000 cash and accepted a second mortgage from the purchaser. In order to obtain sufficient funds to purchase a residence at his new official station, employee later assigned his interest in and to 120 monthly installments under the second mortgage and received the sum of $12,000. The transaction entered into by the employee was an "interim personal financing loan." It was not a loan secured by the employee's interest in his old residence, and thus was not a part of the total financial package in the purchase of a residence at his new duty station. Hence, the costs incurred in securing assignment of the second mortgage are not reimbursable 157

The statutes and regulations authorizing transferred federal employees to be reimbursed for the expenses of the "sale" of their residence at their old duty station place no definitive limitations on the meaning of the term "sale." Hence, a transferred employee who conveyed the title of his old residence to a state agency in exchange for $10 and a release from his mortgage contract may be reimbursed for his allowable expenses in the sales transaction, even though it was not an ordinary open-market real estate sale 473

Relocation expenses

Break in Service (*See* OFFICERS AND EMPLOYEES, Transfers, Break in Service)

Leases (*See* OFFICERS AND EMPLOYEES, Transfers, Leases)

Miscellaneous expenses (*See* OFFICERS AND EMPLOYEES, Transfers, Miscellaneous Expenses)

Real Estate Expenses (*See* OFFICERS AND EMPLOYEES, Transfers, Real Estate Expenses)

Temporary Quarters (*See* OFFICERS AND EMPLOYEES, Transfers, Temporary Quarters)

Service Agreements

Failure to Execute

An employee transferred in the interest of the government did not execute a service agreement incident to that transfer. However, lack of such an agreement does not defeat relocation expense reimbursement. The statutory condition to payment of relocation expenses incident to such a transfer is that the employee remain in government service without a break in service for a minimum of 12 months following transfer. So long as that condition is met, relocation expenses may be paid. *Baltazar A. Villarreal*, B-214244, May 22, 1984. Time with a particular agency is not a condition precedent to relocation expense reimbursement. *Finn v. United States*, 192 Ct. Cl. 814 (1970)..

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Service Agreements—Continued

Failure to Fulfull

Retirement

Employee who was transferred from Idaho Falls, Idaho, to Albany, Oregon, failed to complete 12-month service requirement when he voluntarily retired. The employee had requested retirement for health reasons so that he could return to Albany, Oregon. However, this case is distinguished from those cases where the employee transfers solely for retirement purposes since, here, agency requested employee to remain on duty for approximately 3 months and employee performed necessary and substantial duty at Albany, his new official duty station, prior to his retirement. Compare James D. Belknap, B-188597, June 17, 1977. Thus, his transfer is considered to be in the interest of the Government, and his voluntary retirement prior to completion of the 12-month service period may be considered as a valid reason for separation, and his travel and transportation expenses may be paid, subject to a determination by the head of the agency that his separation was for reasons beyond his control, and acceptable to the agency 657

Transfers Within U.S.

Employee who was transferred from Idaho Falls, Idaho, to Albany, Oregon, failed to complete 12-month service requirement when he voluntarily retired. The employee had requested retirement for health reasons so that he could return to Albany, Oregon. However, this case is distinguished from those cases where the employee transfers solely for retirement purposes since, here, agency requested employee to remain on duty for approximately 3 months and employee performed necessary and substantial duty at Albany, his new official duty station, prior to his retirement. Compare James D. Belknap, B-188597, June 17, 1977. Thus, his transfer is considered to be in the interest of the Government, and his voluntary retirement prior to completion of the 12-month service period may be considered as a valid reason for separation, and his travel and transportation expenses may be paid, subject to a determination by the head of the agency that his separation was for reasons beyond his control, acceptable to the agency 657

Temporary Quarters

Entitlement

Employee of the Department of Energy was transferred incident to a permanent change of station from Colorado to Washington, D.C. Employee was authorized temporary quarters allowance for family including authorization for dependent mother to stay in Ada, Oklahoma, until she joined the family in Washington. Due to illness, dependent mother was placed in a nursing home in New Mexico until she joined the family in Washington a few months later. Since nursing home expenses incurred would not have been incurred absent the transfer, the occupancy of such quarters may be regarded as "reasonably related and incident to the transfer" and, therefore, may be paid pursuant to FTR para. 2-5.2(d) 326

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Temporary Quarters—Continued
Entitlement—Continued
A transferred employee's immediate family joined him at his new duty station several months after he reported for duty, remained there for 26 days, and then returned to their residence at the old duty station. The employee's claim for family travel and temporary quarters subsistence expense is denied since the record does not provide any objective evidence that the family intended to vacate the residence at the old station so as to entitle the employee to be reimbursed 342
A transferred employee may be deemed to have disestablished his residence at his old duty station effective the date he reported to his new duty station, even though his family did not disestablish their residence at the old station. Thus, under para. 2-5.2a of the Federal Travel Regulations (May 1973 ed.), he is entitled to TQSE for himself, not to exceed 30 days 342
Subsistence Expenses
A relocated IRS employee is not entitled to reimbursement for a reletting fee incurred by the premature settlement of a lease when moving from temporary to permanent quarters at this new duty station since it is a security deposit, as distinguished from a subsistence expense in the nature of rent for lodging, and since it did not occur at the old duty station. The employee may also not be reimbursed for a telephone installation charge in temporary quarters at his new duty station since it is not for a service ordinarily included in the price of a hotel or motel room 805
Computation of Allowable Amount
Employee of the Department of Interior requests reimbursement of temporary quarters subsistence expenses incurred in connection with his occupancy of lodgings furnished by a coworker. Although the employee claims that the lodgings were not furnished on the basis of a friendship between the two, applicability of the rules for reimbursement for temporary quarters does not depend upon the relationship between the employee and the person supplying the lodgings. When the lodgings are provided in a personal residence by a host who does not have a history or make a practice of renting out accommodations in his private home, the employee's claim should be supported by information indicating that the lodging charges reflect expenses incurred by the host 287

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Temporary Quarters—Continued
Subsistence Expenses—Continued
Computation of Allowable Amount—Continued
A transferred employee reclaims amount of disallowed portion of meals and miscellaneous expenses incurred while occupying temporary quarters. The agency denied the claim based on its own internal guidelines which provide that such expenses up to 49 percent of the daily allowable maximum rate of per diem are deemed reasonable, but any amount in excess of that percentage was to be summarily disallowed regardless of unusual circumstances. Further agency consideration of the claim is required, since all evaluations of must be made based on the facts in each case. While an agency may establish as a guideline that a percentage of such daily maximum is reasonable on a "less than" basis, the use of that guideline to summarily bar reimbursement of any amount in excess of that percentage without permitting the employee to supply evidence of its reasonableness is arbitrary and not consistent with the Federal Travel Regulations and decisions of this Office. The claim may be allowed if evidence of unusual circumstances is presented 710
Reasonableness
A transferred employee reclaims amount of disallowed portion of meals and miscellaneous expenses incurred while occupying temporary quarters. The agency denied the claim based on its own internal guidelines which provide that such expenses up to 49 percent of the daily allowable maximum rate of per diem are deemed reasonable, but any amount in excess of that percentage was to be summarily disallowed regardless of unusual circumstances. Further agency consideration of the claim is required, since all evaluations of reasonableness must be made based on the facts in each case. While an agency may establish as a guideline that a percentage of such daily maximum is reasonable on a "less than" basis, the use of that guideline to summarily bar reimbursement of any amount in excess of that percentage without permitting the employee to supply evidence of its reasonableness is arbitrary and not consistent with the Federal Travel Regulations and decisions of this Office. The claim may be allowed if evidence of unusual circumstances is presented 710
An agency is responsible for determining the reasonableness of meal and miscellaneous expenses claimed during a temporary quarters subsistence expense period. The medical condition of a transferred employee's wife should be taken into account to the extent restaurant meals were required and criteria used to determine reasonableness of expenses based on restaurant meals rather than meals taken in the temporary lodging was appropriate 647

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Temporary Quarters—Continued

Subsistence Expenses—Continued

Reasonableness of Meal Costs

A transferred employee reclaims amount of disallowed meal expenses incurred while occupying temporary quarters. The agency relied on its internal guideline stating that meal costs up to 45 percent of the daily maximum will be considered reasonable without further explanation. The employing agency has the initial responsibility to determine the reasonableness of expenditures for expenses claimed by employees while occupying temporary quarters. Where the agency has exercised that responsibility, General Accounting Office (GAO) will not substitute its judgment for that of the agency unless the agency's determination is clearly erroneous, arbitrary, or capricious. Here, agency's determination is sustained in the absence of adequate justification by the employee for additional meal costs..... 409

A transferred employee reclaims amount of disallowed portion of meals and miscellaneous expenses incurred while occupying temporary quarters. The agency denied the claim based on its own internal guidelines which provide that such expenses up to 49 percent of the daily allowable maximum rate of per diem are deemed reasonable, but any amount in excess of that percentage was to be summarily disallowed regardless of unusual circumstances. Further agency consideration of the claim is required, since all evaluations of reasonableness must be made based on the facts in each case. While an agency may establish as a guideline that a percentage of such daily maximum is reasonable on a "less than" basis, the use of that guideline to summarily bar reimbursement of any amount in excess of that percentage without permitting the employee to supply evidence of its reasonableness is arbitrary and not consistent with the Federal Travel Regulations and decisions of this Office. The claim may be allowed if evidence of unusual circumstances is presented..... 710

Time Limitation

Extension

Indications that a transferred employee's wife was ill prior to their occupancy of temporary quarters does not preclude the possibility that the subsequent extension of authority to stay in temporary quarters was precipitated by circumstances occurring during the initial period as the regulations require. An extension documented some time after the fact based upon an assertion of timely verbal approval will support payment for the additional temporary subsistence allowance period 647

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Temporary Quarters—Continued

What Constitutes

Employee for the Department of Energy was transferred incident to a permanent change of station from Colorado to Washington, D.C. Employee was authorized temporary quarters allowance for family including authorization for dependent mother to stay in Ada, Oklahoma, until she joined the family in Washington. Due to illness, dependent mother was placed in a nursing home in New Mexico until she joined the family in Washington a few months later. Since nursing home expenses incurred would not have been incurred absent the transfer, the occupancy of such quarters may be regarded as "reasonably related and incident to the transfer" and, therefore, may be paid pursuant to FTR para. 2-5.2(d) 326

Transportation for House Hunting

Authorization

A transferred employee who was authorized a househunting trip, which he had not performed before he reported to duty, may be reimbursed for travel expenses and 6 days per diem for his wife's subsequent househunting trip where the record indicates that she performed such duties prior to her return to the old duty station 342

Travel expenses (*See* **TRAVEL EXPENSES, Transfers**)

Travel Orders

Required for Reimbursement of Expenses

Orders Issued Subsequent to Transfer

No Effect on Entitlement

An employee transferred in the interest of the government was not issued travel orders. However, travel orders are not essential for relocation expense reimbursement. While the issuance of travel orders demonstrates an agency's intention to transfer an employee, the absence of such orders is not fatal to those relocation expense reimbursement rights if there is other objective evidence of that transfer intention. *Orville H. Myers,* 57 Comp. Gen. 447 (1978) 900

Travel expenses (*See* **TRAVEL EXPENSES**)

ORDERS

Amendment

Retroactive

Military travel orders may not be amended retroactively to increase or decrease rights which have become fixed under statute and regulation after the travel has been performed, except to correct plain errors. Retroactive modification of a Marine Corps sergeant's orders to delete a provision requiring group travel is appropriate under this rule to correct a plain error, where it was demonstrated that no group existed with which he could travel and that the order-issuing authority had not intended to specify group travel at the time the orders were published 884

ORDERS—Continued Page
Amendment
Retroactive
The travel and transportation entitlements of members of the uniformed services are for computation under the statutes and regulations in effect at the time the travel is performed. Generally, if the applicable statutes and regulations are amended after the issuance of orders but before the completion of travel, no retroactive modification of the travel orders would be involved, and instead the orders would be automatically brought into conformity with the statutes and regulations at the time of their amendment 884
Cancelled, Revoked, or Modified
Retroactively
Military travel orders may not be amended retroactively to increase or decrease rights which have become fixed under statute and regulation after the travel has been performed, except to correct plain errors. Retroactive modification of a Marine Corps sergeant's orders to delete a provision requiring group travel is appropriate under this rule to correct a plain error, where it was demonstrated that no group existed with which he could travel and that the order-issuing authority had not intended to specify group travel at the time the orders were published 884
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Travel
Military Personnel
Government Transportation Request
Military travel orders may not be amended retroactively to increase or decrease rights which have become fixed under statute and regulation after the travel has been performed, except to correct plain errors. Retroactive modification of a Marine Corps sergeant's orders to delete a provision requiring group travel is appropriate under this rule to correct a plain error, where it was demonstrated that no group existed with which he could travel and that the order-issuing authority had not intended to specify group travel at the time the orders were published. 884

OVERTIME
Compensation (*See* COMPENSATION, Overtime)

PATENTS
Infringement
Contract Matters
Claims of possible patent infringement do not provide a basis for the General Accounting Office (GAO) to object to an award since questions of patent infringement are not encompassed by GAO's bid protest function 663

Page

PAY
Civilian employees (*See* COMPENSATION)
Reservists
Concurrent Military Reservist and Civilian Service
A statutory provision limiting the combined military and civilian compensation of military Reserve technicians to the rate payable for level V of the Executive Schedule should have been applied on a biweekly pay period basis rather than an annual basis, since the statutory language and legislative history indicate that it is to be applied similarly to related statutory pay rate limitations for other employees which are applied on a pay period basis 78
Retired
Annuity Elections For Dependents
Survivor Benefit Plan (*See* PAY, Retired, Survivor Benefit Plan)
Foreign Employment
Congressional Consent
Pub. L. 95-105
Applicability
The prohibition against an officer of the United States accepting emoluments, office, etc., from a foreign government without the consent of Congress in Article I, section 9, clause 8 of the U.S. Constitution, and 37 U.S.C. 908, is applicable to a retired member of the U.S. Marine Corps, who, under an employment agreement with a domestic corporation, serves as an instructor for, and is subject to the supervision and control of the Royal Saudi Navy, which is the source of the funds for his salary and other emoluments. Since he has not received the required congressional consent, his military retired pay must be withheld 382
Re-retirement
Rate Applicable
A statute authorizing military and naval reservists who are "qualified" for retirement to be "retained" in an active status and to receive credit "for all purposes" for their subsequent service does not apply to reservists who have in fact been retired, since retirement orders are not subject to cancellation, and while retireees may be recalled to active service from retirement they cannot be retired and "retained" on active duty simultaneously. Hence, that statute provides no authority to permit a retired Navy Reserve officer who was recalled to duty and who then performed 19 years' active service to be "re-retired" anew on the basis of that additional service. 10 U.S.C. 676 774

PAY—Continued Page
Retired—Continued
Re-retirement—Continued
Recomputation of Retired Pay
A statute authorizing military and naval reservists who are "qualified" for retirement to be "retained" in an active status and to receive credit "for all purposes" for their subsequent service does not apply to reservists who have in fact been retired, since retirement orders are not subject to cancellation, and while retirees may be recalled to active service from retirement they cannot be retired and "retained" on active duty simultaneously. Hence, that statute provides no authority to permit a retired Navy Reserve officer who was recalled to duty and who then performed 19 years' active service to be "re-retired" anew on the basis of that additional service. 10 U.S.C. 676 774
The Congress has enacted legislation to delete a statutory directive which previously prohibited retired military and naval reservists from receiving additional prohibited retired military and naval reservists from receiving additional retirement benefits for active service performed upon a recall to duty, so that a retired Navy Reserve officer who was recalled to active duty for an extended period may now elect to have her retired pay recomputed, with credit for the added service she performed, under the same statutory retired pay recomputation formulas generally applicable to all retired service members who perform periods of active duty following their retirement. 10 U.S.C. 1402 774
Survivor Benefit Plan
Annuity Deductions
An Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when he retired in 1978, but he was later divorced whereupon SBP deductions from his retired pay ceased. He remarried in 1980 and his new spouse became automatically covered under the SBP a year later. However, he failed to advise the Air Force of the remarriage so retired pay SBP deductions were not reinstated. In Dec. 1983 he elected SBP coverage for his former spouse pursuant to their divorce settlement agreement, and he died in Apr. 1984. The deliquent SBP premiums should be collected from the former spouse's annuity notwithstanding that they covered a period when the current spouse was covered under the SBP rather than the former spouse 134

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Beneficiary Payments
Mentally Incapacitated Beneficiaries
Effect of Incapacity on Payments
Survivor Benefit Plan annuity payments should not be made to a mentally incapacitated annuitant's agent appointed under a power of attorney, notwithstanding that the validity of the power of attorney may have been preserved by operation of a state statute. The Survivor Benefit Plan is an income maintenance program for the dependents of deceased service members, entailing continuing periodic payments of indefinite duration in substantial aggregate amounts. Accounting officers have a duty to obtain acquittance when payments are made under Federal law, and it is a matter of serious doubt that a good acquittance could be assured through payment of Survivor Benefit Plan annuities due mentally incapacitated annuitants to anyone other than court-appointed representatives, since only such representatives are subject to continuing independent supervision 621
Children
Eligible beneficiaries under the Survivor Benefit Plan, an income maintenance program for the surviving dependents of deceased service members, include Plan participants' children between 18 and 22 years old who are full-time students. Children over 18 years old who are not attending school may become eligible for an annuity at any time until they reach the age of 22 by undertaking a fulltime course of study, since the Congress in establishing the Plan indicated that children aged anywhere between 18 and 22 years old who are students should be regarded as eligible dependents for purposes of annuity coverage 767
If a Survivor Benefit Plan participant's child who is between 18 and 22 years old becomes a full-time student and thus becomes eligible for an annuity under the Plan, any resulting adjustment that may be necessary in the participant's cost for beneficiary coverage should be made effective on the first day of the month after the child has resumed school attendance, as costs for benefit coverage generally are assessed on a monthly basis and should be predicated on the beneficiary status in being on the first day of a month, for the month. 767
As a general rule, a valid marriage entered into by a Survivor Benefit Plan participant's child terminates the child's annuity eligibility for all time, because a valid marriage operates to end a child's dependence upon its parents, and the relationship of dependency cannot be renewed by a subsequent divorce. Nevertheless, if the marriage is ended not by an ordinary divorce but rather by an annulment, or there is otherwise a judicial decree rendered by a court of competent jurisdiction declaring the marriage void, then there would be a proper basis for concluding the marriage was invalid, and the child's annuity coverage could be reinstated 767

PAY—Continued Page

Retired—Continued

Survivor Benefit Plan—Continued

Contribution Indebtedness

An Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when he retired in 1978, but he was later divorced whereupon SBP deductions from his retired pay ceased. He remarried in 1980 and his new spouse became automatically covered under the SBP a year later. However, he failed to advise the Air Force of the remarriage so retired pay SBP deductions were not reinstated. In Dec. 1983 he elected SBP coverage for his former spouse pursuant to their divorce settlement agreement, and he died in Apr. 1984. The delinquent SBP premiums should be collected from the former spouse's annuity notwithstanding that they covered a period when the current spouse was covered under the SBP rather than the former spouse 134

Election Status

A terminally ill retired officer made an irrevocable election of Survivor Benefit Plan (SBP) coverage in Dec. 1983 for his former spouse pursuant to a clause in his divorce settlement agreeing to do so. Such election precluded his current spouse from SBP coverage. In February 1984 an affidavit was received from him with a letter from his and his current spouse's attorney attempting to revoke the election on the basis that he was too ill to have understood the implications when he made the election and stating that he wanted his current spouse to be covered. The former spouse election was made in proper form, the member was never adjudicated incompetent, and the great weight of medical and other evidence presented supports the former spouse's contention that he was mentally competent when he made the election. Thus, the election should be given effect 134

Remarriage of Member

Annuity Deductions

Resumption After Post-Election Marriage

An Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when he retired in 1978, but he was later divorced whereupon SBP deductions from his retired pay ceased. He remarried in 1980 and his new spouse became automatically covered under the SBP a year later. However, he failed to advise the Air Force of the remarriage so retired pay SBP deductions were not reinstated. In Dec. 1983 he elected SBP coverage for his former spouse pursuant to their divorce settlement agreement, and he died in Apr. 1984. The delinquent SBP premiums should be collected from the former spouse's annuity notwithstanding that they covered a period when the current spouse was covered under the SBP rather than the former spouse 134

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Remarriage of Member—Continued
Spouse's Annuity Eligibility
A retired Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when in 1980 he was divorced. In the divorce settlement he agreed to provide survivor benefit coverage for his former spouse should the law ever be changed to allow it. He remarried, and a year later (1981) his new spouse was automatically covered under the SBP. In Sept. 1983 Public Law 98-94 was enacted authorizing a person in this situation to elect SBP coverage for a former spouse. He did so in Dec. 1983 stating that the election was made pursuant to the divorce settlement. Such an election is irrevocable; thus, a later attempt to revoke it is ineffective and the former spouse is the beneficiary of the SBP annuity upon his death 134
A terminally ill retired officer made an irrevocable election of Survivor Benefit Plan (SBP) coverage in Dec. 1983 for his former spouse pursuant to a clause in his divorce settlement agreeing to do so. Such election precluded his current spouse from SBP coverage. In February 1984 an affidavit was received from him with a letter from his and his current spouse's attorney attempting to revoke the election on the basis that he was too ill to have understood the implications when he made the election and stating that he wanted his current spouse to be covered. The former spouse's election was made in proper form, the member was never adjudicated incompetent, and the great weight of medical and other evidence presented supports the former spouse's contention that he was mentally competent when he made the election. Thus, the election should be given effect.. 134
Spouse
The widow of a deceased Coast Guard member erroneously received retired pay amounting to $43,281.68 which should have ceased upon the member's death. When the erroneous payments were discovered it appeared the widow was not entitled to a survivor annuity and waiver of the erroneous payment was granted. The service then determined that although the member had elected not to participate in the Survivor Benefit Plan, the service had failed to inform the spouse of that fact and this entitled the widow to receive a full annuity under the Plan. Although the annuity entitlement is retroactive to the date of the member's death, the widow is not entitled to additional payment for the period for which she received the erroneous retired pay which was waived. Since the waiver action was based on incomplete facts, it is modified to apply only to the excess she received over the amount due for the annuity for that period, and the balance is considered as satisfying her annuity entitlement..... 696

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Spouse—Continued
Social Security Offset
Computation
Services may not calculate a social security offset against a Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment when that payment has actually been reduced because the sponsoring retired member had elected to receive a reduced social security benefit prior to reaching full eligibility age. Similarly, the services may not calculate the offset as if the beneficiary were receiving an unreduced social security payment when the retired member had never received social security benefits, but the spouse of the retired member elected to receive reduced benefits prior to reaching full eligibility age 813
Formula Basis
Services may not calculate a social security offset against a Survivor Benefits Plan annuity as if the beneficiary were receiving an unreduced social security payment when the payment has actually been reduced because the sponsoring retired member had elected to receive a reduced social security benefit prior to reaching full eligibility age. Similarly, the services may not calculate the offset as if the beneficiary were receiving an unreduced social security payment when the retired member had never received social security benefits, but the spouse of the retired member elected to receive reduced benefits prior to reaching full eligibility age 813
Witholding
Foreign Employment (*See* PAY, Retired, Foreign Employment)
Survivor Benefit Plan (*See* PAY, Retired, Survivor Benefit Plan)
Waiver of Overpayments (*See* DEBT COLLECTIONS, Waiver, Military Personnel, Pay, etc.)

PAYMENTS
Absence of Unenforceability of Contracts
Quantum Merit-Valebant Basis (*See* PAYMENTS, *Quantum Merit/Valebant* Basis, Absence, etc. of contract)
Advance
Prohibition
Advance payments for advertisements were not authorized by an appropriation act or other law and were therefore improper under 31 U.S.C. 3324(a). However, upon verification that the advertisements paid for were published, no loss to the Government will have occurred and the imprest fund which made the improper payment may be reimbursed 806
Contracts (*See* CONTRACTS, Payments)
Discount on Contract payments (*See* CONTRACTS, Discounts)
Discounts
Prompt payment
Computation Basis (*See* CONTRACTS, Discounts, Prompt Payment)

PAYMENTS—Continued Page
Erroneous
Recovery
Government's Right to Recover
Amounts received by an Indian as overpayment from an erroneous Indian probate proceeding distribution and which, together with accured interest on overpayment, were withdrawn by the Indian in good faith but were subsequently recovered by the Interior Department from monies deposited in the Indian's Individual Indian Money account from an unrelated proceeding, may be returned to Indian overpaid 533
Amounts received by an Indian as overpayment from an erroneous Indian probate proceeding distribution and which, together with accured interest on the overpayment, the Interior Department subsequently recovered from monies in the Indian's Individual Indian money account attributable to the same proceeding, may not be returned to Indian overpaid 533
Monies returned to Indian, which earlier were improperly recovered, would be repaid from the current lump-sum appropriation to the Bureau of Indian Affairs for "Operation of Indian Programs." Since such repayment would not be improper or incorrect, there is no need for the disbursing officer to request relief under section 3527(c) of title 31 of the United States Code or for this Office to grant relief 533
In Lieu of Taxes (*See* TAXES, Federal Payments in Lieu of Taxes)
Government Liability (*See* CONTRACTS, Payments, Past Due Accounts, Late Charges)
Prompt Payment Act
Applicability
Determination
The Army should include Prompt Payment Act interest penalties when it makes late payments to public utility companies that do not have a tariff-authorized late charge. The Act requires that interest penalties be added to late payments made to "any business concern." Utilities are not excluded from the definition of this term. Our decision in 63 Comp. Gen. 517 (1984) concerned a public utility which had adopted tariff-authorized late charges and other express payment terms. We held only that, just as is the case with other contractors, such express terms take precedence over provisions in the Act which were intended to provide contractors with a substitute penalty when none was provided in the contract 842
Interest Payment
The Army's payment as a result of this decision of interest owed on utility bills should include compound interest as required by section 3902(c) of title 31 842
Provision in interagency agreement between Federal Emergency Management Agency (FEMA) and General Services Administration (GSA) required FEMA to reimburse GSA for "expenses incurred by GSA in providing the requested assistance." Under this provision, FEMA should reimburse GSA for interest penalties incurred under Prompt Payment Act, since late payment interest is an ordinary business expense and thus within scope of reimbursement provision ... 795

Page

Quantum Meruit/Valebant Basis

Absence, etc. of Contract

Government Acceptance of Goods/Services

Benefit to Government Requirement

City of Ansonia may recover $33,187.50 for sewer services provided to the Army's housing facilities at Fort Devens, Massachusetts. The City may be paid on a *quantum meruit* basis, pursuant to the Comptroller General's claims settlement authority, 31 U.S.C. 3702 (1982), because the services constituted a permissible procurement, the Government received and accepted the services after it was notified of the connection, the City acted in good faith and the amount claimed represents no more than the reasonable value of the benefit received. 692

Price Reasonableness

City of Ansonia may recover $33,187.50 for sewer services provided to the Army's housing facilities at Fort Devens, Massachusetts. The City may be paid on a *quantum meruit* basis, pursuant to the Comptroller General's claims settlement authority, 31 U.S.C. 3702 (1982), because the services constituted a permissible procurement, the Government received and accepted the services after it was notified of the connection, the City acted in good faith and the amount claimed represents no more than the reasonable value of the benefit received. 692

PER DIEM (*See* **SUBSISTENCE, Per Diem**)

PRINTING AND BINDING

Purchases From Other Than Public Printer

Propriety

The Pension Benefit Guaranty Corporation (PBGC) may not be regarded as exempt from the Government-wide statutory requirements (44 U.S.C. 501, 1701) to satisfy its printing and distribution needs from the Government Printing Office because the statutes and legislative history which created PBGC clearly indicate that Congress intended that, after the first 270 days of the corporation's existence, it would be subject to those requirements 226

Agencies and establishments of the United States Government are required by 44 U.S.C. 502, 1701 to satisfy their printing and distribution requirements through the offices of the Government Printing Office (GPO) unless their enabling legislation confers some statutory exemption from those requirements. Those agencies and establishments which have previously been found exempt from those requirements have been given the statutory authority to determine the character and necessity of their accounts, "notwithstanding the provisions of any other law governing the expenditure of public funds." Since the statutes creating the Pension Benefit Guaranty Corporation (29 U.S.C. 1301 *et seq.*) do not contain such a provision, that corporation may not be regarded as exempt from the general requirement to use GPO to satisfy its printing and distribution needs 226

PROCUREMENT

Bids (*See* **BIDS**)

Page

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

PROPERTY

Private

Damage, Loss, etc.

Government Liability

Insurance

Watervliet Arsenal, Department of the Army, may not under 31 U.S.C. 3721 purchase insurance to pay claims for loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work and charge the cost of premiums to the industrial fund as an operating expense since claims for loss of employee-owned property incident to service in the absence of any other law is for consideration under 31 U.S.C. 3721 and any payment warranted must be charged to the "Claims, Defense" appropriation 790

Personal Property (*See* **PROPERTY, Private, Damage, Loss, etc., Personal Property**)

Vehicle Operated on Government Business

An Army officer was authorized to rent a car for use with another officer while on temporary duty. An accident occurred while the car was driven by the other officer. This officer, though not specifically authorized to rent a car on his travel order, was authorized to use that car for official business. Since the accident occurred while the driver was performing official business, payment may be made to the rental company for the deductible amount of damages required by the rental contract 253

Vehicle Rental

An Army officer was authorized to rent a car for use with another officer while on temporary duty. An accident occurred while the car was driven by the other officer. This officer, though not specifically authorized to rent a car on his travel order, was authorized to use that car for official business. Since the accident occurred while the driver was performing official business, payment may be made to the rental company for the deductible amount of damages required by the rental contract 253

Personal Property

Appropriation Chargeable

Watervliet Arsenal, Department of the Army, may not under 31 U.S.C. 3721 assume risk of loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work by charging losses to the Arsenal's industrial fund overhead account since claims made pursuant to 31 U.S.C. 3721 are properly chargeable to the appropriation for "Claims, Defense" and may not be charged to some other fund or appropriation. Charging them to industrial fund's overhead account would result in their payment from another appropriation 790

PROPERTY—Continued Page
Private—Continued
Damage, Loss, etc.—Continued
Claims Act of 1964
Watervliet Arsenal, Department of the Army, may not under 31 U.S.C. 3721 assume risk of loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work by charging losses to the Arsenal's industrial fund overhead account since claims made pursuant to 31 U.S.C. 3721 are properly chargeable to the appropriation for "Claims, Defense" and may not be charged to some other fund or appropriation. Charging them to industrial fund's overhead account would result in their payment from another appropriation 790
Watervliet Arsenal, Department of the Army, may not under 31 U.S.C. 3721 purchase insurance to pay claims for loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work and charge the cost of premiums to the industrial fund as an operating expense since claims for loss of employee-owned property incident to service in the absence of any other law is for consideration under 31 U.S.C. 3721 and any payment warranted must be charged to the "Claims, Defense" appropriation 790
We recommend Watervliet Arsenal, Department of the Army, seek a reconsideration of the determination by the U.S. Army Claims Service that losses of employee-owned tools may not be paid under authority of 31 U.S.C. 3721 since it involves in the refusal of the Army to hear an entire class of claims based upon a policy determination that has as far as we can determine never been officially adopted or endorsed by the Department of the Army 790
Government Liability
Watervliet Arsenal, Department of the Army, may not under 31 U.S.C. 3721 assume risk of loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work by charging losses to the Arsenal's industrial fund overhead account since claims made pursuant to 31 U.S.C. 3721 are properly chargeable to the appropriation for "Claims, Defense" and may not be charged to some other fund or appropriation. Charging them to industrial fund's overhead account would result in their payment from another appropriation 790
Military Personnel
Watervliet Arsenal, Department of the Army, may not under 31 U.S.C. 3721 assume risk of loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work by charging losses to the Arsenal's industrial fund overhead account since claims made pursuant to 31 U.S.C. 3721 are properly chargeable to the appropriation for "Claims, Defense" and may not be charged to some other fund or appropriation. Charging them to industrial fund's overhead account would result in their payment from another appropriation 790
Lease (*See* LEASES)

PROPERTY—Continued Page
Public
Damage, Loss, etc.
Accountability of Civilian and Military Personnel
Evidence
The Forest Service assessed a claim against one of its forest rangers to recover $1,475.15 (plus interest) for unauthorized expenditures which he directed his staff to make in order to expand and improve the building which serves as headquarters for the Jemez District of the Santa Fe National Forest. Pursuant to General Accounting Office (GAO)'s settlement authority under 31 U.S.C. 3702 (1982), and the agency's regulations which provide for assessing financial liability against Forest Service employees, GAO finds that the legal basis of the claim has not been adequately established. Therefore, collection should be terminated..... 177
Liability determination
The Forest Service assessed a claim against one of its forest rangers to recover $1,475.15 (plus interest) for unauthorized expenditures which he directed his staff to make in order to expand and improve the building which serves as headquarters for the Jemez District of the Santa Fe National Forest. Pursuant to General Accounting Office (GAO)'s settlement authority under 31 U.S.C. 3702 (1982), and the agency's regulations which provide for assessing financial liability against Forest Service employees, GAO finds that the legal basis of the claim has not been adequately established. Therefore, collection should be terminated..... 177
Negligence or Errors in Judgment
The Forest Service assessed a claim against one of its forest rangers to recover $1,475.15 (plus interest) for unauthorized expenditures which he directed his staff to make in order to expand and improve the building which serves as headquarters for the Jemez District of the Santa Fe National Forest. Pursuant to General Accounting Office (GAO)'s settlement authority under 31 U.S.C. 3702 (1982), and the agency's regulations which provide for assessing financial liability against Forest Service employees, GAO finds that the legal basis of the claim has not been adequately established. Therefore, collection should be terminated..... 177
Repair, Replacement, etc. Costs
The Federal Aviation Administration may not be reimbursed by the Navy for replacement cost of an Instrument Landing System owned by the Government at the El Paso, Texas International Airport which was destroyed by the crash of a Navy aircraft, since property of Government agencies is not the property of the separate entities but rather of the Government as a single entity and there can be no reimbursement by the Government to itself for damage to or loss of its own property. This decision distinguishes 41 Comp. Gen. 235..... 464

PROPERTY—Continued Page
Public—Continued
Damage, Loss, etc.—Continued
Repair, Replacement, etc. Costs—Continued
Although the Federal Aviation Administration (FAA) charged the cost of replacement of Instrument Landing System (ILS) to its "Facilities and Equipment (Airport and Airway Trust Fund)" appropriation account which consists of appropriations made to the FAA from the Airport and Airway Trust Fund for the purpose of funding the acquisition, establishment and improvement of air navigation facilities, this does not bring activity within exception to interdepartmental waiver rule recognized by this Office for damage caused to property held in trust by the Government on behalf of particular identifiable beneficiaries in order to protect beneficiaries equitable interest in property. FAA is using Federal funds to repair damage to Government-owned property and its not acting as trustee on behalf of particular group of identifiable in repairing ILS..... 464
Real (*See* REAL PROPERTY)

PUBLIC LANDS
Leases
Mineral
Revenues
When the bidder for a mineral lease offered by the Bureau of Land Management does not execute a lease, the one-fifth bonus submitted with the bid is forfeited. Section 35 of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. 191), provides that all money received from sales, bonuses, royalities, and rentals are to be distributed under that section. Therefore, the forfeited bonuses are to be distributed in the same manner as other lease proceeds to which section 35 is applicable..... 570

REAL PROPERTY
Disposition
Authority
Proposal by the Immigration and Naturalization Service (INS) to renovate Government-owned facility at Terminal Island in San Pedro, Cal., to provide space for detaining aliens by means of a long-term lease-back arrangement raises a fundamental legal problem. In order to lease the facility, which is presently wholly owned by the Government, back from the contractor performing the renovation work, INS must somehow sell or otherwise transfer the facility to the contractor. Nothing in INS's authorizing statute at 8 U.S.C. 1252(c) provides it with authority to dispose of Government-owned property... 339

REAL PROPERTY—Continued Page
Disposition—Continued
Authority—Continued
Property owned by the Government which was once used as a detention facility but is currently being used by INS as its Western Regional Office and which INS admittedly needs for use once again as a detention facility does not qualify as property which is "excess" to the needs of the INS or "surplus" to the needs of the INS or "surplus" to the needs of the United States so as to warrant its disposal under the Federal Property and Administrative Service Act of 1949, as amended, either by the General Services Administration or by INS upon a delegation of authority from GSA. There is no other authority of which we are aware which would enable INS to divest itself of a building it now owns under these circumstances 339
Public Lands (*See* PUBLIC LANDS)
Surplus Government Property
Disposition Authority
Property owned by the Government which was once used as a detention facility but is currently being used by INS as its Western Regional Office and which INS admittedly needs for use once again as a detention facility does not qualify as property which is "excess" to the needs of the INS or "surplus" to the needs of the INS or "surplus" to the needs of the United States so as to warrant its disposal under the Federal Property and Administrative Services Act of 1949, as amended, either by the General Services Administration or by INS upon a delegation of authority from GSA. There is no other authority of which we are aware which would enable INS to divest itself of a building it now owns under these circumstances 339

REGULATIONS
Amendment
Contrary to Established Procedures
The Bureau of Land Management of the Department of the Interior issued an instruction memorandum capping liquidated damages assessments established by 43 C.F.R. 3163.3 for noncompliance with the Bureau's requirements for onshore Federal and Indian oil and gas activities. Change in computation of assessment amounts mandated by regulations is effective only when instituted by rulemaking under 5 U.S.C. 553. Accordingly, the instruction memorandum is ineffective to make this change 439

Page

RELEASES

Proper Release of Acquittance

Power of Attorney

Survivor Benefit Plan annuity payments should not be made to a mentally incapacitated annuitant's agent appointed under a power of attorney, notwithstanding that the validity of the power of attorney may have been preserved by operation of a state statute. The Survivor Benefit Plan is an income maintenance program for the dependents of deceased service members, entailing continuing periodic payments of indefinite duration in substantial aggregate amounts. Accounting officers have a duty to obtain acquittance when payments are made under Federal law, and it is a matter of serious doubt that a good acquittance could be assured through payment of Survivor Benefit Plan annuities due mentally incapacitated annuitants to anyone other than court-appointed representatives, since only such representatives are subject to continuing independent supervision 621

Survivor Benefit Plan Annuitant

Mentally Incapacitated Adult

Survivor Benefit Plan annuity payments should not be made to a mentally incapacitated annuitant's agent appointed under a power of attorney, notwithstanding that the validity of the power of attorney may have been preserved by operation of a state statute. The Survivor Benefit Plan is an income maintenance program for the dependents of deceased service members, entailing continuing periodic payments of indefinite duration in substantial aggregate amounts. Accounting officers have a duty to obtain acquittance when payments are made under Federal law, and it is a matter of serious doubt that a good acquittance could be assured through payment of Survivor Benefit Plan annuities due mentally incapacitated annuitants to anyone other than court-appointed representatives, since only such representatives are subject to continuing independent supervision 621

RETIREMENT

Civilian

Contributions

Back Pay Award

The agency's action in offsetting refunded retirement contributions from an employee's backpay award is consistent with Federal Personnel Manual requirements which were sustained in our decision in *Angel F. Rivera*, 64 Comp. Gen. 86 (1984). Therefore, we will not disturb the agency's action, although the issue of whether refunded retirement contributions are deductible from a backpay award is now in litigation 865

RETIREMENT—Continued Page

Civilian—Continued

Reemployed Annuitant

Annuity Deduction

Mandatory

A Civil Service annuitant claims entitlement to full compensation, in addition to his annuity, for temporary full-time duties allegedly performed following his retirement. Under the provisions of 5 U.S.C. 8344(a), the salary of a retired Civil Service annuitant must be reduced by the amount of his annuity during any period of actual employment. However, since the claimant states that he was not appointed to a position following retirement, which statement has been confirmed by the agency's personnel office, he is not entitled to any compensation, reduced or otherwise, for the period in question..... 21

Service Credits

Military Service

A former member of the United States Navy who was separated from the service with disability severance pay (10 U.S.C. 1212), has been a civilian employee of the government since 1960. At the time of civilian appointment, he was credited with 6 years, 6 months and 10 days of military years of service for annual leave accrual purposes (5 U.S.C. 6303), which included 3 years, 7 months and 10 days of time spent on the Temporary Disability Retired List (TDRL). The TDRL time is not properly creditable for this purpose. Under 5 U.S.C. 6303(a), and 5 U.S.C. 8332(c)(1)(A), while military service is creditable, the term "military service" is defined in 5 U.S.C. 8331(13) to mean "honorable active service." Since placement of a military member's name on the TDRL list removes his name from the active duty list, he is in a retirement status during that time. Therefore, the employee's civilian service computation date must be reestablished and his annual leave balance adjusted..... 461

SAINT LAWRENCE SEAWAY DEVELOPMENT CORPORATION

Employees

Work Schedules

The Saint Lawrence Seaway Development Corporation proposes an 8-hour shift for its maintenance and marine employees including a 15-minute rest break at 9 a.m. and a paid 20-minute combination rest/meal period at 1 p.m. A noncompensable lunch period may not be extended or shortened by a paid rest period because there exists a legal distinction in both origin and effect between a rest and a meal period. Time for a meal period is not compensable if the employees are not required to perform substantial duties. On the other hand, time for brief rest periods may be authorized without decrease in compensation..... 357

A proposal to establish an 8-hour shift with a paid 20-minute combination rest/meal period may not be implemented. It is clear that the purpose of this period is to provide the employees with a duty-free period for the purpose of eating, and there is no indication of any need for a change from the current situation in which the employees are not required to perform substantial duties during the mean period. Accordingly, the employees may not be compensated for the rest/meal period..... 357

Page

SERVICE CONTRACT ACT OF 1965 (*See* CONTRACTS, Labor stipulations, Service Contract Act of 1965)

SET-OFF
Contract Payments
Assignments
"No Set-Off" Provision
Tax Debts
Set-Off Precluded
Assignee bank has priority over the Internal Revenue Service for payment of contract proceeds even though tax debt matured before assignee satisfied requirements of Assignment of Claims Act, 31 U.S.C. 3727, since contract included a no setoff clause, the assignment was made to finance the contract, and the assignor still owes the assignee bank more than the amount of the contract proceeds..... 554

Tax Debts
Assignee bank has priority over the Internal Revenue Service for payment of contract proceeds even though tax debt matured before assignee satisfied requirements of Assignment of Claims Act, 31 U.S.C. 3727, since contract included a no setoff clause, the assignment was made to finance the contract, and the assignor still owes the assignee bank more than the amount of the contract proceeds..... 554

No Set-Off Provisions (*See* SET-OFF, Contract Payments, Assignments, "No Set-Off" Provision)

Pay, etc. Due Military Personnel
Travel allowances payable in advance to enlisted service members at the time of their final discharge for their subsequent personal travel home may not properly be subjected to offset on account of their debts to the Government, since it has long been recognized as a matter of public policy that it is impermissible to discharge enlisted service members at their last post of duty without the means of returning home. This policy has no application to former enlisted members who have completed their separation travel, however, and travel allowances remaining due to them after they have returned home may be withheld and applied against their debts..... 497

SEWERS
Construction
Assessment Charges
City of Ansonia may recover $33,187.50 for sewer services provided to the Army's housing facilities at Fort Devens, Massachusetts. The City may be paid on a *quantum merit* basis, pursuant to the Comptroller General's claims settlement authority, 31 U.S.C. 3702 (1982), because the services constituted a permissible procurement, the Government received and accepted the services after it was notified of the connection, the City acted in good faith and the amount claimed represents no more than the reasonable value of the benefit received. 692

SEWERS—Continued Page
Service Charges
Contracts
Award Propriety
City of Ansonia may recover $33,187.50 for sewer services provided to the Army's housing facilities at Fort Devens, Massachusetts. The City may be paid on a *quantum merit* basis, pursuant to the Comptroller General's claims settlement authority, 31 U.S.C. 3702 (1982), because the services constituted a permissible procurement, the Government received and accepted the services after it was notified of the connection, the City acted in good faith and the amount claimed represents no more than the reasonable value of the benefit received. 692

SIGNATURES
Initials
The handwritten initials of a vendor's agent on a receipt are sufficient to support the reimbursement of an imprest fund. Although a full handwritten signature represents the maximum protection of the Government, the initials were sufficient evidence of the vendor's intent to acknowledge receipt of payment 806
Vouchers
The handwritten initials of a vendor's agent on a receipt are sufficient to support the reimbursement of an imprest fund. Although a full handwritten signature represents the maximum protection of the Government, the initials were sufficient evidence of the vendor's intent to acknowlege receipt of payment 806

SMALL BUSINESS ADMINISTRATION
Contracts
Contracting With Other Government Agencies
Procurement Under 8(A) Program
Award Validity
Review by GAO
The General Accounting Office (GAO) does not consider protests concerning awards under section 8(a) of the Small Business Act absent a showing of possible fraud or bad faith on the part of government officials or an allegation that the Small Business Administration violated its own regulations 309
Fraud or Bad Faith Alleged
Evidence Sufficiency
Protester has not established that a subcontract awarded to a section 8(a) firm was fraudulent or made in bad faith where, more than 5 months after award, the firm was found to have been ineligible at the time of award and no evidence is presented to show that agency officials were or should have been aware of the ineligibility at that time 309

SMALL BUSINESS ADMINISTRATION—Continued Page
Contracts—Continued
Contracting With Other Government Agencies—Continued
Procurement Under 8(A) Program—Continued
Review by GAO
Determination to set aside procurement for full food services at military base under section 8(a) of the Small Business Act may be made after bid opening where agency reasonably determined that cancellation of total small business set-aside procurement and subsequent 8(a) award were clearly in the government's interest due to urgency of the requirement and the necessity of maintaining continuous food services after expiration of incumbent's contract which did not allow sufficient time to complete small business set-aside procurement 729

SOCIAL SECURITY
Military Personnel
Retired
Survivor Benefit Plan
Offset
Formula
Services may not calculate a social security offset against a Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment when that payment has actually been reduced because the sponsoring retired member had elected to receive a reduced social security benefit prior to reaching full eligibility age. Similarly, the services may not calculate the offset as if the beneficiary were receiving an unreduced social security payment when the the retired member had never received social security benefits, but the spouse of the retired member elected to receive reduced benefits prior to reaching full eligibility age. 813

STATES
Federal Payments in Lieu of Taxes
Distribution to Units of Local Government
Federal mineral land lease monies distributed to a county, and used by the county to carry out functions it would otherwise provide and pay for with county revenues, must be deducted from the county's Payments in Lieu of Taxes payments. 31 U.S.C. 6903(b) 22
Multi-county associations of local government, created in accordance with state law, can receive state distributions of Federal mineral lease funds. 30 U.S.C. 191; Utah Code Ann. 63-52-1, 63-52-3, and 11-13-5.5 849
As with direct county receipts of state distributions of Federal mineral lease monies, association expenditures of such monies to provide services for their members which otherwise would be provided by county members with county revenues, must be deducted from the Counties' Payments in Lieu of Taxes payments on a pro rata basis..... 849

STATES—Continued Page

Highway

Traffic Lights

Special Benefit to Government

Needed traffic signals may be installed at government expense if private entities requesting a signal would be charged for installation in similar circumstances, and the government is the primary beneficiary of the light. 61 Comp. Gen. 501 (1982). City's determination that light does not meet its priority criteria means that a private entity would be charged for signal installation on the same basis. Fact that the building where the signal will be installed is leased by GSA from a private owner does not shift the primary benefit of the signal installation to the lessor, because the government will have full benefit of increased safety for its employees for the remainder of the lease term. 847

Taxes (*See* TAXES, States)

STATION ALLOWANCES

Military Personnel

Dependents

Arrival at Home Port Prior to Vessel

The Joint Travel Regulations may be amended to authorize payment of overseas station allowances authorized by 37 U.S.C. 405 to members with dependents after the date a change in homeport of the vessel or staff or mobile unit to which they are assigned or are being transferred has been officially announced. Allowances may be paid even though travel of dependents occurs before the effective date of the vessel's or unit's change of homeport..... 888

Effective Date of Entitlement

The Joint Travel Regulations may be amended to authorize payment of overseas station allowances authorized by 37 U.S.C. 405 to members with dependents after the date a change in homeport of the vessel or staff or mobile unit to which they are assigned or are being transferred has been officially announced. Allowances may be paid even though travel of dependents occurs before the effective date of the vessel's or unit's change of homeport..... 888

Temporary Lodgings

Conditions of Entitlement

Prior to Effective Date of Orders

The Joint Travel Regulations may be amended to authorize payment of overseas station allowances authorized by 37 U.S.C. 405 to members with dependents after the date a change in homeport of the vessel or staff or mobile unit to which they are assigned or are being transferred has been officially announced. Allowances may be paid even though travel of dependents occurs before the effective date of the vessel's or unit's change of homeport..... 888

Page

STATUTES OF LIMITATION

Claims

Date of Accrual

City of Ansonia's *quantum meruit* claim is not barred by the 6-year time limitation in 31 U.S.C. 3702(b)(1) (1982). All monetary claims against the United States cognizable by this Office must be received within 6 years of date that claim first accrues or be forever barred. The City's claim first accrued no earlier than March 4, 1981, when the Army accepted sewer services by failing to disconnect its facilities and continuing its use of the City's sewer system with the knowledge that the connection existed and that the city expected payment. Since the City's claim reached this Office on August 26, 1985, the 6-year time limitation in 31 U.S.C. 3702 (1982) was met 692

STATUTORY CONSTRUCTION

Permanency

Section 8097 of the Department of Defense Appropriations Act, 1986, Pub. L. No. 99-190, 99 Stat. 1185, 1219 (1986), does not constitute permanent legislation. A provision contained in an appropriation act may not be construed as permanent legislation unless the language or nature of the provision makes it clear that such was the intent of the Congress. Here, the provision in question includes no words of futurity and the provision is not unrelated to the purposes of the Act. Further, the provision is not rendered ineffectual by a finding that it is not permanent 588

Presumption Against

Superfluity

Federal judge requests reexamination of prior decisions concerning effect of section 140 of Public Law 97-92, an amendment which bars pay increases for federal judges except as specifically authorized by Congress. Although the sponsor of section 140 now says that the amendment was not intended to be permanent legislation but was to expire with the appropriation act to which it was attached, we hold that section 140 is permanent legislation in view of congressional intent expressed at the time of passage of section 140 and subsequently. Prior decisions are affirmed 352

SUBSISTENCE

Actual Expenses

Meals

Employee was authorized actual subsistence expenses to perform temporary duty in Washington, D.C. He incurred transportation expenses to obtain meals for distances ranging from 2 to 112 miles, roundtrip. Federal Travel Regulations (FTR) allow expenses of travel to obtain actual subsistence expenses, but such expenses must be necessarily and prudently incurred and reasonable in nature. Where the expenses claimed appear largely unnecessary and unreasonable, and the employee failed to provide additional justification, the agency acted properly in denying the employee's claim 10

SUBSISTENCE—Continued Page

Actual Expenses—Continued

Prudent Person Rule

Employee was authorized actual subsistence expenses to perform temporary duty in Washington, D.C. He incurred transportation expenses to obtain meals for distances ranging from 2 to 112 miles, roundtrip. Federal Travel Regulations (FTR) allow expenses of travel to obtain actual subsistence expenses, but such expenses must be necessarily and prudently incurred and reasonable in nature. Where the expenses claimed appear largely unnecessary and unreasonable, and the employee failed to provide additional justification, the agency acted properly in denying the employee's claim 10

Per diem

Actual expenses (*See* SUBSISTENCE, Actual expenses)

Fractional Days

Thirty-Minute Period at Beginning or End

Under the "30-minute rule" an employee who completes temporary duty travel within 30 minutes after the beginning of a per diem quarter must provide a statement on his travel voucher explaining the official necessity for his arrival time in order to receive per diem for that quarter. That statement should demonstrate that he departed from his temporary duty station promptly following the completion of his assignment and that he proceeded expeditiously thereafter. Where statement furnished by employee fails to address promptness of departure, agency properly denied claim for an additional quarter day of per diem submitted by an employee who returned to his residence at 6:10 p.m 660

Headquarters

Itinerant Employees

Eleven seasonal employees of the Forest Service's Northern Region claim per diem for a 3-month assignment to fight fires in the Southwestern Region from April to July 1983. The Forest Service denied per diem under the Northern Region's Supplement to Federal Travel Regulations (FTR) para. 1-1.3 which provides that when a seasonal employee is assigned to a new location for over 2 weeks, the new location becomes the employee's official station. The denial of per diem is sustained. The Supplement is a valid exercise of discretion and is consistent with the FTR and our decisions 906

What Constitutes

Eleven seasonal employees of the Forest Service's Northern Region claim per diem for a 3-month assignment to fight fires in the Southwestern Region from April to July 1983. The Forest Service denied per diem under the Northern Region's Supplement to Federal Travel Regulations (FTR) para. 1-1.3 which provides that when a seasonal employee is assigned to a new location for over 2 weeks, the new location becomes the employee's official station. The denial of per diem is sustained. The Supplement is a valid exercise of discretion and is consistent with the FTR and our decisions 906

SUBSISTENCE—Continued Page
Per diem—Continued
Hours of Departure, etc.
Arrival and Departure Time Evidence
Under the "30-minute rule" an employee who completes temporary duty travel within 30 minutes after the beginning of a per diem quarter must provide a statement on his travel voucher explaining the official necessity for his arrival time in order to receive per diem for that quarter. That statement should demonstrate that he departed from his temporary duty station promptly following the completion of his assignment and that he proceeded expeditiously thereafter. Where statement furnished by employee fails to address promptness of departure, agency properly denied claim for an additional quarter day of per diem submitted by an employee who returned to his residence at 6:10 p.m 660
Leaves of Absence
Annual
An employee who elected to travel by privately-owned vehicle rather than common carrier and was charged annual leave for his excess traveltime claims subsistence expenses for that traveltime. The employee's claim may not be allowed, since we have held and the Federal Travel Regulations provide that subsistence expenses may not be paid during traveltime charged to annual leave. In view of the prohibition against paying subsistence expenses during a period of annual leave, it is not material that the employee's actual costs of travel, including the claimed subsistence expenses, were less than the constructive cost of travel by common carrier 763
Thirty-Minute Rule
Arrival and Departure Time Evidence
Under the "30-minute rule" an employee who completes temporary duty travel within 30 minutes after the beginning of a per diem quarter must provide a statement on his travel voucher explaining the official necessity for his arrival time in order to receive per diem for that quarter. That statement should demonstrate that he departed from his temporary duty station promptly following the completion of his assignment and that he proceeded expeditiously thereafter. Where statement furnished by employee fails to address promptness of departure, agency properly denied claim for an additional quarter day of per diem submitted by an employee who returned to his residence at 6:10 p.m 660

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

TAXES
Federal
The Equal Employment Opportunity Commission (EEOC) is not required to withhold employee payroll taxes or pay employer excise taxes under the Railroad Retirement Tax Act, 26 U.S.C. 3201-3233, when it distributes judgment proceeds to the employees of railroad companies unless provided for in the judgment 800

TAXES—Continued Page

Federal Payment in Lieu of Taxes

Distribution

State Statutory Provisions

Multi-county associations of local government, created in accordance with state law, can receive state distributions of Federal mineral lease funds. 30 U.S.C. 191; Utah Code Ann. 63-52-1, 63-52-3, and 11-13-5.5 849

To States (*See* **STATES, Federal Payments in Lieu of Taxes**)

To Units of Local Government

Deduction Propriety

Federal mineral land lease monies distributed to a county, and used by the county to carry out functions it would otherwise provide and pay for with county revenues, must be deducted from the country's Payments in Lieu of Taxes payments. 31 U.S.C. 6903(b)..... 849

As with direct county receipts of state distributions of Federal mineral lease monies, association expenditures of such monies to provide services for their members which otherwise would be provided by county members with county revenues, must be deducted from the Counties' Payments in Lieu of Taxes payments on a pro rata basis 849

State

Constitutionality

Assessment v. Service Charge

Maryland 9-1-1 fee may not be paid by Department of Health and Human Services, because the fee amounts to a tax from which the United States is constitutionally immune. 64 Comp. Gen. 655 (1985).... 879

Assessment for Local Improvements

Maryland 9-1-1 fee may not be paid by Department of Health and Human Services, because the fee amounts to a tax from which the United States is constitutionally immune. 64 Comp. Gen. 655 (1985).... 879

Government Function, etc.

Maryland 9-1-1 fee may not be paid by Department of Health and Human Services, because the fee amounts to a tax from which the United States is constitutionally immune. 64 Comp. Gen. 655 (1985).... 879

Taxes Imposed on Other Than Government

Incidence of Tax on Vendor

Maryland 9-1-1 fee may not be paid by Department of Health and Human Services, because the fee amounts to a tax from which the United States is constitutionally immune. 64 Comp. Gen. 655 (1985).... 879

Telephone Service

Maryland 9-1-1 fee may not be paid by Department of Health and Human Services, because the fee amounts to a tax from which the United States is constitutionally immune. 64 Comp. Gen. 655 (1985).... 879

Withholding

Generally

The Equal Employment Opportunity Commission (EEOC) is not required to withhold employee payroll taxes or pay employer excise taxes under the Railroad Retirement Tax Act, 26 U.S.C. 3201-3233, when it distributes judgment proceeds to the employees of railroad companies unless provided for in the judgment..... 800

TRANSPORTATION—Continued Page
Automobiles—Continued
Overseas Employees
Authority
Civilian employees of the Government who are separated from service at an overseas post may be allowed to have privately-owned vehicles which were transported to those posts at Government expense transported to an alternate destination not in the United States or the country in which the employee's actual residence is located. Such transportation is subject to the limitation that the cost may not exceed the constructive cost of having the vehicle shipped to the employee's place of actual residence when transferred to his last duty station overseas and may not be authorized if separation occurred before April 10, 1984, the date of the decision *Thelma I. Grimes*, 63 Comp. Gen. 281 468
Bills of Lading
Description
Rate Bases
A motor carrier that delivered a Government shipment and billed for the services contends that since another carrier picked up and transported the shipment before transferring it for further transportation and delivery, the transportation constituted a joint-line movement requiring the application of joint-line rates. The General Services Administration's audit determination, that the delivering carrier's lower single-line rates were applicable, is sustained because the record shows that the delivering carrier, having the necessary operating authority, agreed to transport the shipment from origin to destination at single-line rates. The fact that the billing carrier elected to allow another carrier to pick up the shipment is irrelevant 45
Government
Rate on Bill of Lading *v.* Applicable Rates
A "Deferred Service Requested" annotation on each of several Government Bills of Lading (GBL) satisfied an air carrier's Tender No. 17 requirement for application of relatively low deferred service rates. The carrier, however, applied higher rates published in Tender No. 14 applicable to regular air service allegedly because ambiguities in the GBL caused it to conclude that the shipper really did not desire deferred service. The General Services Administration's determination that deferred service rates (Tender No. 17) were applicable is sustained. The precise deferred service annotation on the GBL's required by Tender No. 17 was strong evidence of the shipper's intention to procure deferred service. If the carrier was confused by the shipper's actions it had a duty to clarify the shipper's intent 84
Released Valuation Condition
A carrier's tariff, offering released value rates to the public generally, contained a provision increasing line-haul charges by 25 percent where a shipper failed to annotate the Bill of Lading in specified form declaring the value of the property. Condition 5, now published at 41 C.F.R. 101-4.302-3(e), among the provisions governing Government Bill of Lading shipments, substantially complies with the tariff's formal annotation requirement. Therefore, the General Services Administration's disallowance of the carrier's claim for an additional 25 percent of original charges is sustained 444

TRANSPORTATION—Continued Page

Bills of Lading—Continued

Notations

Evidential Value

A "Deferred Service Requested" annotation on each of several Government Bills of Lading (GBL) satisfied an air carrier's Tender No. 17 requirement for application of relatively low deferred service rates. The carrier, however, applied higher rates published in Tender No. 14 applicable to regular air service allegedly because ambiguities in the GBL caused it to conclude that the shipper really did not desire deferred service. The General Services Administration's determination that deferred service rates (Tender No. 17) were applicable is sustained. The precise deferred service annotation on the GBL's required by Tender No. 17 was strong evidence of the shipper's intention to procure deferred service. If the carrier was confused by the shipper's actions it had a duty to clarify the shipper's intent 84

Carriers

Agents

Creation of Agency

Fact Question

Where the delivering/billing carrier had the appropriate authority to serve the origin and destination points, offered the government direct service between the points at single-line rates, and the Government Bills of Lading were issued to that carrier, the General Services Administration's determination that the higher joint-line rates charged and collected by the carrier were inapplicable is sustained, even though other carriers provided the pick-up service. The billing carrier's mere denial of an agency relationship and the absence of a written agency agreement do not rebut the presumption that the government followed its usual practice, called the carrier shown on the bills of lading, and looked to that carrier for performance of through single-line service 611

A motor carrier that delivered a Government shipment and billed for the services contends that since another carrier picked up and transported the shipment before transferring it for further transportation and delivery, the transportation constituted a joint-line movement requiring the application of joint-line rates. The General Services Administration's audit determination, that the delivering carrier's lower single-line rates were applicable, is sustained because the record shows that the delivering carrier, having the necessary operating authority, agreed to transport the shipment from origin to destination at single-line rates. The fact that the billing carrier elected to allow another carrier to pick up the shipment is irrelevant 45

Page

TELEPHONE
Long Distance Calls
Government Business Necessity
Certification Requirement
Statistical Sampling Use
Administrative certification by head of agency or designee that long distance telephone calls are necessary in the interest of the Government may be made on an estimate of the percentage of similar toll calls in the past that have been official calls provided the verification process provides reasonable assurance of accuracy and freedom from abuse 19
Private Residences
Prohibition
Exceptions
Use of appropriated funds to install telephone equipment in the residences of Internal Revenue Service employees to be used for portable computer data transmission is prohibited by 31 U.S.C. 1348(a)(1) (1982). However, there are circumstances, involving telephone service of limited use or when there are numerous safeguards and the service is essential, when the prohibition has been held inapplicable. Here, IRS has demonstrated the essential nature of the service, and an exception to the prohibition is warranted. Prior to installing the equipment, IRS should establish safeguards to prevent misuse .....
Hotel, Etc. Rooms
A relocated IRS employee is not entitled to reimbursement for a reletting fee incurred by the premature settlement of a lease when moving from temporary to permanent quarters at this new duty station since it is a security deposit, as distinguished from a subsistence expense in the nature of rent for lodging, and since it did not occur at the old duty station. The employee may also not be reimbursed for a telephone installation charge in temporary quarters at his new duty station since it is not for a service ordinarily included in the price of a hotel or motel room 805
Toll Charges
Billing Operations
Certification Requirement
Administrative certification by head of agency or designee that long distance telephone calls are necessary in the interest of the Government may be made on an estimate of the percentage of similar toll calls in the past that have been official calls provided the verification process provides reasonable assurance of accuracy and freedom from abuse 19
Payment
Administrative certification by head of agency or designee that long distance telephone calls are necessary in the interest of the Government may be made on an estimate of the percentage of similar toll calls in the past that have been official calls provided the verification process provides reasonable assurance of accuracy and freedom from abuse 19

Page

TENNESSEE VALLEY AUTHORITY
Contracts
Review By General Accounting Office (*See* CONTRACTS, Protests, Authority To Consider, Tennessee Valley Authority Procurements)

TRANSPORTATION
Air Carriers
Overcharges
Recovery
A "Deferred Service Requested" annotation of each of several Government Bills of Lading (GBL) satisfied an air carrier's Tender No. 17 requirement for application of relatively low deferred service rates. The carrier, however, applied higher rates published in Tender No. 14 applicable to regular air service allegedly because ambiguities in the GBL caused it to conclude that the shipper really did not desire deferred service. The General Services Administration's determination that deferred service rates (Tender No. 17) were applicable is sustained. The precise deferred service annotation on the GBL's required by Tender No. 17 was strong evidence of the shipper's intention to procure deferred service. If the carrier was confused by the shipper's actions it had a duty to clarify the shipper's intent 84
Automobiles
Authority
An employee, transferred from Pullman, Washington, to Fairbanks, Alaska, was authorized to ship a privately owned vehicle (POV). The agency disallowed the POV claim based on the rationale that the employee and her family used another POV as their approved mode of relocation travel, and thus exhausted their rights under 5 U.S.C. 5727, which precludes the shipment of more than one POV. On appeal, the claim is allowed. Relocation travel and POV shipment entitlements are separate and distinct statutory rights. The use of a POV as an approved mode of travel, in lieu of other approved modes of travel, is reimbursable on a mileage basis under authority of 5 U.S.C. 5724, and such use as a mode of personal transportation does not diminish the employee's rights under 5 U.S.C. 5727 to ship a different POV when travel orders approve such shipment. *David J. Dossett*, B-217691, July 31, 1985 710
Military Personnel
To Other Than New Duty Station
Under current regulations service members who have their household goods and automobiles shipped to an overseas duty station in anticipation of the family move are not entitled to return transportation if the family, for personal reasons, changes its plans and does not join the member. The applicable statute, 37 U.S.C. 406(h), is broad enough to provide authority for regulations authorizing return transportation of the household goods and privately owned vehicle independent of travel by the member or the dependents in these circumstances when the service finds that the transportation is in the best interest of the member or the dependents and the United States. To the extent they are inconsistent herewith, 49 Comp. Gen. 695 (1970) and 44 Comp. Gen. 574 (1965) are overruled 520

TRANSPORTATION—*Continued* Page
Automobiles—Continued
Overseas Employees
Authority
Civilian employees of the Government who are separated from service at an overseas post may be allowed to have privately-owned vehicles which were transported to those posts at Government expense transported to an alternate destination not in the United States or the country in which the employee's actual residence is located. Such transportation is subject to the limitation that the cost may not exceed the constructive cost of having the vehicle shipped to the employee's place of actual residence when transferred to his last duty station overseas and may not be authorized if separation occurred before April 10, 1984, the date of the decision *Thelma I. Grimes*, 63 Comp. Gen. 281 468
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A motor carrier that delivered a Government shipment and billed for the services contends that since another carrier picked up and transported the shipment before transferring it for further transportation and delivery, the transportation constituted a joint-line movement requiring the application of joint-line rates. The General Services Administration's audit determination, that the delivering carrier's lower single-line rates were applicable, is sustained because the record shows that the delivering carrier, having the necessary operating authority, agreed to transport the shipment from origin to destination at single-line rates. The fact that the billing carrier elected to allow another carrier to pick up the shipment is irrelevant 45
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A carrier's tariff, offering released value rates to the public generally, contained a provision increasing line-haul charges by 25 percent where a shipper failed to annotate the Bill of Lading in specified form declaring the value of the property. Condition 5, now published at 41 C.F.R. 101-4.302-3(e), among the provisions governing Government Bill of Lading shipments, substantially complies with the tariff's formal annotation requirement. Therefore, the General Services Administration's disallowance of the carrier's claim for an additional 25 percent of original charges is sustained 444

TRANSPORTATION—Continued Page

Bills of Lading—Continued

Notations

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Carriers

Agents

Creation of Agency

Fact Question

Where the delivering/billing carrier had the appropriate authority to serve the origin and destination points, offered the government direct service between the points at single-line rates, and the Government Bills of Lading were issued to that carrier, the General Services Administration's determination that the higher joint-line rates charged and collected by the carrier were inapplicable is sustained, even though other carriers provided the pick-up service. The billing carrier's mere denial of an agency relationship and the absence of a written agency agreement do not rebut the presumption that the government followed its usual practice, called the carrier shown on the bills of lading, and looked to that carrier for performance of through single-line service 611

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TRANSPORTATION—Continued Page

Dependents

Immediate Family

What Constitutes

Employee was transferred from Washington, D.C., to Ogden, Utah. He had been divorced and legal custody of his daughter had been awarded to his former wife who lived in Claremont, California. Although the daughter had resided with employee for some 10 months prior to employee's transfer, at the time employee reported to his new duty station he was neither accompanied by his daughter nor did she later join him in Utah. Under the Federal Travel Regulations, a dependent must be a member of the employee's household at the time he or she reports for duty. Accordingly, employees may not be reimbursed for the cost of his daughter's travel from his old duty station to his former spouse's home upon his transfer 845

Household Effects

House Trailer Shipments, etc.

Miscellaneous Expenses

Subject to the statutory limitations on reimbursement, an employee who transported her double-wide mobile home to her new duty station is entitled to a miscellaneous expense allowance to cover costs of disassembling the mobile home in preparation for shipment and of reassembling and blocking the mobile home at the new residence site. The allowance also covers nonreimbursable deposits for propane gas service and fees for connecting that and other utilities. While the allowance covers state-imposed charges for titling and registration at the new duty station, it does not cover the cost of parts and labor to install wheels and axles necessary to prepare the mobile home for shipment since these were newly acquired items 749

A transferred employee who transported her mobile home from her old to her new duty station is entitled to reimbursement for the transportation of a mobile home, in lieu of expenses for shipment of household goods, since she used the mobile home as her residence at her new duty station. However, she is not entitled to any additional miscellaneous expenses above an amount equivalent to 2 weeks of her basic salary 613

Reimbursement

A transferred employee who transported her mobile home from her old to her new duty station is entitled to reimbursement for the transportation of a mobile home, in lieu of expenses for shipment of household goods, since she used the mobile home as her residence at her new duty station. However, she is not entitled to any additional miscellaneous expenses above an amount equivalent to 2 weeks of her basic salary 613

TRANSPORTATION—Continued Page

Household Effects—Continued

Military Personnel

Reshipment of Effects Without a Station Change

Under current regulations service members who have their household goods and automobile shipped to an overseas duty station in anticipation of the familiy move are not entitled to return transportation if the family, for personal reasons, changes its plans and does not join the member. The applicable statute, 37 U.S.C. 406(h), is broad enough to provide authority for regulations authorizing return transportation of the household goods and privately owned vehicle independent of travel by the member or the dependents in these circumstances when the service finds that the transportation is in the best interest of the member or the dependents and the United States. 520

Overseas Employees

Return to United States

Time Limitation

Under applicable Department of Defense regulations, an employee separated from an overseas position is entitled to onward transportation of household goods stored in the United States provided shipment to a final destination is begun within 2 years from the date of separation. Where the employee was unable to provide a delivery date or destination within 2 years from the date of separation, contracts with Government transportation officers concerning shipment did not meet the requirement to begin shipment within the requisite period. Erroneous advice that the 2-year period began to run from the date the employee's goods reached the continental U.S. does not provide a basis to have them delivered at Government expense..... 392

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Pets

Status as Household Effects

The statute providing for the transportation, within prescribed weight limitations, of the "baggage and household effects" of transferred service members applies only to inanimate objects that can be packed, stored, and shipped by commercial carrier at standard costs computed on the basis of weight. Hence, the statute does not authorize the transportation of live animals, including household pets, since the transportation of live animals involves special handling and extraordinary cost that cannot be calculated on the basis of weight, and animals are fundamentally unlike the inanimate household furnishings and personal effects acceptable for shipment by commercial movers 122

TRANSPORTATION—Continued Page

Household Effects—Continued

Time Limitation

Under applicable Department of Defense regulations, an employee separated from an overseas position is entitled to onward transportation of household goods stored in the United States provided shipment to a final destination is begun within 2 years from the date of separation. Where the employee was unable to provide a delivery date or destination within 2 years from the date of separation, contracts with Government transportation officers concerning shipment did not meet the requirement to begin shipment within the requisite period. Erroneous advice that the 2-year period began to run from the date the employee's goods reached the continental U.S. does not provide a basis to have them delivered at Government expense..... 392

House Trailers, Mobile Homes, etc. (*See* **TRANSPORTATION, Household Effects, House Trailer Shipments, etc.**)

Mileage basis payment (*See* **MILEAGE**)

Mobile Homes

Civilian Personnel (*See* **TRANSPORTATION, Household Effects, House Trailer Shipments, etc.**)

Motor Carrier Shipments

Reasonableness of Rates

A provision of a tender negotiated under the Military Traffic Management Command's Guaranteed Traffic program permits otherwise applicable rates to be used. This permits lower rates in the motor carrier's existing non-negotiated rate tender which are lower than the negotiated rates to be applied in the absence of evidence that special services were requested and performed on specific shipments..... 563

Rates applicable on the date that transportation services are performed are binding on the parties. In the absence of a benefit to the Government, the applicable tender may not be retroactively modified to nullify its application to a particular point of origin which would result in higher charges being due the carrier..... 563

Overcharges

Deduction Reclaims

Rate Propriety

Where the delivering/billing carrier had the appropriate authority to serve the origin and destination points, offered the government direct service between the points at single-line rates, and the Government Bills of Lading were issued to that carrier, the General Services Administration's determination that the higher joint-line rates charged and collected by the carrier were inapplicable is sustained, even though other carriers provided the pick-up service. The billing carrier's mere denial of an agency relationship and the absence of a written agency agreement do not rebut the presumption that the government followed its usual practice, called the carrier shown on the bills of lading, and looked to that carrier for performance of through single-line service..... 611

TRANSPORTATION—Continued Page
Overcharges—Continued
Deduction Reclaims—Continued
Review
Where a carrier issued a rate tender to the United States Government, but the Military Traffic Management Command (MTMC) returned it to the carrier because of formal defects and the carrier never refiled the tender with MTMC, General Services Administration (GSA), in its audit function, could not use the tender's rates as a basis for determining overcharges on shipments tendered by components of the Department of Defense (DOD). When MTMC, as the Department of Defense's traffic manager, rejected the tender, it terminated the power of all DOD agencies to accept the tender's terms. Therefore, GSA's deduction action, taken on the basis of the rejected tender's rates, was improper 912
Set-Off
A motor carrier that delivered a Government shipment and billed for the services contends that since another carrier picked up and transported the shipment before transferring it for further transportation and delivery, the transportation constituted a joint-line movement requiring the application of joint-line rates. The General Services Administration's audit determination, that the delivering carrier's lower single-line rates were applicable, is sustained because the record shows that the delivering carrier, having the necessary operating authority, agreed to transport the shipment from origin to destination at single-line rates. The fact that the billing carrier elected to allow another carrier to pick up the shipment is irrelevant 45
Pets
Not Included in Term "Household Good"
The statute providing for the transportation, within prescribed weight limitations, of the "baggage and household effects" of transferred service members applies only to inanimate objects that can be packed, stored, and shipped by commercial carrier at standard costs computed on the basis of weight. Hence, the statute does not authorize the transportation of live animals, including household pets, since the transportation of live animals involves special handling and extraordinary cost that cannot be calculated on the basis of weight, and animals are fundamentally unlike the inanimate household furnishings and personal effects acceptable for shipment by commercial movers 122
Procurement Practices
General Accounting Office (GAO) will consider protests of competitive selections of no cost, no fee travel management services contractors under GAO's bid protest authority under the Competition in Contracting Act since the selections are procurements of contracts for services 109

TRANSPORTATION—Continued Page
Procurement Practices—Continued
Competitive selections of no cost, no fee travel management contractors by the General Services Administration are subject to the procurement provisions of the Federal Property and Administrative Services Act, as amended by the Competition in Contracting Act. These selections are not distinguishable from those noncompetitive business arrangements for substantially similar services that some agencies have with Scheduled Airline Ticket Offices (SATO's). Therefore, these SATO business arrangements are subject to applicable procurement laws 109
Protest concerning NASA request for carriers' rate tenders for marine transportation services is dismissed since the request was issued under authority of the Transportation Act of 1940, as amended, 49 U.S.C. 10721 (1982), and the agency did not obtain such services under the government's procurement system so that a government bill of lading will serve as the basis for payment 328
Protest of agency reevaluation of proposals in response to General Accounting Office (GAO) decisions which sustained protests on grounds that three areas of evaluation were improper is denied where agency reevaluation has not been shown to be unreasonable 699
Rates
Section 22 Quotations
Applicability
Foreign Military Sales
Government foreign military sales shipments, for which the Government is to be reimbursed, were shipped on Government Bills of Lading. Neither *Baggett Transportation Company, Inc.*, 670 F.2d 1011 (Ct. Cl. 1982), which held that section 22 rates are not applicable to foreign military sales shipments, nor any other authority prohibits the use of Government Bills of Lading and the application of their provisions for such shipments 444
Offer and Acceptance
Where a carrier issued a rate tender to the United States Government, but the Military Traffic Management Command (MTMC) returned it to the carrier because of formal defects and the carrier never refiled the tender with MTMC, General Services Administration (GSA), in its audit function, could not use the tender's rates as a basis for determining overcharges on shipments tendered by components of the Department of Defense (DOD). When MTMC, as the Department of Defense's traffic manager, rejected the tender, it terminated the power of all DOD agencies to accept the tender's terms. Therefore, GSA's deduction action, taken on the basis of the rejected tender's rates, was improper 912
Tender Revision
A provision of a tender negotiated under the Military Traffic Management Command's Guaranteed Traffic program permits otherwise applicable rates to be used. This permits lower rates in the motor carrier's existing non-negotiated rate tender which are lower than the negotiated rates to be applied in the absence of evidence that special services were requested and performed on specific shipments 563

178-403 O - 87 - 10 : QL 3

TRANSPORTATION—Continued Page
Rates—Continued
Section 22 Quotations—Continued
Tender Revision—Continued
Rates applicable on the date that transportation services are performed are binding on the parties. In the absence of a benefit to the Government, the applicable tender may not be retroactively modified to nullify its application to a particular point of origin which would result in higher charges being due the carrier 563
Tariff *v.* Section 22 Quotations
Government foreign military sales shipments, for which the Government is to be reimbursed, were shipped on Government Bills of Lading. Neither *Baggett Transportation Company, Inc.*, 670 F.2d 1011 (Ct. Cl. 1982), which held that section 22 rates are not applicable to foreign military sales shipments, nor any other authority prohibits the use of Government Bills of Lading and the application of their provisions for such shipments 444
Construction
Against Carrier
A "Deferred Service Requested" annotation on each of several Government Bills of Lading (GBL) satisfied an air carrier's Tender No. 17 requirement for application of relatively low deferred service rates. The carrier, however, applied higher rates published in Tender No. 14 applicable to regular air service allegedly because ambiguities in the GBL caused it to conclude that the shipper really did not desire deferred service. The General Services Administration's determination that deferred service rates (Tender No. 17) were applicable is sustained. The precise deferred service annotation on the GBL's required by Tender No. 17 was strong evidence of the shipper's intention to procure deferred service. If the carrier was confused by the shipper's actions it had a duty to clarify the shipper's intent 84
Value Released *v.* Unreleased
Bill of Lading Requirement Provision
A carrier's tariff, offering released value rates to the public generally, contained a provision increasing line-haul charges by 25 percent where a shipper failed to annotate the Bill of Lading in specified form declaring the value of the property. Condition 5, now published at 41 C.F.R. 101-4.302-3(e), among the provisions governing Government Bill of Lading shipments, substantially complies with the tariff's formal annotation requirement. Therefore, the General Services Administration's disallowance of the carrier's claim for an additional 25 percent of original charges is sustained 444
Tariff Provision
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TRANSPORTATION—Continued Page

Travel Agencies

Airlines Office on Government Property

General Accounting Office (GAO) will consider protests of competitive selections of no cost, no fee travel management services contractors under GAO's bid protest authority under the Competition in Contracting Act since the selections are procurements of contracts for services 109

Competitive selections of no cost, no fee travel management contractors by the General Services Administration are subject to the procurement provisions of the Federal Property and Administrative Services Act, as amended by the Competition in Contracting Act. These selections are not distinguishable from those noncompetitive business arrangements for substantially similar services that some agencies have with Scheduled Airline Ticket Offices (SATO's). Therefore, these SATO business arrangements are subject to applicable procurement laws 109

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TRAVEL AGENCIES (*See* TRANSPORTATION, Travel agencies)

TRAVEL ALLOWANCES

Military Personnel

Enlistment Extension,

Discharge, Reenlistment, etc.

Travel allowances payable in advance to enlisted service members at the time of their final discharge for their subsequent personal travel home may not properly be subjected to offset on account of their debts to the Government, since it has long been recognized as a matter of public policy that it is impermissible to discharge enlisted service members at their last post of duty without the means of returning home. This policy has no application to former enlisted members who have completed their separation travel, however, and travel allowances remaining due to them after they have returned home may be withheld and applied against their debts 497

TRAVEL EXPENSES

Air Travel

Constructive Cost Reimbursement

No Expenses Incurred

An employee who used a free airline ticket issued because of her husband's membership in an airline's frequent travelers club for travel on Government business may not be reimbursed the constructive cost of the airline ticket since she has not demonstrated that she paid for that ticket or had a legal obligation to do so. Thus it is concluded that she acquired the transportation at no direct personal expense 17

TRAVEL EXPENSES—Continued Page
Air Travel—Continued
Enlistment Extension,—Continued
Constructive Cost Reimbursement—Continued
No Expenses Incurred—Continued
On official airline travel the employee's return flight was overbooked, he voluntarily vacated his seat, and he took the next scheduled flight. Airline company issued a Miscellaneous Charge Order (MCO) to the employee to be used on a standby basis within 1 year. Claimant was later authorized official travel from Rockville to San Francisco, Cal. He used the MCO (determined by GAO to belong to employee) to purchase an airline ticket for a personal side trip from San Francisco to Ft. Lauderdale, Fla. His return trip to Baltimore was included in the segment paid by the MCO. Employee may not be reimbursed for the cost of the unused portion of the official airline ticket since the government has no obligation for the cost of the return travel as no travel expenses were incurred 182
Government Travel Account Use
When travel orders given to military members specify travel by commercial airline with Government Transportation Requests (TR's) to be used, and the members are unable to obtain TR's and instead personally pay for their commercial flights, they may be reimbursed if an appropriate official certifies that TR's were not available to them. Such certification does not entail a retroactive modification of the travel orders and is instead simply a factual determination concerning the conditions that existed at the time the travel was performed 884
Reimbursement Basis
When travel orders given to military members specify travel by commercial airline with Government Transportation Requests (TR's) to be used, and the members are unable to obtain TR's and instead personally pay for their commercial flights, they may be reimbursed if an appropriate official certifies that TR's were not available to them. Such certification does not entail a retroactive modification of the travel orders and is instead simply a factual determination concerning the conditions that existed at the time the travel was performed 884
A transferred employee secured a one-way airfare ticket for his dependent daughter to travel from her college location to his new permanent duty station to effect her change of station. He exchanged that ticket for a roundtrip excursion airfare ticket for her at a lesser cost than the initial one-way ticket, thus permitting her to return to college at no additional expense. Since the record shows that no one-way airfare ticket between the two points could be issued at a cost less than the roundtrip excursion airfare ticket the expense claimed may be paid in its entirety under authority of the Federal Travel Regulations pertaining to indirect travel, which limits reimbursement to the constructive cost by the usually traveled route 47

TRAVEL EXPENSES—Continued Page
Air Travel—Continued
Reimbursement Basis—Continued
An employee who used a free airline ticket issued because of her husband's membership in an airline's frequent travelers club for travel on Government business may not be reimbursed the constructive cost of the airline ticket since she has not demonstrated that she paid for that ticket or had a legal obligation to do so. Thus it is concluded that she acquired the transportation at no direct personal expense 171
On official airline travel the employee's return flight was overbooked, he voluntarily vacated his seat, and he took the next scheduled flight. Airline company issued a Miscellaneous Charge Order (MCO) to the employee to be used on a standby basis within 1 year. Claimant was later authorized official travel from Rockville to San Francisco, Cal. He used the MCO (determined by GAO to belong to employee) to purchase an airline ticket for a personal side trip from San Francisco to Ft. Lauderdale, Fla. His return trip to Baltimore was included in the segment paid by the MCO. Employee may not be reimbursed for the cost of the unused portion of the official airline ticket since the government has no obligation for the cost of the return travel as no travel expenses were incurred 182
Automobile hire (*See* VEHICLES, Rental)
Automobile rental (*See* VEHICLES, Rental)
Circuitous Routes
Payment Basis
A transferred employee secured a one-way airfare ticket for his dependent daughter to travel from her college location to his new permanent duty station to effect her change of station. He exchanged that ticket for a roundtrip excursion airfare ticket for her at a lesser cost than the initial one-way ticket, thus, permitting her to return to college at no addition expense. Since the record shows that no one-way airfair ticket between the two points could be issued at a cost less than the roundtrip excursion airfare ticket the expense claimed may be paid in its entirety under authority of the Federal Travel Regulations pertaining to indirect travel, which limits reimbursement to the constructive cost by the usually traveled route 47
Personal Convenience
Constructive Costs
A transferred employee secured a one-way airfare ticket for his dependent daughter to travel from her college location to his new permanent duty station to effect her change of station. He exchanged that ticket for a roundtrip excursion airfare ticket for her at a lesser cost than the initial one-way ticket, thus, permitting her to return to college at no addition expense. Since the record shows that no one-way airfair ticket between the two points could be issued at a cost less than the roundtrip excursion airfare ticket the expense claimed may be paid in its entirety under authority of the Federal Travel Regulations pertaining to indirect travel, which limits reimbursement to the constructive cost by the usually traveled route 47

TRAVEL EXPENSES—Continued Page

Constructive Travel Costs

Actual Expenses Less

A transferred employee secured a one-way airfare ticket for his dependent daughter to travel from her college location to his new permanent duty station to effect her change of station. He exchanged that ticket for a roundtrip excursion airfare ticket for her at a lesser cost than the initial one-way ticket, thus, permitting her to return to college at no addition expense. Since the record shows that no one-way airfair ticket between the two points could be issued at a cost less than the roundtrip excursion airfare ticket the expense claimed may be paid in its entirety under authority of the Federal Travel Regulations pertaining to indirect travel, which limits reimbursement to the constructive cost by the usually traveled route 47

Computation

An employee who used a free airline ticket issued because of her husband's membership in an airline's frequent travelers club for travel on Government business may not be reimbursed the constructive cost of the airline ticket since she has not demonstrated that she paid for that ticket or had a legal obligation to do so. Thus, it is concluded that she acquired the transportation at no direct personal expense 171

On official airline travel the employee's return flight was overbooked, he voluntarily vacated his seat, and he took the next scheduled flight. Airline company issued a Miscellaneous Charge Order (MCO) to the employee to be used on a standby basis within 1 year. Claimant was later authorized official travel from Rockville to San Francisco, Cal. He used the MCO (determined by GAO to belong to employee) to purchase an airline ticket for a personal side trip from San Francisco to Ft. Lauderdale, Fla. His return trip to Baltimore was included in the segment paid by the MCO. Employee may not be reimbursed for the cost of the unused portion of the official airline ticket since the government has no obligation for the cost of the return travel as no travel expenses was incurred 182

Delays

Medical Condition

Employee who traveled by a longer route and did not travel 300 miles per day in connection with a permanent change of station explains that the route and delay resulted from his wife's illness. The agency may reimburse the employee on the basis of the mileage and time claimed if they determine that the employee has explained to their satisfaction the reasons for the alternate route and delay. 647

TRAVEL EXPENSES—Continued Page

First Duty Station

Manpower Shortage

Relocation Expenses

A new appointee to a manpower shortage position was issued travel orders erroneously authorizing reimbursement for temporary quarters subsistence expenses, real estate expenses and miscellaneous expenses as though he were a transferred employee. After travel was completed, his orders were corrected to show entitlement only to travel, travel per diem and movement of household goods, as authorized for manpower shortage position. The claimant asserts entitlement to full reimbursement, arguing that the advice received when hired and the travel orders issued are consistent with private sector practices. The claim is denied. Under 5 U.S.C. 5723 (1982), the travel and transportation rights of a manpower shortage appointee are strictly prescribed. Regardless of whether the error was committed orally or in writing, the government is not bound by any agent's or employee's acts which are contrary to governing statute or regulations 679

Government Liability

No Expense Incurred No Liability

An employee who used a free airline ticket issued because of her husband's membership in an airline's frequent travelers club for travel on Government business may not be reimbursed the constructive cost of the airline ticket since she has not demonstrated that she paid for that ticket or had a legal obligation to do so. Thus it is concluded that she acquired the transportation at no direct personal expense 171

On official airline travel the employee's return flight was overbooked, he voluntarily vacated his seat, and he took the next scheduled flight. Airline company issued a Miscellaneous Charge Order (MCO) to the employee to be used on a standby basis within 1 year. Claimant was later authorized official travel from Rockville to San Francisco, Cal. He used the MCO (determined by GAO to belong to employee) to purchase an airline ticket for a personal side trip from San Francisco to Ft. Lauderdale, Fla. His return trip to Baltimore was included in the segment paid by the MCO. Employee may not be reimbursed for the cost of the unused portion of the official airline ticket since the government has no obligation for the cost of the return travel as no travel expenses were incurred 182

Manpower Shortage Category Personnel

First Duty Station (*See* **TRAVEL EXPENSES, First Duty Station, Manpower Shortage**)

Mileage (*See* **MILEAGE**)

Military Personnel

Air Travel (*See* **TRAVEL EXPENSES, Air Travel**)

Travel Orders (*See* **ORDERS, Travel, Military**)

TRAVEL EXPENSES—Continued Page

Overseas Employees

Renewal Agreement Travel

Requirements

Federal employees who agree to perform consecutive overseas tours of duty are eligible for tour renewal travel for themselves and their dependents to the U.S. for a period of leave. An employee's dependents may properly perform tour renewal travel by accompanying the employee on a temporary duty assignment in the U.S. and the employee in that situation may defer his own tour renewal travel for use during leave taken at a later date. Hence, the wife and son of a Defense Department employee stationed overseas were properly authorized tour renewal travel to accompany the employee when he performed a temporary duty assignment at Fort Meade, MD, notwithstanding that as a general rule Federal employees have no entitlement to the concurrent travel of their dependents on temporary duty assignments 213

Federal employees stationed overseas who are eligible for tour renewal travel to the U.S. for themselves and their dependents may elect to defer their own tour renewal travel to some time subsequent to the time of their dependents' travel. An employee who defers personal tour renewal travel and is later unable to perform that travel has no obligation to refund the expenses of the tour renewal travel performed earlier by the dependents. A Defense Department employee who was apparently precluded by official action from exercising his own eligibility for deferred tour renewal travel is thus not liable to refund the expenses of the tour renewal travel performed earlier by his wife and son 213

Transfers

Agency Within U.S.

An employee involved in an inter-agency transfer in the interest of the government without a break in service, which also involved vested overseas return travel rights from Alaska, is entitled to relocation expenses under 5 U.S.C. 5724 and 5724a. 900

Per Diem (*See* SUBSISTENCE, Per Diem)

Transfers

Agency Liability for Expenses of Transfer

From Educational Leave Point to New Station

A transferred employee secured a one-way airfare ticket for his dependent daughter to travel from her college location to his new permanent duty station to effect her change of station. He exchanged that ticket for a roundtrip excursion airfare ticket for her at a lesser cost than the initial one-way ticket, thus, permitting her to return to college at no additional expense. Since the record shows that no one-way airfare ticket between the two points could be issued at a cost less than the roundtrip excursion airfare ticket the expense claimed may be paid in its entirety under authority of the Federal Travel Regulations pertaining to indirect travel, which limits reimbursement to the constructive cost by the usually traveled route 47

TRAVEL EXPENSES—Continued Page
Transfers—Continued
Dependents
Unaccompanied Travel
A transferred employee secured a one-way airfare ticket for his dependent daughter to travel from her college location to his new permanent duty station to effect her change of station. He exchanged that ticket for a roundtrip excursion airfare ticket for her at a lesser cost than the initial one-way ticket, thus, permitting her to return to college at no additional expense. Since the record shows that no one-way airfare ticket between the two points could be issued at a cost less than the roundtrip excursion airfare ticket the expense claimed may be paid in its entirety under authority of the Federal Travel Regulations pertaining to indirect travel, which limits reimbursement to the constructive cost by the usually traveled route 47

Employee was transferred from Washington. D.C., to Ogden, Utah. He had been divorced and legal custody of his daughter had been awarded to his former wife who lived in Claremont, California. Although the daughter had resided with employee for some 10 months prior to employee's transfer, at the time employee reported to his new duty station he was neither accompanied by his daughter nor did she later join him in Utah. Under the Federal Travel Regulations, a dependent must be a member of the employee's household at the time he or she reports for duty. Accordingly, employee may not be reimbursed for the cost of his daughter's travel from his old duty station to his former spouse's home upon his transfer 845

A transferred employee's immediate family joined him at his new duty station several months after he reported for duty, remained there for 26 days, and then returned to their residence at the old duty station. The employee's claim for family travel and temporary quarters subsistence expense is denied since the record does not provide any objective evidence that the family intended to vacate the residence at the old station so as to entitle the employee to be reimbursed 342

House Hunting Travel
Reimbursement
A transferred employee who was authorized a househunting trip, which he had not performed before he reported to duty, may be reimbursed for travel expenses and 6 days per diem for his wife's subsequent househunting trip where the record indicates that she performed such duties prior to her return to the old duty station 342

Reimbursement
Approval
Employee who traveled by a longer route and did not travel 300 miles per day in connection with a permanent change of station explains that the route and delay resulted from his wife's illness. The agency may reimburse the employee on the basis of the mileage and time claimed if they determine that the employee has explained to their satisfaction the reasons for the alternate route and delay 647

TRAVEL EXPENSES—Continued Page

Transfers—Continued

Reimbursement—Continued

Approval—Continued

A transferred employee secured a one-way airfare ticket for his dependent daughter to travel from her college location to his new permanent duty station to effect her change of station. He exchanged that ticket for a roundtrip excursion airfare ticket for her at a lesser cost than the initial one-way ticket, thus, permitting her to return to college at no additional expense. Since the record shows that no one-way airfare ticket between the two points could be issued at a cost less than the roundtrip excursion airfare ticket the expense claimed may be paid in its entirety under authority of the Federal Travel Regulations pertaining to indirect travel, which limits reimbursement to the constructive cost by the usually traveled route 47

Relocation Expenses (*See* OFFICERS AND EMPLOYEES, Transfers)

Vouchers and Invoices (*See* VOUCHERS AND INVOICES, Travel)

UNEMPLOYMENT

Compensation

Overpayments by States

Collection

Unemployment compensation benefits must be deducted from backpay awards where state law requires employer, rather than employee, to reimburse the state for overpayments and where appropriate state agency has determined that an overpayment has occurred and has notified employing agency. Here, state agency determined that, since employee would receive backpay for period covered by unemployment compensation, he had been overpaid, and it so notified Veterans Administration (VA). The VA properly deducted the overpayment from backpay. Absent such a state determination and requirement, unemployment compensation should not be deducted from backpay 22

UNIONS

Agreements

Wage Increases

Supervisory Employees' Entitlements

Supervisors of prevailing rate employees seek reconsideration of our prior decision, 64 Comp. Gen. 100 (1984), holding that the supervisors are subject to the statutorily-imposed pay limitation which does not apply to their subordinates, who negotiate their pay increases. We affirm our prior decision since the supervisors are clearly covered by the pay increase limitation and are not specifically excluded from the limitation. Prior decisions involving pay linkage between groups of prevailing rate employees are distinguished since they do not deal with specific statutory pay limitations. Prior court decisions involving prevailing rate employees who are not covered by the statutory pay limitation are also distinguished on the same basis. 434

Page

VACANCIES

Vacancies Act

Applicability

Provisions of the Vacancies Act, 5 U.S.C. 3345-49 (1982), govern the filling of vacancies in those offices which require Senate confirmation in the Department of Health and Human Services, except where there is specific statutory authority to fill such vacancies. The Vacancies Act applies to the position of Under Secretary, and various Assistant Secretary positions, and the positions of Deputy Inspector General, Commissioner on Aging, Administrator of the Health Care Financing Administration, and Commissioner of Social Security. The Vacancies Act limits acting appointments to fill such positions to 30-days duration 626

Actions by individuals occupying offices pursuant to the Vacancies Act which are taken subsequent to expiration of 30-day time limitation set forth in 5 U.S.C. 3348 are of uncertain validity. Accordingly, at the end of the 30-day period, such individuals should refrain from taking any further action in an acting capacity 626

VEHICLES

Government

Damages

Recovery

Rule that a Federal agency or entity does not pay inter-or intra-agency claims for damage to public property does not apply in the case of a reimbursable or revolving fund. Air Force Industrial Fund activity may therefore be reimbursed for damage to vehicles which it loaned to another Air Force unit for use on a project unrelated to the Fund's purpose 910

Hire (*See* Vehicles, Rental)

Rental

Damage Claims

An Army officer was authorized to rent a car for use with another officer while on temporary duty. An accident occured while the car was driven by the other officer. This officer, though not specifically authorized to rent a car on his travel order, was authorized to use that car for official business. Since the accident occurred while the driver was performing official business, payment may be made to the rental company for the deductible amount of damages required by the rental contract 253

An Army employee was authorized to rent a car for use with other employees while on temporary duty in Germany. A tire on the rental car was damaged while being driven to the duty assignment and the gas cap was stolen from the car while parked. Under the rental agreement, the employee was required to reimburse the rental company for any tire damage and any other damage not caused by accidents. Since the damages occured while the vehicle was being used for official business, he may be reimbursed for the expenses 799

Transportation (*See* TRANSPORTATION, Automobiles)

Page

VOLUNTARY SERVICES

Reimbursement Entitlement

Rule

A Civil Service annuitant claims entitlement to compensation in addition to his annuity for temporary full-time duties allegedly performed following his retirement. He states that he was never appointed to a position following his retirement, but contends that his supervisor accepted his offer to continue working after retirement, and said that he would find a way to pay him. The claim is denied. Under 31 U.S.C. 1342, an officer or employee of the government is prohibited from accepting the voluntary services of an individual. Further the government is not bound by the unauthorized acts of its agents, even where the agent may be unaware of the limitations on his authority 21

VOUCHERS AND INVOICES

Certifications

False Claims

Three employees were determined to have filed false travel vouchers and were criminally prosecuted. The Department of Justice entered into a compromise plea agreement with each defendant, which permitted them to enter a guilty plea to a misdemeanor, and in turn they would make restitution of the fraudulent amounts. In response to the question concerning disposition of additional amounts withheld from the employees for those days tainted by fraud, the agency is advised that only the Department of Justice is authorized to compromise fraud claims and since it has done so in this case, monies administratively retained are to be repaid the defendants, without personal pecuniary liability attaching to the finance and accounting officer by virtue of such payment 371

Long Distance Telephone Calls

Administrative certification of long distance telephone calls under 31 U.S.C. 1348(b) does not carry with it financial responsibilities attendant to the certification of a voucher for payment, but may be relied on by certifying official who does certify voucher for payment .. 19

Sampling Procedures

Use of Statistical Sampling

Administrative certification of long distance telephone calls under 31 U.S.C. 1348(b) does not carry with it financial responsibilities attendant to the certification of a voucher for payment, but may be relied on by certifying official who does certify voucher for payment .. 19

Signatures (*See* SIGNATURES)

VOUCHERS AND INVOICES—Continued Page

Travel

False or Fraudulent Claims

Three employees were determined to have filed false travel vouchers and were criminally prosecuted. The Department of Justice entered into a compromise plea agreement with each defendant, which permitted them to enter a guilty plea to a misdemeanor, and in turn they would make restitution of the fraudulent amounts. In response to the question concerning disposition of additional amounts withheld from the employees for those days tainted by fraud, the agency is advised that only the Department of Justice is authorized to compromise fraud claims and since it has done so in this case, monies administratively retained are to be repaid the defendants, without personal pecuniary liability attaching to the finance and accounting officer by virtue of such payment 371

WORDS AND PHRASES

"Federal Employee"

A person newly appointed to the Federal service who has not yet entered on duty does not have the status of a Federal "employee." Consequently, relocation allowances credited to the account of a deceased Veterans Administration appointee are payable to his estate in the manner prescribed for deceased public creditors generally, and may not instead be paid directly to his survivors in the manner otherwise specifically prescribed by statute for settling the accounts of deceased employees 237

"State-of-the-Art"

The term "state-of-the-art" may be narrowly applied as a solicitation requirement to mean only that each offeror's product be its latest design, rather than to mean adherence to an industry-wide technological standard, so long as the end result is not the submission of offers with such differing levels of technology that competition on a materially similar baseline is effectively precluded 230

U.S. GOVERNMENT PRINTING OFFICE : 1987 O - 178-403 : QL 3

TABLE OF DECISION NUMBERS

October 1, 1985—September 30, 1986

B-95136, July 16, 1986 722
B-200923, Feb. 27, 1986 352
B-206699, Nov. 25, 1985 78
B-211490, Apr. 9, 1986 468
B-212699, Feb. 10, 1986 273
B-214479, Sept. 22, 1986 842
B-214561.3, Sept. 26, 1986 876
B-214597, Dec. 24, 1985 154
B-215268, Mar. 24, 1986 434
B-215408, Feb. 26, 1986 342
B-215635, Mar. 19, 1986 423
B-215735, Sept. 26, 1986 879
B-215842, June 25, 1986 666
B-216550, Jan. 29, 1986 245
B-216753, Oct. 3, 1985 10
B-216821, Nov. 26, 1985 81
B-216918, May 27, 1986 594
B-217050, July 30, 1986 753
B-217114, Sept. 24, 1986 858
B-217181, Sept. 29, 1986 893
B-217227, Jan. 3, 1986 186
B-217447, Apr. 24, 1986 520
B-217478, Jan. 2, 1986 177
B-217484, Feb. 11, 1986 282
B-217502, Oct. 31, 1985 49
B-217578, Feb. 27, 1986 357
B-217628, Jan. 23, 1986 226
B-217644, Oct. 31, 1985 53
B-217739, Dec. 19, 1985 134
B-217821, Apr. 8, 1986 464
B-217884, Feb. 18, 1986 302
B-217904, Feb. 11, 1986 285
B-217913, May 30, 1986 601
B-217921, Jan. 29, 1986 253
B-217996, Oct. 21, 1985 19
B-218165.2, B-218165.3, June 10, 1986 643
B-218198.6 et al., Dec. 10, 1985 109
B-218228.3, Dec. 30, 1985 167
B-218228.4, Feb. 13, 1986 300
B-218335.2 et al., Oct. 28, 1985 34
B-218339.2, Mar. 21, 1986 429
B-218489.4, Apr. 14, 1986 476
B-218535.3, Mar. 31, 1986 450
B-218634.2, Nov. 21, 1985 72

B-218645, Sept. 29, 1986 900
B-218672, Oct. 17, 1985 16
B-218681, Mar. 24, 1986 439
B-218695, Oct. 30, 1985 45
B-218705, Oct. 21, 1985 21
B-218816, June 3, 1986 605
B-218819, Oct. 30, 1985 47
B-218844, Nov. 26, 1985 84
B-218897, Dec. 31, 1985 171
B-218988, Mar. 12, 1986 409
B-218990.2, Sept. 8, 1986 835
B-218994, Jan 2, 1986 182
B-219013, Sept. 29, 1986 906
B-219121, Aug. 4, 1986 761
B-219136, Oct. 22, 1985 25
B-219140, Aug. 13, 1986 790
B-219161, Oct. 2, 1985 4
B-219177, Dec. 19, 1985 143
B-219220, Apr. 14, 1986 485
B-219235, Apr. 29, 1986 533
B-219260, Dec. 26, 1985 157
B-219361.2, Oct. 1, 1985 1
B-219430, Oct. 28, 1985 41
B-219455.5, Oct. 7, 1985 15
B-219463, Oct. 22, 1985 29
B-219474, Aug. 18, 1986 795
B-219477, Feb. 11, 1986 287
B-219480, Sept. 22, 1986 845
B-219488, Mar. 11, 1986 392
B-219532, Nov. 4, 1985 61
B-219573.2, Oct. 4, 1985 13
B-219582, Nov. 13, 1985 62
B-219619.2, Jan. 16, 1986 202
B-219644.4, July 7, 1986 705
B-219664, Dec. 6, 1985 92
B-219664.3, May 13, 1986 558
B-219666, Dec. 5, 1985 87
B-219667.2, Feb. 6, 1986 268
B-219684, Dec. 23, 1985 145
B-219726, Dec. 16, 1986 122
B-219730, Nov. 14, 1985 66
B-219742, July 1, 1986 689
B-219749.2, Apr. 2, 1986 457
B-219803, Nov. 1, 1985 59
B-219813, June 24, 1986 657
B-219828.3, Apr. 14, 1986 488
B-219829, July 22, 1986 741
B-219841, May 28, 1986 598
B-219856, Jan. 21, 1986 213
B-219906, Dec. 27, 1985 164
B-219924, Mar. 24, 1986 444

B-219937, Dec. 26, 1985 160
B-219940 et al., Sept. 26, 1986 881
B-219958, Sept. 26, 1986 884
B-219971, Feb. 21, 1986 332
B-220005.2, Jan. 14, 1986 200
B-220007, Dec. 9, 1985 104
B-220032.2, Jan. 2, 1986 184
B-220049, Jan. 16, 1986 205
B-220079, Dec. 16, 1985 125
B-220083, Nov. 22, 1985 76
B-220084, Oct. 31, 1985 54
B-220087, Jan. 30, 1986 258
B-220110, Dec. 17, 1985 127
B-220113, Feb. 28, 1986 360
B-220157, Jan. 13, 1986 191
B-220172, Mar. 4, 1986 371
B-220197, Jan. 24, 1986 237
B-220210, Sept. 8, 1986 838
B-220226, Sept. 22, 1986 847
B-220227, Sept. 26, 1986 888
B-220276, Dec. 23, 1985 151
B-220283.2, Sept. 25, 1986 874
B-220288, Feb. 19, 1986 326
B-220293.2, Oct. 18, 1985 17
B-220327, Jan. 29, 1986 255
B-220436, Feb. 4, 1986 265
B-220446, Feb. 6, 1986 270
B-220455, Mar. 31, 1986 451
B-220497, Nov. 20, 1985 71
B-220512.2, Mar. 7, 1986 380
B-220518, Feb. 11, 1986 290
B-220521, Jan. 13, 1986 195
B-220522, June 9, 1986 626
B-220578, Oct. 21, 1985 23
B-220588, Jan. 22, 1986 222
B-220602, Dec. 31, 1985 172
B-220633, Feb. 18, 1986 305
B-220644, Jan. 23, 1986 230
B-220650, Apr. 23, 1986 508
B-220665, Feb. 18, 1986 309
B-220680.3, June 3, 1986 619
B-220699, May. 14, 1986 570
B-220705, Oct. 22, 1985 21
B-220734, Sept. 24, 1986 865
B-220736, Apr. 10, 1986 473
B-220749, Mar. 21, 1986 430
B-220752, Feb. 18, 1986 313
B-220756, Mar. 28, 1986 447
B-220784, Mar. 11, 1986 396
B-220804, Jan. 24, 1986 240
B-220809, et al., Aug. 5, 1986 778

B-220820, Dec. 18, 1985 130
B-220848.2, Mar. 6, 1986 377
B-220860, Mar. 10, 1986 382
B-220871, Mar. 4, 1986 373
B-220902, Feb. 20, 1986 328
B-220941, June 11, 1986 647
B-220947, Mar. 11, 1986 401
B-220961, Nov. 21, 1985 74
B-220961.2, Dec. 18, 1985 132
B-220988.3, Feb. 20, 1986 330
B-221011, Feb. 25, 1986 339
B-221031, B-220409, Feb. 18, 1986 318
B-221065, Sept. 26, 1986 891
B-221075, May 13, 1986 563
B-221079, Mar. 18, 1986 418
B-221114, Jan. 27, 1986 242
B-221120, Apr. 2, 1986 461
B-221133, Apr. 15, 1986 497
B-221183, Feb. 24, 1986 336
B-221191, Aug. 18, 1986 797
B-221208, Mar. 13, 1986 415
B-221230.3 et al., Mar. 11, 1986 405
B-221245.2, Jan. 17, 1986 212
B-221248, Sept. 22, 1986 849
B-221264, Apr. 29, 1986 541
B-221265, June 2, 1986 608
B-221304, Mar. 10, 1986 386
B-221306, Feb. 26, 1986 347
B-221333, Apr. 14, 1986 490
B-221356, May 2, 1986 549
B-221374, et al., May 14, 1986 573
B-221421, Feb. 28, 1986 366
B-221459, Apr. 23, 1986 510
B-221462, Sept. 29, 1986 910
B-221463, B-221464, Mar. 12, 1986 412
B-221466, July 3, 1986 696
B-221506, July 14, 1986 719
B-221525, Apr. 23, 1986 517
B-221526.2, Feb. 18, 1986 323
B-221526.3, B-221526.4, July 3, 1986 699
B-221538, Apr. 15, 1986 500
B-221545, June 3, 1986 621
B-221559.2, July 31, 1986 757
B-221572, Apr. 9, 1986 470
B-221585, June 9, 1986 635
B-221594, Sept. 29, 1986 912
B-221608, June 2, 1986 611
B-221634, June 24, 1986 660
B-221661, Mar. 18, 1986 422
B-221667, Feb. 12, 1986 299
B-221675, July 7, 1986 710

B-221686, May 8, 1986 557
B-221698, Aug. 18, 1986 799
B-221717, May 5, 1986 554
B-221745, Apr. 28, 1986 528
B-221753, Apr. 15, 1986 503
B-221846, June 9, 1986 640
B-221846.2, Aug. 26, 1986 819
B-221851, May 22, 1986 585
B-221855, Apr. 18, 1986 505
B-221945, Aug. 4, 1986 767
B-221982, Aug. 18, 1986 800
B-221983.2, May 2, 1986 552
B-222001, June 2, 1986 613
B-222035, July 2, 1986 692
B-222045, May 13, 1986 569
B-222053, July 29, 1986 749
B-222087, Aug. 18, 1986 805
B-222097, May 22, 1986 588
B-222103, Mar. 21, 1986 433
B-222138, Aug. 26, 1986 813
B-222184, Aug. 18, 1986 806
B-222200.3, July 17, 1986 729
B-222246, Sept. 4, 1986 826
B-222249, June 19, 1986 654
B-222317, July 9, 1986 715
B-222328, June 2, 1986 615
B-222343, Aug. 4, 1986 772
B-222345.2, June 3, 1986 625
B-222440, July 28, 1986 745
B-222481, June 24, 1986 663
B-222532, Sept. 2, 1986 823
B-222554, Aug. 1, 1986 761
B-222570, B-222571, Aug. 26, 1986 817
B-222616, Aug. 12, 1986 784
B-222816, June 17, 1986 651
B-222860, Aug. 4, 1986 774
B-222912, July 18, 1986 735
B-222308 et al., Apr. 28, 1986 530
B-222319, July 21, 1986 738
B-222323, Apr. 24, 1986 524
B-222483, Apr. 16, 1986 504
B-222549, May 14, 1986 584
B-223059; B-223243, Sept. 5, 1986 828
B-223157 et al., Sept. 22, 1986 854
B-223214, Aug. 5, 1986 783
B-223503, Aug. 18, 1986 811
B-223594, Sept. 24, 1986 871
B-223873, Aug. 18, 1986 812
B-224090, Sept. 2, 1986 825
B-224343, Sept. 5, 1986 831

INDEX

LIST OF CLAIMANTS

ABF Freight System, Inc. 46
Ace Reforestation, Inc. 151
AEG Aktiengesellschaft 419
Aerojet TechSystems Company 832
Agriculture, Dept. of 47, 246, 473, 508, 614
Agro Construction and Supply Co., Inc. 471
Air Force, Department of 299, 719
ALM, Incorporated 405
American Electronic Laboratories, Inc. 63
Anchor Continental, Inc. 271
Ansonia, City of, Connecticut 692
APEC TECHNOLOGY LIMITED 230
Army and Rice Services, Inc., Dept. of 644
Army, Assistant Secretary 889
Army Corps of Engineers 838, 859
Army, Dept of 842
Army Materiel Command 847
Arnold Rooter, Inc. 71
ARTISAN BUILDERS 240
Associated Healthcare Systems, Inc. 823
AT&T Communications 412
Aucoin, The Honorable Less 589
Automated Sciences Group, Inc. 415
Barnum, Kenneth C. 158
Barrier Construction Company 825
Bassette, Gene, et al. 906
Baurenovierungsgesellschaft, m.b.H. 778
Bentsen, Lloyd, The Honorable 722
Biernaski, Martha C. 171
Bisbee, John C. 473
Bowers, Hollis W. 217
Brende, Joel O. 282
Brown, The Honorable George E. 589
Buffalo District, Corps of Engineers 371
Bureau of Land Management 439, 570
Butt, John P. 47
BWC Technologies, Inc. 500
Cable Antenna Systems 314
Challenger Piping, Inc. 505
Chemray Coatings Corp. 625
Chesapeake and Potomac Telephone Company 380
C.I. Whitten Transfer Company 444
Colbar, Inc. 300
CoMont, Inc. 66
Contract Services Co., Inc. 41
Corps of Engineers 660
Coughline, The Honorable Lawrence 589
Council on Environmental Quality 605
Cox, Barbara 517
d/b/a/ National Service Co. 874
Data Resources, Inc. 104
Daves, George L. 343
Defense Military Pay and Allowance Committee, Dept. of 768
De La Cruz Roberto 430
Defense Forecasts, Inc. 87
Defense, Dept. of 497, 521
Defense, Department of, General Counsel 543
Defense Logistics Agency (DLA) 599
Dicks, The Honorable Norman D. 589
Dingell, John D., The Honorable 366
DLI Engineering Corp. 34
Dresser Industries, Inc. 450
Duffy, John L. 647
Duro Paper Bag Manufacturing Co. 186
Dynalectron Corporation 93, 290, 558
Dyson, Roy The Honorable 360
Eastman, Sylvia J. and Meadows, Ann H., ... 753
Eaton, Lucille 813
Edgewater Machine & Fabricators, Inc. 489
Education, Dept. of 4
EHE National Health Services, Inc. 1
Elie, Nathaniel C. 21
Energy, Dept. of 529, 608
Engine & Generator Rebuilders 192
Environmental Protection Agency 154, 185
Environmental Tectonics Corp. 504
Epp, Edgar K. 461
Equal Employment Opportunity Commission 800
Essex Electro Engineers, Inc. 242
Experimental Pathology Laboratories, Inc. 386
Exquisito Services, Inc. 729
Fairbanks Associates 573
Falcon Systems, Inc. 585
Farmers Home Administration 424
Fearn, Maureen S. 697
Federal Aviation Administration 50, 302, 464
Federal Claims Collections Act of 1966 893
Federal Emergency Management Agency 795
Federal Judges IV 352
Federal Services Group 654
Fiorelli, Louis G. 799
Flight Resources Inc. 619
Fort Wainwright Developers, Inc. 573
Franklin Lumber, Inc. 522
Friedman, Dr. L. 773
Gailey, Talmadge M. 128
Gateway Cable Company 855
General Electric Company 377
General Services Administration 564, 795
General Services Administration, General Counsel 601
Gibbs, Laurence B., The Honorable 881
Gibson, Virginia A. 608
Government Printing Office 53
G.W., Inc. 817
Gudgel, Delewis, A. 285
Hammond, Debra R. 710
Hansen, James V., The Honorable 849
Harrell-Patterson Contracting, Inc. 330

Hartnett Stephen M., Major, USMC 382
Health and Human Services, Dept. of 647
Henry, Jack L 658
Heritage Medical Products, Inc 783
H.L. Carpenter Company 184
Hopper, Grace M., Rear Admiral 775
House of Representatives 589
Housing and Urban Development, Dept. of 797
Immigration and Naturalization Service 340
Indian Affairs, Bureau of 534
Interior, Dept. of 29, 461, 557, 570, 658, 667
Internal Revenue Service 10, 554, 807
International Diamond Products Corp 212
Instruments & Controls Service Company 686
Introl Corp 429
Job Corps Center 667
Jeffcoat, Clyde E 811, 812
Kassel, Jeffrey 865
K-II Construction, Inc 423
Kennedy, Gordon W 332
Kiewit Western Co 55
Kinetic Builders, Inc 871
Kinross Manufacturing Corporation 160
KISS Engineering Corporation 549
Koehring Company, Speedstar Division 268
Krems, Steven C 447
Labor, Dept. of 635
Lite Industries 318
Little People's Productivity Center, Inc 433
Little Susitna Company 652
LNR Associates 615
Longo, Michael M.D 238
MacDonald, John R 485
MacWilliams, J. D 508
Mandell, Mark S., Esquire 876
Magline, Inc 318
Manfredi, John F 285
Marine Corps, United States 622
Marsellis-Warner Corporation 76
Martin, Charles A. & Associates 828
Martin Electronics, Inc 59
Maruschak, Eugene J 10
Military Reserve 78
Milwaukee Industrial Clinics, S.C 18
Mounts Engineering 477
Mulder, Thomas D 901
National Oceanic and Atmospheric Administration 16
Navy, Dept. of 677
N.B. Kenney Company, Inc 265
Network Systems Corporation 258
Nicolet Biomedical Instruments 145
Nobles, Kelly G 764
Nowak, David E 805
NJCT Corp 15
NKF Engineering, Inc 104
NRC Data Systems 735
Nuclear Regulatory Commission 19
Nyberg, John 274
Ocean Enterprises, Ltd 585, 683
Office of Environmental Quality 605
OTKM Construction Incorporated 202
Pacific Lighting Energy Systems 13
Pacific Sky Supply, Inc 457
Pension Benefit Guaranty Corporation 226
Petchem Inc 328
Peterson, Kenneth R. Captain USA 253
Plus Pendetur Corporation 258
Price Waterhouse 206
Prompt Payment Act 842
Proxmire, The Honorable William 626
R.S. Data Systems 75, 132
Rampart Services, Inc 164
Resource Consultants, Inc 72
Richardson, John W. Jr 845
Ridge, Inc 663
Riss International 912
Robertson and Penn, Inc 874
Ruby, Ruth J 143
Sadco Enterprise 573
Sanders, Laurence R 326
S.A.F.E. Export Corporation 531
Security State Bank of Aitkin 554
Semtex Industrial Corp 503
Senate, United States 626
Serie, Jerome R 287
Sexton, Raymond J 396
Sidings Unlimited 130
Simmons, Janice M 529
Social Security Administration 738
SMIT Transformatoren B.V 745
Smith, W.H. Hardware Co 569
Spectrum Analysis & Frequency Engineering, Inc 761
Sperry Corporation 715
Sperry Corporation 195
Spurlock, The Honorable Delbert L. Jr 469
Stafford, Robert T., The Honorable 722
Standard Manufacturing Company 451
Starflight, Inc 84
Stephenson, Walter C 177
Superior Court of the District of Columbia 594
Tang, Katherine I 749
Tandem Computers, Inc 491
TCI, Limited 24
Teco, Inc 33
Teele, John H 680
Temps & Co 640, 819
The Latta Co 336
Teirra Engineering Consultants, Inc 785
Topley Realty Co., Inc 511
Towmotor Corporation 373
T.R. Ltd 173
Trans World Maintenance, Inc 401
Transportation, Dept. of 464, 525
Treadway Inn 790
Treasury, Dept. of 10, 81
Tree, John D. Jr 660
Treyz, Fred A., Brigadier General 135
Tri-County Corrugated, Inc 200
Trueblood, Carl 557
Truglio, Glenn A 891
TSCO, Inc 347
T.V. Travel, Inc 323, 699
Uniformed Services University of Health Sciences 543
United Food Services, Inc 167
United States Fish and Wildlife Service 29
Varrelman, Elizabeth A 392
Veterans Administration 61, 517, 689
Voice of America 434
Daniel H. Wagner, Associates Inc 305
Washington National Arena Limited Partnership 25
Wener, Charles 541
Wespercorp, Inc 310
Wiley, Harvey P 410
Wirco, Inc 256
Wittpenn, Nancy 677
Yu Corp 29
Zachary, Bonnie J 614
Zaientz, Joel R 182

TABLES OF STATUTES, ETC., CITED IN DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

UNITED STATES STATUTES AT LARGE

For use only as supplement to U.S. Code citations

	Page
1868, July 23, 15 Stat. 168	629
1877, Mar. 1, 19 Stat. 268	633
1891, Feb. 6, 26 Stat. 733	629
1933, June 13, 48 Stat. 132	228
1933, June 14, 48 Stat. 144	228
1935, May 28, 49 Stat. 298	228
1946, June 11, 60 Stat. 237	638
1953, July 27, 67 Stat. 197	839
1954, Sept. 1, 68 Stat. 1105	51
1957, Sept. 9, 71 Stat. 634	756
1959, Sept. 9, 73 Stat. 480	726
1962, Sept. 7, 76 Stat. 506	777
1964, Aug. 14, 78 Stat. 439	522
1964, Aug. 30, 78 Stat. 701	572
1965, July 14, 79 Stat. 218	628
1965, Aug. 6, 79 Stat. 449	628
1965, Sept. 5, 79 Stat. 667	798
1968, Aug. 8, 82 Stat. 639	722
1968, Oct. 4, 82 Stat. 937	722
1971, July 9, 85 Stat. 108	722
1972, Sept. 21, 86 Stat. 706	768, 815
1973, Dec. 24, 87 Stat. 774	65, 597
1973, Dec. 28, 87 Stat. 839	667
1976, Sept. 14, 90 Stat. 1255	555
1976, Oct. 15, 90 Stat. 2429	628
1977, Aug. 7, 91 Stat. 685	366
1978, Mar. 1, 92 Stat. 95	636
1978, Sept. 30, 92 Stat. 788-789	545
1978, Sept. 30, 92 Stat. 1211-1215	546
1978, Oct. 13, 92 Stat. 1179	486
1978, Nov. 2, 92 Stat. 2445	639
1979, Oct. 12, 93 Stat. 657	546
1980, Oct. 1, 94 Stat. 1352	545
1980, Oct. 10, 94 Stat. 1833	219
1981, Oct. 1, 95 Stat. 958	303
1981, Dec. 15, 95 Stat. 1183	79, 352
1981, Dec. 23, 95 Stat. 1503	841
1981, Dec. 29, 95 Stat. 1565	78
1982, Sept. 8, 96 Stat. 746	320
1982, Sept. 8, 96 Stat. 800	215
1982, Sept. 10, 96 Stat. 830	303
1982, Oct. 2, 96 Stat. 1186	79
1982, Oct. 13, 96 Stat. 1322	667
1982, Oct. 25, 96 Stat. 1749	537
1982, Dec. 21, 96 Stat. 1830	79, 356
1983, Sept. 24, 97 Stat. 614	593
1983, Sept. 24, 97 Stat. 683	320
1983, Oct. 31, 97 Stat. 871	669
1983, Nov. 14, 97 Stat. 964	303
1983, Nov. 14, 97 Stat. 973	436
1983, Nov. 21, 97 Stat. 993	741
1983, Nov. 30, 97 Stat. 1240	424
1983, Nov. 30, 97 Stat. 1301	756
1984, July 18, 98 Stat. 494	353
1984, July 18, 98 Stat. 1060	353
1984, July 18, 98 Stat. 1089	628
1984, July 18, 98 Stat. 1174	496
1984 July 18, 98 Stat. 1175	198, 306, 731
1984, July 18, 98 Stat. 1199	644
1984, Aug. 30, 98 Stat. 1547	17
1984, Oct. 1, 98 Stat. 219	742
1984, Oct. 12, 98 Stat. 1837	426, 541, 689
1984, Oct. 12, 98 Stat. 1963	726
1984, Oct. 19, 98 Stat. 2492	364, 593
1984, Oct. 19, 98 Stat. 2507	364
1984, Oct. 19, 98 Stat. 2611	320
1984, Oct. 30, 98 Stat. 3093	607
1985, Aug. 15, 99 Stat. 293	353, 365, 636
1985, Sept. 30, 99 Stat. 471	320
1985, Nov. 1, 99 Stat. 579	746
1985, Nov. 8, 99 Stat. 583	365
1985, Nov. 8, 99 Stat. 666	816
1985, Dec. 12, 99 Stat. 1102	636
1985, Dec. 13, 99 Stat.	804, 1136
1985, Dec. 19, 99 Stat. 1185	526, 589, 689, 792
1985, Dec. 19, 99 Stat. 1214-1215	652
1985, Dec. 19, 99 Stat. 1291	726

UNITED STATES CODE

See also U.S. Statutes at Large

	Page
1 U.S. Code 1	810
2 U.S. Code 351-361	79, 353
2 U.S. Code 683	525
5 U.S. Code 101	631
5 U.S. Code 301	359
5 U.S. Code 302(b)(2)	808
5 U.S. Code 550.1102(b)	896
5 U.S. Code 551(5)	442
5 U.S. Code 553	441
5 U.S. Code 2062	462
5 U.S. Code 2102	596
5 U.S. Code 2102(a)(3)	596
5 U.S. Code 2105	239
5 U.S. Code 3131—3136	546
5 U.S. Code 3323(b)	22
5 U.S. Code 3341	637

5 U.S. Code 3344 637
5 U.S. Code 3345-3349 629
5 U.S. Code 3346 631
5 U.S. Code 3348 629
5 U.S. Code 3371-3376 892
5 U.S. Code 3375 892
5 U.S. Code 4101-4118 144
5 U.S. Code 4110 ..... 144, 509
5 U.S. Code 4501-06 739
5 U.S. Code 4503 739
5 U.S. Code 4506 740
5 U.S. Code 5301-5308 546
5 U.S. Code 5305 353
5 U.S. Code 5308 79
5 U.S. Code 5316 79
5 U.S. Code 5318 ..... 353, 545
5 U.S. Code 5334(a) 519
5 U.S. Code 5342(a)(2)(A) 436
5 U.S. Code 5343 note 435
5 U.S. Code 5348 438
5 U.S. Code 5349(a) 437
5 U.S. Code 5382(b) 546
5 U.S. Code 5401-5405 486
5 U.S. Code 5402 487
5 U.S. Code 5402(c)(2) 486
5 U.S. Code 5504 79
5 U.S. Code 5511(b) 895
5 U.S. Code 5512(a) 895
5 U.S. Code 5514 249
5 U.S. Code 5522(a)(1) 896
5 U.S. Code 5525 542
5 U.S. Code 5541(a)(2) 896
5 U.S. Code 5542 ..... 274, 774
5 U.S. Code 5542(a) 274
5 U.S. Code 5542(a)(1) 278
5 U.S. Code 5542(a)(2) 278
5 U.S. Code 5542(b)(1) 50
5 U.S. Code 5542(b)(2)(B)(iv) 773
5 U.S. Code 5542(c)(1) 50
5 U.S. Code 5581-5583 239
5 U.S. Code 5584 ..... 217, 529
5 U.S. Code 5584(a) 219
5 U.S. Code 5595 754
5 U.S. Code 5595(a)(2) 754
5 U.S. Code 5595(a)(2)(ii) 754
5 U.S. Code 5595(b) 754
5 U.S. Code 5702 17
5 U.S. Code 5702(a) 908
5 U.S. Code 5702(c) 12
5 U.S. Code 5703 678
5 U.S. Code 5705 896
5 U.S. Code 5706 172
5 U.S. Code 5722 469
5 U.S. Code 5722(a) 394
5 U.S. Code 5722(a)(2) 901
5 U.S. Code 5723 ..... 239, 681
5 U.S. Code 5723(c) 239
5 U.S. Code 5724 ..... 48, 334, 659, 711
5 U.S. Code 5724(a) 124, 345
5 U.S. Code 5724(a)(1) 681
5 U.S. Code 5724(b) 615
5 U.S. Code 5724(d) 394, 469
5 U.S. Code 5724(e) 334
5 U.S. Code 5724(h) 660
5 U.S. Code 5724(i) 282, 659
5 U.S. Code 5724a 48, 327, 334, 475, 711
5 U.S. Code 5724a(a)(3) 288, 411, 714
5 U.S. Code 5724a(a)(4) 158, 283, 448, 752, 806
5 U.S. Code 5724a(a)(4)(A) 475
5 U.S. Code 5724a(b) 614, 753
5 U.S. Code 5724a(b)(2) 750
5 U.S. Code 5724a(c) 334
5 U.S. Code 5724b 891
5 U.S. Code 5724b(b) 892
5 U.S. Code 5724c 892
5 U.S. Code 5727 ..... 469, 711
5 U.S. Code 5728(a) 215
5 U.S. Code 6101 276
5 U.S. Code 6101(a)(3) 359
5 U.S. Code 6103 54
5 U.S. Code 6301-6312 609
5 U.S. Code 6303 462
5 U.S. Code 6303(a) 463
5 U.S. Code 6304 610
5 U.S. Code 6304(d)(1)(C) 610
5 U.S. Code 6307 610
5 U.S. Code 6307(a) 432
5 U.S. Code 6307(b) 432
5 U.S. Code 6311 432
5 U.S. Code 7103(10) 487
5 U.S. Code 7103(11) 487
5 U.S. Code 8331(13) 463
5 U.S. Code 8332(c)(1)(A) 463
5 U.S. Code 8341(a)(3) 771
5 U.S. Code 8344 22
5 U.S. Code 8344(a) 21
5 U.S. Code 8347 771
5 U.S. Code 8707 219
5 U.S. Code 8707(d) 218
5 U.S. Code 8708 221
7 U.S. Code 1421 246
7 U.S. Code 1444d(e) 252
7 U.S. Code 1445b-2(c) 246
7 U.S. Code Ch. 35A 246
8 U.S. Code 1252(c) 340
10 U.S. Code 101(22) 463
10 U.S. Code 101(24) 463
10 U.S. Code 676 775
10 U.S. Code 687(b)(4) 463
10 U.S. Code 1035 542
10 U.S. Code 1124 739
10 U.S. Code 1212 462
10 U.S. Code 1313-1337 775
10 U.S. Code 1333 777
10 U.S. Code 1334(b) 777
10 U.S. Code 1402 776
10 U.S. Code 1402(a) 775
10 U.S. Code 1431-1446 ..... 624, 768
10 U.S. Code 1435(2) 769
10 U.S. Code 1447-1455 ..... 135, 624, 768, 814
10 U.S. Code 1447(3) 136
10 U.S. Code 1447(5) 769
10 U.S. Code 1448(a)(3) 698
10 U.S. Code 1448(b) 140
10 U.S. Code 1448(b)(3) 140
10 U.S. Code 1448(b)(4) 140
10 U.S. Code 1450(a) 142
10 U.S. Code 1450(f)(2) 141
10 U.S. Code 1451 814
10 U.S. Code 1451(e) 816
10 U.S. Code 1452 ..... 142, 770
10 U.S. Code 1453 698
10 U.S. Code 2113(f) 543
10 U.S. Code 2208 792
10 U.S. Code 2208(c) 910
10 U.S. Code App. 2301-2306 59
10 U.S. Code 2301(a) 167
10 U.S.C.A. 2301(a)(1) 403
10 U.S.C.A. 2302(2) 403
10 U.S.C.A. 2302(3) 403
10 U.S.C.A. 2304 242
10 U.S. Code 2304(a) 461
10 U.S. Code 2304(a)(2) 817
10 U.S. Code 2304(a)(2)(A) 818
10 U.S. Code 2304(a)(2)(B) 818
10 U.S. Code 2304(a)(16) 60, 450
10 U.S. Code 2304(b)(1)(B) 60
10 U.S. Code 2304(c)(1) 306
10 U.S. Code 2304(c)(3) 60
10 U.S. Code 2304(f) 306

10 U.S. Code 2304(f)(5) 167
10 U.S. Code 2304(g) 198
10 U.S. Code 2305(a)(1)(A) 167, 197
10 U.S. Code 2305(a)(1)(A)(ii) 194
10 U.S. Code 2305(a)(1)(B)(ii) 167, 194
10 U.S. Code 2305(b) 339, 349
10 U.S. Code 2305(b)(4) 551
10 U.S. Code 2305(b)(4)(A)(ii) 198, 408
10 U.S. Code 2305(b)(4)(B) 408
10 U.S. Code 2305(b)(4)(C) 408
10 U.S. Code 2305(b)(5) 407
10 U.S. Code 2392 321
10 U.S. Code 2392 note 322
10 U.S. Code 2774(a) 698
10 U.S. Code 2828(g) 574
10 U.S. Code 2828(g)(1) 574
10 U.S. Code 2828(g)(6)(A) 574
12 U.S. Code 1423 449
12 U.S. Code 1701 67
12 U.S. Code 1702 ..... 67, 228
12 U.S. Code 1710(g) 69
12 U.S. Code 1713(l) 69
12 U.S. Code 1748b(h) 69
12 U.S. Code 1749hh 69
12 U.S. Code 1750(f) 69
15 U.S. Code 637(a) 310, 729
15 U.S. Code 637(a)(1) 789
15 U.S. Code 637(b)(7) 109
15 U.S. Code 637(b)(7)(C) 504
15 U.S. Code 637b 857
15 U.S. Code 644(g) 829
15 U.S. Code 644(i) 830
16 U.S. Code 460L-6a(f) 26
16 U.S. Code 831h(b) 228
18 U.S. Code 205 88
18 U.S. Code 641 371
20 U.S. Code 1071-87-2 5
20 U.S. Code 1078 5
20 U.S. Code 1078(a) 7
20 U.S. Code 1078(a)(3)(A) 5
20 U.S. Code 1078(f) 5
20 U.S. Code 1080 5
20 U.S. Code 1081(b) 9
20 U.S. Code 1087 5
20 U.S. Code 1087-1(b)(1) 7
20 U.S. Code 1087-1(b)(3) 5
22 U.S. Code 2566 87
22 U.S. Code 2751 444
22 U.S. Code 2792(b) 446
25 U.S. Code 372 534
25 U.S. Code 385a 467
25 U.S. Code 410 538
26 U.S. Code 3101-3126 802
26 U.S. Code 3201-3233 801
26 U.S. Code 3401(d)(1) 802
26 U.S. Code 3402 802
26 U.S. Code 6321 32
26 U.S. Code 7810(a) 882
26 U.S. Code 7810 882
26 U.S. Code 7810(b) 883
28 U.S. Code 2410 882
26 U.S. Code 9502 466
26 U.S. Code 9502(c) 466
26 U.S. Code 9502(d) 466
26 U.S. Code 9602(b)(3) 466
28 U.S. Code 461 353
28 U.S. Code 510 631
28 U.S. Code 7425(d) 882
29 U.S. Code 201-219 ..... 274, 359
29 U.S. Code 216(b) 803
29 U.S. Code 626(b) 803
29 U.S. Code 1301 227
29 U.S. Code 1302(b)(8) 227
29 U.S. Code 1304 228
29 U.S. Code 1304 note 227
29 U.S. Code 1305(b)(2)(D) 226
29 U.S. Code 1342 226
29 U.S. Code 1551(m) 669
29 U.S. Code 1579 675
29 U.S. Code 1580 675
29 U.S. Code 1691 668
29 U.S. Code 1697 668
29 U.S. Code 1697(a) 672
29 U.S. Code 1699 671
29 U.S. Code 1706 672
30 U.S. Code 191 571
30 U.S. Code 901 636
31 U.S. Code 39 796
31 U.S. Code 691 722
31 U.S. Code 725S-1 467
31 U.S. Code 1301(a) 637, 798, 804
31 U.S. Code 1301(c) 591
31 U.S. Code 1304 83
31 U.S. Code 1318(b) 19
31 U.S. Code 1341 4
31 U.S. Code 1341(a)(1) 9, 744
31 U.S. Code 1342 ..... 21, 675
31 U.S. Code 1346(b) 722
31 U.S. Code 1348 837
31 U.S. Code 1348(a)(1) 836
31 U.S. Code 1348(b) 19
31 U.S. Code 1501 9
31 U.S. Code 1501(a)(5) 8
31 U.S. Code 1501(a)(5)(A) 8
31 U.S. Code 1501(b) 7
31 U.S. Code 1502(a) 155, 743
31 U.S. Code 1535 ..... 608, 637, 675
31 U.S. Code 1552(b) 603
31 U.S. Code 3127(c) 859
31 U.S. Code 3302 ..... 571, 602, 669
31 U.S. Code 3321 676
31 U.S. Code 3324 809
31 U.S. Code 3324(a) 490
31 U.S. Code 3526 ..... 67, 112
31 U.S. Code 3526(c) 861
31 U.S. Code 3527 677
31 U.S. Code 3527(c) 299, 534, 811, 812
31 U.S. Code 3527(d) 884
31 U.S. Code 3527(d)(1)(B) 541
31 U.S. Code 3527(d)(2) 863
31 U.S. Code 3528 21
31 U.S. Code 3529 534
31 U.S. Code 3530 884
31 U.S. Code App. 3551-3556 ..... 67, 74, 112, 229, 316, 504, 585, 746
31 U.S. Code 3551(1) 42, 112
31 U.S. Code 3551(2) 43
31 U.S. Code 3551(3) 68, 746
31 U.S. Code 3552 ..... 67, 240, 316, 330
31 U.S. Code 3553 14
31 U.S.C.A. 3553(b)(2) 208, 459, 553
31 U.S.C.A. 3553(b)(2)(A) 553
31 U.S. Code 3553(c)(1) 821
31 U.S. Code 3553(d)(1) 574, 820
31 U.S. Code 3553(d)(2) 150
31 U.S. Code 3554 ..... 14, 270, 331
31 U.S. Code 3554(b) 822
31 U.S. Code 3554(b)(2) 211
31 U.S. Code 3554(c) 50, 822
31 U.S. Code 3554(c)(1) 473
31 U.S. Code 3554(e)(1) 42
31 U.S. Code 3555(a) 209
31 U.S. Code Ch. 37 ..... 248, 894
31 U.S. Code 3702 ..... 239, 694
31 U.S. Code 3702(a) 179
31 U.S. Code 3702(b)(1) 696
31 U.S. Code 3702(d) 680
31 U.S. Code 3711-19 537
31 U.S. Code 3711(a) 372
31 U.S. Code 3711(a)(3) 538
31 U.S. Code 3711(d) 373

31 U.S. Code 3716 896
31 U.S. Code 3716(a) 896
31 U.S. Code 3716(c)(1) 251
31 U.S. Code 3717 253
31 U.S. Code 3717(g)(1) 253
31 U.S. Code 3721 ..... 603, 791
31 U.S. Code 3726 ..... 84, 564
31 U.S. Code 3727 ..... 554, 599
31 U.S. Code 3727(c)(3) 555
31 U.S. Code 3727(d) 555
31 U.S. Code 3901–06 842
31 U.S. Code 3901–3909 83
31 U.S. Code 3901 19
31 U.S. Code 3902 83
31 U.S. Code 3902(b)(3) 19
31 U.S. Code 3902(c) 844
31 U.S. Code 3902(d) 796
31 U.S. Code 3903(1) 843
31 U.S. Code 6301–08 606
31 U.S. Code 6303 606
31 U.S. Code 6304 606
31 U.S. Code 6305 606
31 U.S. Code 6305(2) 606
31 U.S. Code 9101(3)(I) 227
31 U.S. Code 9101(3)(L) 68
32 U.S. Code 709 78
37 U.S. Code 201–209 544
37 U.S. Code 302–303a 544
37 U.S. Code 404 17
37 U.S. Code 404(a) 497
37 U.S. Code 404(f)(2)(A) 497
37 U.S. Code 405 888
37 U.S. Code 405(a) 889
37 U.S. Code 406 521
37 U.S. Code 406(b) 123
37 U.S. Code 406(b)(1)(A) 123
37 U.S. Code 406(h) 522
37 U.S. Code 554(b) 124
37 U.S. Code 908 382
37 U.S. Code 1007 896
39 U.S. Code 401(3) 228
39 U.S. Code 410 584
39 U.S. Code 410(a) 228, 585
39 U.S. Code 410(b) 585
39 U.S. Code 2008(c) 228
40 U.S. Code 1 725
40 U.S. Code 270a–270d 30
40 U.S. Code 270a–270f 151
40 U.S. Code 270a(d) 31
40 U.S. Code 276(a) 291
40 U.S. Code 276a 30, 337
40 U.S. Code 278a 303, 723
40 U.S. Code 295 260
40 U.S. Code 472 ..... 68, 746
40 U.S. Code 472(e) 341
40 U.S. Code 472(g) 342
40 U.S. Code 474(11) 69
40 U.S. Code 481 112
40 U.S. Code 481(a)(1) 113
40 U.S. Code 481(a)(3) 113
40 U.S. Code 484(c) 342
40 U.S. Code 490(a)(8) 725
40 U.S. Code 490(f) 725
40 U.S. Code 541–544 ..... 2, 478, 652, 785
40 U.S. Code 542 787
40 U.S. Code 543 478
40 U.S. Code 544 479
40 U.S. Code 601–616 722
40 U.S. Code 602 726
40 U.S. Code 606(a) 728
40 U.S. Code 612 727
40 U.S. Code 612(1) 727
40 U.S. Code 615 728
40 U.S. Code 753 725
40 U.S. Code 759 ..... 73, 113, 259
40 U.S. Code 759(b)(2) 259
40 U.S. Code 759(h) 73
40 U.S. Code 759(h)(6)(A) 74
41 U.S. Code 10a–10d 373
41 U.S. Code 35–45 337
41 U.S. Code 251 note 14
41 U.S. Code 253 26
41 U.S. Code 253(a)(1)(A) 472, 736
41 U.S. Code 253(c)(2) 224
41 U.S. Code 253(e) 224
41 U.S. Code 253(f)(3) 224
41 U.S. Code 253(f)(5)(A) 224
41 U.S. Code 253(g) 687
41 U.S. Code 253(g)(1) 516
41 U.S. Code 253(g)(4) 516
41 U.S. Code 253b(d)(2) 209
41 U.S. Code 259(c) 737
41 U.S. Code 351 291
41 U.S. Code 416 515
41 U.S. Code 601 350
41 U.S. Code 611 720
42 U.S. Code 402(q) 816
42 U.S. Code 1317 628
42 U.S. Code 1471 424
42 U.S. Code 1472 424
42 U.S. Code 1472(a) 424
42 U.S. Code 1474 424
42 U.S. Code 1487(a) 425
42 U.S. Code 1490a(a) 425
42 U.S. Code 1490a(a)(1)(G) 424
42 U.S. Code 1975–1975f 756
42 U.S. Code 1975c 756
42 U.S. Code 1975c(c) 756
42 U.S. Code 1975d(a)(2) 756
42 U.S. Code 1975(d) 756
42 U.S. Code 2000e–2000e–17 595
42 U.S. Code 2000e–5 595
42 U.S. Code 2000–5(b) 595
42 U.S. Code 2000e–16 595
42 U.S. Code 2000e–16(a) 596
42 U.S. Code 2000e(b) 596
42 U.S. Code 3011 628
42 U.S. Code 3501 note 628
42 U.S. Code 3501a 628
42 U.S. Code 3522(b) 628
42 U.S. Code 3531 798
42 U.S. Code 4321 605
42 U.S. Code 4341–47 605
42 U.S. Code 4371–74 605
42 U.S. Code 4372 606
42 U.S. Code 4372(d)(1) 605
42 U.S. Code 4372(d)(4) 605
42 U.S. Code 4375 607
42 U.S. Code 7501–08 366
42 U.S. Code 7502 366
42 U.S. Code 7506(a) 367
42 U.S. Code 10101 615
44 U.S. Code 501 226
44 U.S. Code 1701 226
44 U.S. Code 3702 808
45 U.S. Code 351–367 801
45 U.S. Code 822 525
45 U.S. Code 825–27 525
45 U.S. Code 827 525
45 U.S. Code 827(a) 526
45 U.S. Code 829(a) 526
47 U.S. Code 521 314
47 U.S. Code 555 316
49 U.S. Code 1301(8) 466
49 U.S. Code 1348(b) 466
49 U.S. Code 1353 466
49 U.S. Code 2205(a) 466
49 U.S. Code 2205(b) 466
49 U.S. Code 2205(c) 466
49 U.S. Code 10721 ..... 329, 446, 566
50 U.S. Code 1651(a)(4) 555

PUBLISHED DECISIONS OF THE COMPTROLLER GENERAL

	Page
2 Comp. Gen. 346	125
2 Comp. Gen. 606	723
3 Comp. Gen. 74	911
4 Comp. Gen. 891	837
5 Comp. Gen. 366	723
5 Comp. Gen. 696	723
6 Comp. Gen. 320	125
6 Comp. Gen. 619	798, 804
8 Comp. Gen. 103	840
8 Comp. Gen. 627	125
9 Comp. Gen. 248	590
10 Comp. Gen. 120	589
10 Comp. Gen. 510	840
14 Comp. Gen. 169	341
14 Comp. Gen. 695	227
14 Comp. Gen. 698	227
15 Comp. Gen. 96	341
15 Comp. Gen. 885	836
16 Comp. Gen. 384	839
16 Comp. Gen. 840	82
16 Comp. Gen. 842	82
18 Comp. Gen. 144	725
18 Comp. Gen. 423	909
18 Comp. Gen. 812	53
18 Comp. Gen. 815	530
18 Comp. Gen. 838	896
20 Comp. Gen. 105	725
20 Comp. Gen. 310	53
20 Comp. Gen. 322	589
20 Comp. Gen. 568	395
21 Comp. Gen. 906	724
22 Comp. Gen. 32	678
22 Comp. Gen. 48	676
22 Comp. Gen. 243	678
22 Comp. Gen. 563	341
23 Comp. Gen. 746	679
23 Comp. Gen. 888	678
24 Comp. Gen. 339	229
24 Comp. Gen. 599	62
25 Comp. Gen. 299	179
25 Comp. Gen. 315	359
25 Comp. Gen. 909	341
26 Comp. Gen. 354	590
26 Comp. Gen. 368	520
26 Comp. Gen. 530	520
26 Comp. Gen. 618	672
26 Comp. Gen. 668	836
27 Comp. Gen. 389	724
27 Comp. Gen. 760	124
28 Comp. Gen. 289	394
28 Comp. Gen. 693	23
29 Comp. Gen. 111	678
29 Comp. Gen. 255	660
29 Comp. Gen. 279	723
29 Comp. Gen. 517	696
30 Comp. Gen. 51	771
30 Comp. Gen. 76	725
30 Comp. Gen. 228	530
30 Comp. Gen. 295	911
30 Comp. Gen. 387	679
31 Comp. Gen. 15	519
31 Comp. Gen. 213	463
31 Comp. Gen. 296	776
31 Comp. Gen. 389	469
31 Comp. Gen. 465	678
31 Comp. Gen. 491	793
31 Comp. Gen. 524	610
32 Comp. Gen. 87	908
32 Comp. Gen. 431	837
33 Comp. Gen. 98	908
33 Comp. Gen. 176	603
33 Comp. Gen. 297	810
34 Comp. Gen. 145	602
34 Comp. Gen. 152	537
34 Comp. Gen. 164	498
34 Comp. Gen. 504	498
34 Comp. Gen. 557	840
34 Comp. Gen. 577	840
34 Comp. Gen. 581	266
35 Comp. Gen. 28	836
35 Comp. Gen. 101	215
35 Comp. Gen. 448	51
35 Comp. Gen. 615	672
35 Comp. Gen. 715	724
36 Comp. Gen. 106	499
36 Comp. Gen. 434	589
36 Comp. Gen. 628	463
36 Comp. Gen. 757	908
36 Comp. Gen. 795	129
37 Comp. Gen. 287	565
37 Comp. Gen. 318	556
37 Comp. Gen. 579	190
38 Comp. Gen. 36	341
38 Comp. Gen. 134	509
38 Comp. Gen. 143	724
38 Comp. Gen. 159	775
38 Comp. Gen. 268	463
38 Comp. Gen. 338	541
38 Comp. Gen. 628	156
38 Comp. Gen. 758	884
38 Comp. Gen. 768	446
38 Comp. Gen. 812	228
39 Comp. Gen. 60	872
39 Comp. Gen. 119	144
39 Comp. Gen. 304	724
39 Comp. Gen. 352	914
39 Comp. Gen. 422	7
40 Comp. Gen. 309	568
40 Comp. Gen. 379	51
40 Comp. Gen. 564	295
40 Comp. Gen. 590	840
41 Comp. Gen. 118	775
41 Comp. Gen. 235	465
41 Comp. Gen. 237-238	466
41 Comp. Gen. 238	465
41 Comp. Gen. 460	771
41 Comp. Gen. 531	678
41 Comp. Gen. 569	89
42 Comp. Gen. 195	359
42 Comp. Gen. 246	695
42 Comp. Gen. 272	9
42 Comp. Gen. 329	278
42 Comp. Gen. 337	696
42 Comp. Gen. 480	724
42 Comp. Gen. 490	266
42 Comp. Gen. 495	633
42 Comp. Gen. 673	674
43 Comp. Gen. 305	741
43 Comp. Gen. 442	776
43 Comp. Gen. 505	888
43 Comp. Gen. 759	226
44 Comp. Gen. 65	124
44 Comp. Gen. 258	776
44 Comp. Gen. 337	396
44 Comp. Gen. 399	744
44 Comp. Gen. 405	887
44 Comp. Gen. 574	523
44 Comp. Gen. 623	840
44 Comp. Gen. 818	676
44 Comp. Gen. 824	341
45 Comp. Gen. 53	52

	Page
45 Comp. Gen. 169	600
45 Comp. Gen. 277	69
45 Comp. Gen. 442	523
45 Comp. Gen. 592	765
45 Comp. Gen. 660	239
45 Comp. Gen. 689	888
46 Comp. Gen. 25	724
46 Comp. Gen. 153	215
46 Comp. Gen. 724	659
47 Comp. Gen. 61	724
47 Comp. Gen. 141	463
47 Comp. Gen. 189	346
47 Comp. Gen. 209	625
47 Comp. Gen. 275	259
47 Comp. Gen. 657	16, 739
47 Comp. Gen. 686	765
47 Comp. Gen. 687	752
48 Comp. Gen. 99	776
48 Comp. Gen. 185	144
48 Comp. Gen. 335	445
48 Comp. Gen. 566	883
49 Comp. Gen. 38	863
49 Comp. Gen. 44	556
49 Comp. Gen. 72	694
49 Comp. Gen. 145	395
49 Comp. Gen. 284	62
49 Comp. Gen. 305	691
49 Comp. Gen. 695	521
50 Comp. Gen. 63	341
50 Comp. Gen. 583	174
50 Comp. Gen. 610	144
51 Comp. Gen. 14	904
51 Comp. Gen. 27	615
51 Comp. Gen. 173	72
51 Comp. Gen. 251	843
51 Comp. Gen. 437	624
51 Comp. Gen. 479	417
51 Comp. Gen. 528	258
51 Comp. Gen. 500	266
51 Comp. Gen. 543	24
52 Comp. Gen. 78	288, 411, 714
52 Comp. Gen. 407	394
52 Comp. Gen. 479	124
52 Comp. Gen. 504	798
52 Comp. Gen. 604	169
52 Comp. Gen. 614	258
52 Comp. Gen. 700	530
52 Comp. Gen. 706	191
52 Comp. Gen. 730	806
52 Comp. Gen. 927	914
53 Comp. Gen. 71	509
53 Comp. Gen. 90	284
53 Comp. Gen. 99	334
53 Comp. Gen. 159	124
53 Comp. Gen. 195	837
53 Comp. Gen. 232	190
53 Comp. Gen. 317	724
53 Comp. Gen. 351	724
53 Comp. Gen. 410	880
53 Comp. Gen. 422	427
53 Comp. Gen. 457	144, 509
53 Comp. Gen. 493	78
53 Comp. Gen. 496	133
53 Comp. Gen. 569	267
53 Comp. Gen. 586	405
53 Comp. Gen. 600	635
53 Comp. Gen. 603	568
53 Comp. Gen. 747	913
53 Comp. Gen. 753	384
53 Comp. Gen. 756–757	385
54 Comp. Gen. 93	557
54 Comp. Gen. 112	677
54 Comp. Gen. 114	299
54 Comp. Gen. 169	199
54 Comp. Gen. 205	804
54 Comp. Gen. 308	568
54 Comp. Gen. 310	180
54 Comp. Gen. 371	279
54 Comp. Gen. 416	379
54 Comp. Gen. 493	142
54 Comp. Gen. 600	771
54 Comp. Gen. 604	24
54 Comp. Gen. 612	389
54 Comp. Gen. 747	682
54 Comp. Gen. 847	770
54 Comp. Gen. 913	734
54 Comp. Gen. 1028	239
54 Comp. Gen. 1086	611
55 Comp. Gen. 42	487
55 Comp. Gen. 60	90, 259
55 Comp. Gen. 113	699
55 Comp. Gen. 117	572
55 Comp. Gen. 192	765
55 Comp. Gen. 201	518
55 Comp. Gen. 219	582
55 Comp. Gen. 289	321, 527
55 Comp. Gen. 295	89
55 Comp. Gen. 307	639
55 Comp. Gen. 374	420
55 Comp. Gen. 397	312
55 Comp. Gen. 636	455, 618
55 Comp. Gen. 679	159
55 Comp. Gen. 681	89
55 Comp. Gen. 768	584, 744
55 Comp. Gen. 779	806
55 Comp. Gen. 839	198
55 Comp. Gen. 856	289
55 Comp. Gen. 872	724
55 Comp. Gen. 886	216
55 Comp. Gen. 958	86
55 Comp. Gen. 972	578
55 Comp. Gen. 982	582
55 Comp. Gen. 1051	472, 514
55 Comp. Gen. 1077	229
55 Comp. Gen. 1107	411, 649, 714
55 Comp. Gen. 1111	38
55 Comp. Gen. 1151	581
55 Comp. Gen. 1183	521
55 Comp. Gen. 1185–86	523
55 Comp. Gen. 1186	661
55 Comp. Gen. 1188	661
55 Comp. Gen. 1339	334
55 Comp. Gen. 1438	896
55 Comp. Gen. 1479	835
56 Comp. Gen. 29	21
56 Comp. Gen. 40	806
56 Comp. Gen. 85	681
56 Comp. Gen. 111	804
56 Comp. Gen. 131	682
56 Comp. Gen. 321	172
56 Comp. Gen. 328	131
56 Comp. Gen. 388	70
56 Comp. Gen. 473	209
56 Comp. Gen. 505	717
56 Comp. Gen. 512	798
56 Comp. Gen. 531	421
56 Comp. Gen. 561	475
56 Comp. Gen. 604	411, 714
56 Comp. Gen. 761	631
56 Comp. Gen. 768	376, 718
56 Comp. Gen. 878	376
56 Comp. Gen. 943	220
56 Comp. Gen. 1011	403
56 Comp. Gen. 1022	136
57 Comp. Gen. 147	908
57 Comp. Gen. 285	157
57 Comp. Gen. 311	27
57 Comp. Gen. 321	19

	Page
57 Comp. Gen. 347	180
57 Comp. Gen. 410	77
57 Comp. Gen. 477	659
57 Comp. Gen. 527	415
57 Comp. Gen. 535	609
57 Comp. Gen. 567	132
57 Comp. Gen. 584	568
57 Comp. Gen. 597	169
57 Comp. Gen. 615	167
57 Comp. Gen. 806	16
58 Comp. Gen. 19	851
58 Comp. Gen. 81	444
58 Comp. Gen. 90	80
58 Comp. Gen. 138	6
58 Comp. Gen. 185	190
58 Comp. Gen. 208	397
58 Comp. Gen. 295	721
58 Comp. Gen. 372	894
58 Comp. Gen. 375	567
58 Comp. Gen. 385	214
58 Comp. Gen. 487	384
58 Comp. Gen. 493	386
58 Comp. Gen. 501	499
58 Comp. Gen. 530	319
58 Comp. Gen. 536	278
58 Comp. Gen. 744	908
58 Comp. Gen. 783	900
59 Comp. Gen. 28	752
59 Comp. Gen. 99	371
59 Comp. Gen. 113	83
59 Comp. Gen. 203	183
59 Comp. Gen. 240	435
59 Comp. Gen. 355	107
59 Comp. Gen. 380	540
59 Comp. Gen. 395	870
59 Comp. Gen. 515	465
59 Comp. Gen. 518	744
59 Comp. Gen. 522	734
59 Comp. Gen. 533	273
59 Comp. Gen. 569	770
59 Comp. Gen. 658	725
59 Comp. Gen. 723	836
60 Comp. Gen. 9	183
60 Comp. Gen. 44	44
60 Comp. Gen. 58	435
60 Comp. Gen. 64	825
60 Comp. Gen. 71	23
60 Comp. Gen. 181	17
60 Comp. Gen. 198	80
60 Comp. Gen. 219	156, 743
60 Comp. Gen. 275	109
60 Comp. Gen. 285	751
60 Comp. Gen. 298	89
60 Comp. Gen. 323	226
60 Comp. Gen. 510	555
60 Comp. Gen. 528	398
60 Comp. Gen. 561	889
60 Comp. Gen. 650	159
60 Comp. Gen. 654	261
60 Comp. Gen. 700	6
60 Comp. Gen. 710	465
61 Comp. Gen. 13	411, 714
61 Comp. Gen. 30	170, 301
61 Comp. Gen. 79	313
61 Comp. Gen. 112	475
61 Comp. Gen. 121	152
61 Comp. Gen. 187	116
61 Comp. Gen. 214	837
61 Comp. Gen. 221	80
61 Comp. Gen. 292	396
61 Comp. Gen. 361	659
61 Comp. Gen. 501	848
61 Comp. Gen. 537	603
61 Comp. Gen. 586	9
61 Comp. Gen. 604	80
61 Comp. Gen. 609	744
61 Comp. Gen. 612	744
61 Comp. Gen. 644	10
62 Comp. Gen. 54	353, 589
62 Comp. Gen. 55	228
62 Comp. Gen. 70	603
62 Comp. Gen. 75	116
62 Comp. Gen. 80	909
62 Comp. Gen. 88	650
62 Comp. Gen. 193	769
62 Comp. Gen. 203	329
62 Comp. Gen. 205	729
62 Comp. Gen. 208	733
62 Comp. Gen. 300	376
62 Comp. Gen. 302	624, 769
62 Comp. Gen. 308	17
62 Comp. Gen. 358	353
62 Comp. Gen. 393	766
62 Comp. Gen. 471	814
62 Comp. Gen. 476	299
62 Comp. Gen. 641	794
62 Comp. Gen. 678	603, 670
62 Comp. Gen. 683	555
62 Comp. Gen. 697	9
63 Comp. Gen. 1	229
63 Comp. Gen. 4	886
63 Comp. Gen. 7	888
63 Comp. Gen. 14	89, 107
63 Comp. Gen. 68	475
63 Comp. Gen. 86	787
63 Comp. Gen. 99	865
63 Comp. Gen. 110	793, 798
63 Comp. Gen. 141	353
63 Comp. Gen. 210	462
63 Comp. Gen. 214	266
63 Comp. Gen. 241	19
63 Comp. Gen. 281	469
63 Comp. Gen. 285	672
63 Comp. Gen. 308	9
63 Comp. Gen. 338	796
63 Comp. Gen. 340	796
63 Comp. Gen. 348	169
63 Comp. Gen. 379	197
63 Comp. Gen. 456	447
63 Comp. Gen. 474	557
63 Comp. Gen. 489	876
63 Comp. Gen. 492	877
63 Comp. Gen. 517	843
63 Comp. Gen. 525	8
63 Comp. Gen. 529	56
63 Comp. Gen. 621	885
64 Comp. Gen. 63	734
64 Comp. Gen. 64	39
64 Comp. Gen. 86	865
64 Comp. Gen. 100	435
64 Comp. Gen. 102-103	438
64 Comp. Gen. 142	249
64 Comp. Gen. 234	887
64 Comp. Gen. 245	198
64 Comp. Gen. 273	235
64 Comp. Gen. 282	6
64 Comp. Gen. 305	380
64 Comp. Gen. 310	648
64 Comp. Gen. 323	329, 399
64 Comp. Gen. 359	639, 744
64 Comp. Gen. 370	637
64 Comp. Gen. 376-82	637
64 Comp. Gen. 380-81	637
64 Comp. Gen. 382	639
64 Comp. Gen. 406	145, 510
64 Comp. Gen. 408	510
64 Comp. Gen. 431	672
64 Comp. Gen. 441	489

	Page
64 Comp. Gen. 489	885
64 Comp. Gen. 524	198
64 Comp. Gen. 528	101, 235
64 Comp. Gen. 551	111
64 Comp. Gen. 557	475
64 Comp. Gen. 568	159
64 Comp. Gen. 607	877
64 Comp. Gen. 625	840
64 Comp. Gen. 639	378
64 Comp. Gen. 641	201
64 Comp. Gen. 665	879
64 Comp. Gen. 672	429
64 Comp. Gen. 727	695
64 Comp. Gen. 728	695
64 Comp. Gen. 748	338
64 Comp. Gen. 756	27, 68, 112, 316, 746
64 Comp. Gen. 763	31, 721
64 Comp. Gen. 772	477
64 Comp. Gen. 813	818
64 Comp. Gen. 816	896
64 Comp. Gen. 830	202
64 Comp. Gen. 854	42
64 Comp. Gen. 858	583
64 Comp. Gen. 863	213
64 Comp. Gen. 880	644
64 Comp. Gen. 883	485
64 Comp. Gen. 888	481
65 Comp. Gen. 1	490, 820
65 Comp. Gen. 16	739
65 Comp. Gen. 25	496
65 Comp. Gen. 29	720
65 Comp. Gen. 34	301
65 Comp. Gen. 45	612
65 Comp. Gen. 49	827
65 Comp. Gen. 62	454
65 Comp. Gen. 74	132
65 Comp. Gen. 92	558
65 Comp. Gen. 109	241, 317, 323, 407, 700
65 Comp. Gen. 160	267
65 Comp. Gen. 167	300
65 Comp. Gen. 195	408
65 Comp. Gen. 230	664
65 Comp. Gen. 240	317
65 Comp. Gen. 268	570
65 Comp. Gen. 302	726
65 Comp. Gen. 311	734
65 Comp. Gen. 323	700
65 Comp. Gen. 401	737
65 Comp. Gen. 409	714
65 Comp. Gen. 418	665
65 Comp. Gen. 476	790
65 Comp. Gen. 573	789
65 Comp. Gen. 585	683
65 Comp. Gen. 640	819
65 Comp. Gen. 756	585

DECISIONS OF THE COMPTROLLERS OF THE TREASURY

	Page
3 Comp. Dec. 196	723
5 Comp. Dec. 478	723
6 Comp. Dec. 135	723
6 Comp. Dec. 142	723
6 Comp. Dec. 943	723
8 Comp. Dec. 624	499
18 Comp. Dec. 70	723
20 Comp. Dec. 707	499
21 Comp. Dec. 107	839
26 Comp. Dec. 877	840

DECISIONS OVERRULED, MODIFIED OR DISTINGUISHED

	Page
41 Comp. Gen. 235	464
44 Comp. Gen. 574	521
45 Comp. Gen. 442	521
49 Comp. Gen. 695	520
53 Comp. Gen. 90	282
54 Comp. Gen. 416	379
59 Comp. Gen. 240	435
60 Comp. Gen. 58	435
63 Comp. Gen. 338	795
B-180010.07, June 15, 1977	398
B-188604, Feb. 14, 1978	398
B-188650, Oct. 18, 1977	398
B-188819, Feb. 8, 1978	753
B-202863, Jan. 8, 1982	517
B-218192.2, May 7, 1985	1
B-218260.4, Aug. 6, 1985	1

OPINIONS OF THE ATTORNEYS GENERAL

	Page
16 Op. Atty. Gen. 596	630
18 Op. Atty. Gen. 50	630
20 Op. Atty. Gen. 8	630
32 Op. Atty. Gen. 139	631
34 Op. Atty. Gen. 320	341

DECISIONS OF THE COURTS

	Page
Accardi *v.* Shaughnessy, 347 U.S. 209	795
Acuna *v.* United States, 479 F.2d 1356, 202 Ct. Cl. 206, *cert. denied*, 416 U.S. 905	278
Alabama *v.* King and Boozer, 314, U.S. 1 (1941)	880
Alcea Band of Tilamooks, U.S. *v.*, 341 U.S. 48	539
American Bus Association, U.S. *v.*, 627 F.2d 525	442
American Fidelity Co. *v.* National Bank of Evansville, 105 U.S. App. D.C. 312, 266 F.2d 910	721
American Indians Residing on Maricopa-AK Chin Reservation, U.S. *v.*, 667 F.2d 980	540
Andrus *v.* Glover Construction Co. 446 U.S. 608, 616–17	229

Page

Armstrong & Armstrong, Inc. U.S. *v.*, 356 F. Supp. 515 (E.D. Wash. 1973) Aff'd 514 F.2d 402 ... 203
Baggett Transportation, U.S. *v.*, 670 F.2d 1011 ... 444
Barber by and Through, U.S. *v.*, 676 F.2d 651 ... 698
Barth, U.S., *v.*, 568 F2d 1329 ... 773
Bentley, U.S. *v.*, 107 F.2d 382 ... 537
Baurenovierungsgesellschaft, m.b.H. *v.* United States Department of the Army, Civil Action No. 85-3835 ... 779
Bethel *v.* Jefferson, 589 F.2d 631 ... 596
Blain *v.* General Electric Co., 371 F. Supp. 857 ... 359
Bornhoft *v.* United States, 137 Ct. Cl. 134 .. 172
CACI, Inc.—Federal *v.* United States, 719 F.2d 1567 ... 90, 107
California Human Development Corp. *v.* Brock, 792 F.2d 1044 ... 795
Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419 *v.* Carmen, No. 77-F-1197 ... 292
City of Mesa *v.* Home Builders Assn. of Central Arizona Inc., 111 Ariz., 523 P.2d 57 ... 557
Coleman , U.S. *v.*, 158 Ct. Cl. 498 ... 599
Connecticut Fund for the Environment *v.* EPA, 612 F.2d 998 ... 370
Consumer Energy Council of American, et al., *v.* Federal Energy Regulatory Commission, 673 F.2d 425 ... 442
Continental Casualty Co. U.S. *v.*, 314 U.S. 527, 553 ... 229
Delta Data Systems Corp. *v.* Webster, 744 F.2d 197 ... 717
DiSilvestro, U.S. *v.*, 405 F.2d 150 (2d Cir. 1968) *cert. denied*, 396 U.S. 964 ... 536
Economy Plumbing and Heating Co., U.S. *v.*, 470 F.2d 585 ... 542
Equal Employment Opportunity Commission *v.* The Baltimore and Ohio Railroad Company and The Chesapeake and Ohio Railway Company, No. H-74-637 ... 801
Exquisito Services. Inc., U.S. *v.* Civil Action No. 86-1847 ... 730
Federal Crop Insurance Corp. *v.* Merrill, 332 U.S. 380 ... 23
Fidelity and Deposit Co. *v.* A.J. Concrete Service, Civ. Action No. 83-1822-K ... 30
Finn, U.S. *v.* 192 Ct. Cl. 814 (1970) ... 900
First National Bank in Houston, U.S., *v.*, 350 U.S. 902 ... 721
FTC *v.* Manager, Retail Credit Co., 515 F.2d 988, 994 ... 228
Gila River Pima-Maricopa Indian Community, U.S. *v.*, 586 F.2d 209 (Ct. Cl. 1978) *rev'g* 33 Ind. Cl. Comm. 1 ... 540
Gratiot *v.* U.S., 40 U.S. (15 Pet.) 336 ... 32, 537
Grey *v.* Dukedom Bank, 216 F.2d 108 ... 539
Griffen, U.S. *v.*, 215 Ct. Cl. 710 ... 795
Guardian Federal Savings and Loan Association *v.* Federal Savings and Loan Insurance Corp., 589 F.2d 658 ... 442
Hancock *v.* Train, 426 U.S. 167 ... 62
Indemnity Company, U.S. *v.*, 319 F. Supp. 45 ... 721
Irvine *v.* Marshall, 61 U.S. (20 How.) 558 ... 341
Jerris Wise, U.S. *v.* Cl. Ct. No. 447-86C ... 870

Page

Kalvar Corporation, U.S., *v.*, 543 F.2d 1298 734
Kania, U.S. *v.*, 227 Ct. Cl. 240, at 251, 640 F.2d, at 268 *cert. denied*, 454 U.S. 895 ... 681
Kay *v.* Federal Communications Commission, 443 F.2d 638 ... 356
Kennerly, U.S. *v.*, 721 F.2d ... 539
Key *v.* Doyle, 434 U.S. 59 ... 598
Light, United States *v.*, 220 U.S. 523 ... 341
Lucido, U.S. *v.*, 373 F. Supp. 1142 ... 631
Martin *v.* HMB Construction Co., 279 F.2d 495 ... 803
Matthews *v.* Eldridge, 424 U.S. 319 ... 539
McCarty Corp. U.S. *v.*, 499 F.2d 633 ... 203
McCulloch *v.* Maryland, 17 U.S. (4 Wheat.) 316 (1819) ... 880
Mescalero Apache Tribe, U.S. *v.*, 518 F.2d 1309, *cert. denied* 425 U.S. 911 ... 539
Mescalero Apache Tribe, U.S. *v.*, 518 F.2d 1309, *rev'g* 31 Ind Cl. Comm. 417 ... 540
Meunich, U.S. *v.*, 410 F.Supp. 944 ... 539
Munsey Trust Co., U.S. *v.*, 332 U.S. 234...32, 537
N.Y. Rayon Importing Co., U.S. *v.*, 329 U.S. 654 ... 542
National Broiler Council, Inc., *v.* Federal Labor Relations Council, 382 F. Supp. 322 ... 358
National Employees Union *v.* FLRA, No. 82-2176, aff'g 9 F.L.R.A. 82 (Case No. O-NG-320; Aug. 3, 1982) ... 226
National Federation of Federal Employees *v.* Brown, 645 F.2d 1017 ... 436
National Maritime Union of America, U.S. *v.*, 682 F.2d 944 ... 436
National Surety Corp. U.S. *v.*, 133 F. Supp. 381; 132 Ct. Cl. 724 ... 721
National Surety Corp. U.S. *v.*, 319 F. Supp. 45 ... 721
National Woodwork Manufacturers Association *v.* National Labor Relations Board, 386 U.S. 612 ... 355
Navajo Tribe, U.S. *v.*, 624 F.2d 981 ... 538
Nicoll, United States *v.*, 27 Fed. Cas. 149, No. 15,879 ... 341
Otte, U.S. *v.*, 419 U.S. 43 ... 802
Palmore, U.S. *v.*, 411 U.S. 389 ... 598
Passard, U.S. *v.*, 4 Cl. Ct. 395 and 5 Cl. Ct. 754 ... 698
Perrin, U.S. *v.*, 444 U.S. 37 ... 228
Produce Factors Corporation, U.S. *v.*, 467 F.2d 1343 ... 600
Royal Indemnity Company, Jersey State Bank, U.S. *v.*, 371 F.2d 462 ... 721
Royal Indemnity Co., United States *v.*, 313 U.S. 289 ... 341
Schweiker *v.* Hansen, 450 U.S. 785 ... 23
Scully, U.S. *v.*, 193 F. 185 ... 628
Security Ins. Co. of Hartford *v.* United States, 428 F.2d 838, 841-43, overruling in pertinent part, Standard Accident Ins. Co. of United States, 97 F. Supp. 829 ... 31
Seminole Nation, U.S. *v.*, 316 U.S. 286 ... 537
Service *v.* Dulles, 354 U.S. 363 ... 795
Shaw, U.S. *v.*, 226 Ct. Cl. 240, 640 F.2d 1254 ... 681
Squillacote, U.S. *v.*, 562 F. Supp. 338 aff'd in part and rev'd in part, 739 F.2d 1208 *Reh'g denied*, 747 F.2d 432, *cert. denied*, 105 S. Ct. 2021 ... 543
Street *v.* United States, 133 U.S. 299 ... 53

	Page
Strickland Transportation Company, U.S. *v.*, 334 F.2d 172	445
Sullivan, U.S. *v.*, 4 Ct. Cl. 70, *aff'd*, 742 F.2d 628	757
Swain *v.* Pressley, 430 U.S. 372	598
Torre *v.* Barry, 661 F.2d 1371	596
Trinity Universal Ins. Co. *v.* U.S., 382 F. 2d 317, cert. denied 390 U.S. 906	31
United States Fidelity and Guaranty Co., U.S., *v.*, 328 F. Supp. 69, aff'd 477 F. 2d 567	31
Watt *v.* Alaska, 451 U.S. 259	571
Williams *v.* Phillips, 482 F.2d 669	631
Wisconsin R. Co. *v.* Price County, 133 U.S. 496	341