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[B-163443]

Enlistments—Fraudulent—Determination—Waiver of Fraud *v.* Avoidance of Enlistment

Administrative waiver action taken by the military services on voidable fraudulent enlistments, with a "conditional" suspension of execution of discharge pending member's future good behavior, is contrary to guidance furnished in 54 Comp. Gen. 291.

Enlistments—Fraudulent—Determination—Waiver of Fraud *v.* Release

Once an administrative determination is made as to fraudulent enlistment, the fraud should be waived or the individual should be promptly released from military control.

In the matter of Department of Defense Military Pay and Allowance Committee Action No. 525, September 2, 1976:

This action is in response to letter dated May 18, 1976, from the Assistant Secretary of Defense (Comptroller) requesting a decision on a question concerning fraudulent enlistments as presented in Department of Defense Military Pay and Allowance Committee Action No. 525, enclosed with the letter.

The question presented is:

> In the case of an enlistment that is determined to be fraudulent, may the Services administratively waive the fraud for the purpose of pay and allowances by conditionally allowing the enlistment-contract to stand?

As background, the Committee Action discussion states that Department of Defense (DOD) Directive 1332.14, September 30, 1975, provides for administrative discharges by reason of misconduct for fraudulent enlistments which are voidable, and that the same directive authorizes the discharge authority or higher authority to suspend execution of an approved administrative discharge for a specified period of time.

The discussion further states that in accordance with Rule 2 of Table 1-4-1, Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), when an individual is determined to be serving under a fraudulent enlistment or induction, pay and allowances are suspended until the Government either voids the enlistment or induction, or allows it to stand. However, the Committee Action discussion points out that under the authority of DOD Directive 1332.14, *supra*, the discharge authority may suspend execution of an approved discharge in these cases, thus allowing the enlistment or induction to stand provisionally. In such cases, it is surmised that possibly the Government has retained its option to separate the member by reason of misconduct for fraudulent enlistment for a specified period of time if the member's future conduct warrants vacating the suspension of the approved discharge. However, the discussion

notes that such a procedure appears to be in conflict with the guidance provided in 54 Comp. Gen. 291 (1974).

By way of projection, the Committee discussion states that under current regulations, when it is determined that a member is serving under a fraudulent enlistment and the member is ordered discharged but the discharge authority suspends execution of the approved discharge for fraudulent enlistment, the member's entitlement to pay and allowances is as if the fraud were waived. It is further projected that if, at some later point in time, the suspension of the approved discharge for fraudulent enlistment is vacated and the discharge is ordered executed, the member will be entitled to pay and allowances through the date of discharge. Conversely, in the case where a determination is made that the member is serving under a fraudulent enlistment, which is voidable, and the Government voids the contract and discharges the member, there is no entitlement to pay and allowances from the date of the determination of the fraud.

At the outset, we agree with the observation in the Committee Action discussion that the "conditional" waiver procedure described in the submission is in conflict with the rules laid down in 54 Comp. Gen. 291, *supra*. In that decision, we dealt with submitted questions concerning the propriety of payment of pay and allowances to a member through date of separation when he was being administratively separated from the service for fraudulently concealing or misrepresenting a material fact which disqualified him for enlistment.

Among the problems considered in 54 Comp. Gen. 291, *supra*, was the pay and allowance consequences arising from required administrative determinations as to whether a fraudulent enlistment was void, or if not void, was voidable at the option of the Government. We stated therein, referring to prior regulations concerning fraudulent enlistments as considered in 47 Comp. Gen. 671 (1968), that once an administrative determination is made as to fraudulent enlistment, the fraud should be waived or the individual should be promptly released from military control unless, of course, he was to be held for court-martial proceedings under Article 83 (offense of fraudulent enlistment) of the Uniform Code of Military Justice, 10 U.S. Code 883.

In consonance with the foregoing guidance in 54 Comp. Gen. 291, paragraph 10401 of the DODPM states that a fraudulent contract of enlistment or induction is not void but is voidable at the option of the Government, and that when the Government becomes aware of the fraud it may void the contract or waive the objection and allow the contract to stand. In addition, Rule 2, Table 1–4–1, DODPM, sets

out, for pay and allowance purposes, that when an individual is determined to be serving under a fraudulent enlistment or induction and the Government has neither voided the enlistment or induction nor waived the fraud (or defect), then pay and allowances are suspended until the Government either voids the enlistment or induction, or allows it to stand. That administrative procedure is correct under our prior holdings on this subject.

On the other hand, DOD Directive 1332.14, dated September 30, 1975, as cited in the submission deals with administrative separations of enlisted personnel. It provides for the suspension of execution of approved discharges in appropriate circumstances. The suspended discharge may be put into effect if the member does not meet the standards of work and conduct prescribed.

That procedure is not questioned where members are subject to discharge from valid enlistments; however, in the case of a fraudulent enlistment the individual has not become a member of the service. The fraud in the enlistment nullifies the status of the individual as a member of the service concerned unless positive action is taken by the service to waive the fraud. A member who has no status as a member of the service has no right to pay or allowances and only if the defect in enlistment is waived by the service does the individual become a member of the service and entitled to pay and allowances. That entitlement relates back to the date of original enlistment as if the enlistment had not involved a fraud.

In these circumstances waiver of the fraud in enlistment is necessary before the individual is entitled to pay and allowances. Once the fraud is waived and the individual becomes a member of the service, we are aware of no basis for using that fraud to void the enlistment.

Accordingly, in the case of a fraudulent enlistment, the fraud in enlistment may not be conditionally waived and the individual retained in service with pay and allowances under specified conditions. Thus, the suspension of discharge provisions of DOD Directive 1332.14 are not to be applied in fraudulent enlistment cases.

[B–185503]

Transportation—Contracts—Readjustment Provisions—Interpretation

Interpretation of readjustment provisions in contracts for transportation of fuel in pipelines is upheld where carrier's intention is plain on the face of its offer, where carrier receives a reasonable return on investment, and where if offer were ambiguous it would have to be construed strongly against the carrier author.

In the matter of transportation claim of United States against Standard Transmission, September 2, 1976:

This is an advance decision to the Secretary of Defense concerning the propriety of overcharges totaling nearly $200,000 allegedly made on behalf of the Defense Fuel Supply Center (DFSC) to Standard Transmission (Standard) for the transportation of jet fuel in pipelines to three Air Force bases during 1973 and 1974. The overcharges depend upon the Government's interpretation of the readjustment provisions contained in three offers by Standard to the Government for pipeline transportation services from El Paso, Texas, to Holloman Air Force Base, New Mexico (hereafter El Paso-Holloman); Macon, Georgia, to Robbins Air Force Base, Georgia; and Port Everglades, Florida, to Homestead Air Force Base, Florida.

Standard disagrees with the Government's interpretation of the readjustment provisions; since Standard used substantially similar language in the three offers, we will use the El Paso-Holloman offer to illustrate the dispute.

In February 1972, Southern Pacific Pipe Lines, Inc. (Southern), and Standard tendered to the United States under section 22 of the Interstate Commerce Act, 49 U.S. Code 22 (1970), an offer to transport jet fuel owned by the Government. The offer, published as Southern's and Standard's Section 22 (ICC) Quotation 1, names in item 2, titled "Rates To Be Applied," a two-factor combination rate of 29 cents per barrel; the first factor, 20 cents per barrel, applied over the lines of Southern and Standard from Southern's El Paso station to Standard's terminal in Alamogordo, New Mexico; the second factor, 9 cents per barrel, applied onward to Standard's location at Holloman Air Force Base.

In a letter dated February 15, 1973, the Military Traffic Management and Terminal Service (Service), on behalf of DFSC, requested that Standard consider establishing a scale of rates for the El Paso-Holloman transportation of jet fuel. The letter set forth this graduated scale:

Projected Annual Pipeline Volume (BBLS)	Rates Per Barrel to be Applied
Less than 550,000	$0.42
550,000–599,999	.38
600,000–649,999	.35
650,000–699,999	.33
700,000–749,999	.30
750,000–799,999	$0.29
800,000–849,999	.27
850,000–899,999	.25
900,000 and over	.24

The letter continued:

The proposed rates are based on estimated CY 1973 operating expenses plus a reasonable return on your investment. The rates will be assessed on individual shipments based on the scale which applies to the annual projected volume. For example, if at the beginning of the annual period the projected thruput falls between 700,000 and 749,999 barrels, the rate of $0.30 per barrel would apply on all shipments throughout the entire 12 month period. At the end of the 12 month period, if the actual volume failed to equal or exceeded the projection, the rate level would be adjusted for the applicable volume on the scale. The annual projection for calendar year 1973 and the succeeding 4 years are reflected in the Inclosure. An annual update of these projections will be furnished by the shipper service.

In a letter dated March 8, 1973, the Service stated:

Pursuant to telephone conversation with Mr. P. I. Voshell, this headquarters on 28 February 1973, our proposal has been modified to provide for assessment at a rate of 33 cents per barrel on all shipments occurring throughout the annual period. When the actual volume fails to equal 650,000 barrels or exceeds 699,999 barrels, the rate level will be adjusted for the applicable volume on the scale as indicated in the referenced letter.

Representatives of Standard and of the Service met in Washington to work out together the text of an amendment to Quotation 1. The amendment which applied to all shipments moving under Quotation 1 from origin stations on and after January 1, 1973, named in item 2 a combination rate of 33 cents per barrel. The first factor, 20 cents per barrel, applied over the lines of Southern and Standard from Southern's El Paso station to Standard's terminal in Alamogordo, New Mexico; the second factor, a sliding scale of rates, applied onward to Standard's location at Holloman. The second factor reads in pertinent part:

From	Via	To Location on ST at	Annual Volume (Barrels)	Rate in Cents Per Barrel
Standard Transmission Terminal, Alamogordo, Otero County, New Mexico	Standard Transmission	Holloman A.F.B., Otero County, New Mexico	Less Than 550,000	22¢
			550,000–599,999	18¢
			600,000–649,999	15¢
			650,000–699,999	13¢
			700,000–749,999	10¢
			750,000–799,999	9¢
			800,000–849,999	7¢
			850,000–899,999	5¢
			900,000 and Over	4¢

* * * * * * *

NOTE

A combined rate of thirty-three cents (33¢) per barrel from El Paso to Holloman AFB will be initially assessed and collected on all shipments made under this quotation throughout the entire annual period. When the actual aggregate annual volume delivered at Holloman Air Force Base fails to equal 650,000 barrels or exceeds 699,999 barrels, the rate level for *that portion* of the movement from Alamogordo to Holloman Air Force Base will be adjusted for the *applicable volume* on the scale in Item 2 at the end of the annual period. Certification of quantities transported on annual volume rate basis is required. At the close of

the annual period the Carrier will prepare a statement showing the actual quantity delivered to Holloman Air Force Base, New Mexico, during the annual period. The statement will be Certified by the Base Transportation Officer verifying the actual quantity as being delivered. The Certified statement will be attached to the Supplemental Billing or Refund as appropriate and forwarded to the Finance Center, Indianapolis, Indiana. [Italic supplied.]

The disputed words, italicized in the amendment, are "that portion," and "applicable volume." DFSC and the Service contend that the words "that portion" refer to geographical locations (Alamogordo to Holloman) whereas Standard contends that they refer to the increments of 50,000 barrels on the volume scale. Likewise, DFSC and the Service contend that the words "applicable volume" refer to the total annual volume of barrels transported, whereas Standard contends that this also refers to increments of 50,000 barrels. Based on the Government's interpretation, and assuming that 800,000 barrels was the annual volume, the Government would pay only $.07 per barrel for the Alamogordo to Holloman portion of the movement. Using Standard's interpretation, the Government would be charged a rate of $.22 for less than 550,000 barrels, $.18 for the next 50,000 barrels, $.15 for the next 50,000, etc., until the appropriate annual volume is reached.

Rules for the interpretation of tariffs and quotations under Section 22 of the Interstate Commerce Act are the same as rules for the interpretation of contracts. *Hughes Transportation, Inc.* v. *United States*, 169 Ct. Cl. 63 (1965). And the intent of the parties is controlling. *Union Pacific R.R.* v. *United States*, 434 F. 2d 1341, 193 Ct. Cl. 521 (1970); *Union Pacific R.R.* v. *United States*, 287 F. 2d 593, 598; 152 Ct. Cl. 523 (1961). The intent of the Service is expressed in its letter of February 15, 1973, to the president of Standard. We note that the $.30 rate referred to in the letter includes the first factor of $.20 per barrel for that portion of the movement from El Paso, Texas, to Standard's terminal at Alamogordo, coupled with the second factor of $.10 per barrel on the sliding scale.

Thus, the intention of the Service appears clear on the face of the letter and is further clarified by the inclusion of an example of how the rates apply. If Standard's interpretation of its offer were followed, and using the example of 700,000 to 749,000 shown in the letter, it would be necessary to apply a $.42 per barrel rate for less than 550,000 barrels, a $.38 per barrel rate for the next 50,000 barrels, a $.35 per barrel rate, etc., until the $.30 per barrel rate was reached. However, the letter specifically states "the rate of $.30 per barrel would apply on all shipments throughout the entire 12 month period." As a result of the letter, Standard issued its amendments to the three quotations using the language shown in the note, which corresponds to the language in the original letter from the Service.

The record contains a letter dated December 6, 1974, from the vice president of Standard to the Service. The third paragraph of that letter reads:

> Our analysis of your letter of 15 November, 1974, based on meetings among A. C. Gilliam and W. J. Goss (both of whom were involved in the original negotiations) and myself is that there was apparently a miscommunication of information from the beginning of negotiations. The interpretations, yours and ours, apparently existed from the start but were not discovered, so now we have this problem.

However, the "miscommunication of information" does not invalidate the transportation contracts already performed. As was stated in *Iowa-Des Moines National Bank* v. *Insurance Co. of North America*, 459 F. 2d 650 (8th Cir. 1972), at pages 655–656:

> Ordinarily, in contract law if there is no meeting of minds then no contract exists. However, as stated in 1 Williston on Contracts, § 95, pp. 349–350 (3d ed. 1957):
> "It is often said broadly that if the parties do not understand the same thing there is no contract. But . . . it is clear that so broad a statement cannot be justified. It is even conceivable that a contract may be formed which is in accordance with the intention of neither party. If a written contract is entered into, the meaning and effect of the contract depends on the interpretation given the written language by the court. The court will give that language its natural and appropriate meaning. . . ."
> This is not the Peerless case where both parties had a different ship in mind. In the instant case a premium was paid, a contract entered into, a certain hazard insured against. It is agreed there was some kind of coverage purchased—only the extent of it is really at issue. The insurer cannot be entitled to a verdict on the ground that there existed no meeting of the minds simply because it is able to produce evidence showing that at the time the contract was executed the insurer disagreed with the insured over the contract's interpretation. Cf. Lamson v. Horton-Holden Hotel Co., 193 Iowa 355, 361, 185 N.W. 472, 474 (1921); Morrison-Knudsen Co., Inc. v. Phoenix Ins. Co. of Hartford, Conn., 172 F. 2d 124, 128 (8 Cir. 1949). Such an outcome would wholly defeat the law's well-founded position that where two reasonable interpretations exist, the one that will sustain the claim and cover the loss will be adopted over the interpretation which will defeat recovery. State Automobile and Casualty Underwriters by Automobile Underwriters v. Hartford Accident & Indemnity Co., 166 N.W. 2d 761 (Iowa 1969); Eckard v. World Insurance Co., of Omaha, Nebraska, 250 Iowa 782, 96 N.W. 2d 454 (1959); Service Life Ins. Co. of Omaha, Neb. v. McCullough, 234 Iowa 817, 13 N.W. 2d 440 (1944).

It is also Standard's contention that the rates are unreasonable if the Service's interpretation is followed because Standard's net revenue reaches a height at the low volume level of 500,000 barrels and then declines until it reaches 1,071,050 barrels. In our opinion the Service has successfully rebutted this argument by showing that Standard would still receive a minimum return of 10 percent on investment even at the lower level of net revenue.

Standard further contends that the custom and usage in the industry is to apply the scale of rates on an incremental basis. However, the Service has furnished as an example another pipeline that contracted with it using the same type of rate scale.

We are of the opinion that the terms of the amendments to the three quotations are clear on their face. However, assuming that they

are ambiguous, it would be necessary to construe the agreement against Standard, as the author of the agreement. *Penn Central Company* v. *General Mills, Inc.* 439 F. 2d 1338 (8th Cir. 1971); *C & H Transportation Co.* v. *United States*, 436 F. 2d 480, 193 Ct. Cl. 872 (1971); *Union Pacific R.R.* v. *United States*, 434 F. 2d 1341, 193 Ct. Cl. 521 (1970); *United States* v. *Great Northern Ry.* 337 F. 2d 243 (8th Cir. 1964); *United States* v. *Strickland Transp. Co.*, 204 F. 2d 325 (5th Cir. 1953); *California Tanker Co.* v. *Todd Shipyards Corp.*, 339 F. 2d 426 (2nd Cir. 1964).

Accordingly, we concur with the Service and DFSC in their interpretation of the amendments to the three rate quotations. Action can be taken against Standard in whatever manner is deemed necessary under agency regulations promulgated pursuant to the provisions of the Federal Claims Collection Act of 1966, 31 U.S.C. 951-953 (1970). Such action should be taken not later than October 1, 1976, to avoid any question of time limitations raised by Standard.

[B–185506]

Arbitration—Award—Implementation by Agency—Effective Date

U.S. Information Agency and union negotiate wage rates for Radio Technicians at Voice of America. Agency and union agreed to conduct wage survey and implement wage schedule, but action was delayed while agency sought approval from Civil Service Commission. Agency and union may agree in advance to effective date of new schedule before amount of increase is determined. Thus, new wage rate may be implemented retroactively to date agreed upon.

In the matter of U.S. Information Agency—effective date of wage rates, September 2, 1976:

This decision is in response to the request from the United States Information Agency concerning the propriety of granting retroactive pay increases to Radio Technicians employed at the Agency's Voice of America facility.

The facts, briefly stated, indicate that the Agency and Local 1418 of the National Federation of Federal Employees (NFFE) entered into a collective bargaining agreement on August 15, 1968, covering Radio Technicians employed at the Voice of America. Article XI of the agreement establishes a Joint Wage Council which considers and makes recommendations to the Chief, Domestic Service Personnel Division, regarding wage surveys and the proposed wage schedule to be established by the Chief. The Chief, on behalf of the Agency, determines the timing and coverage of the survey, conducts the survey, and, after consultation with the Joint Wage Council, establishes a wage schedule. The submission from the Agency states that on April 30, 1975, the Joint Wage Council recommended that a wage sur-

vey be implemented immediately and that the newly established rates be implemented on July 1, 1975. The Agency states further:

> Management did not oppose this recommendation, but did recognize its then believed obligation to obtain U.S. Civil Service Commission approval to conduct the survey in June, as opposed to the past practice of conducting a new survey in November of each calendar year.

The Civil Service Commission responded by letter dated August 27, 1975, that the Commission has no authority to approve or disapprove the Agency's request since the wage-fixing mechanism was established under a collective bargaining agreement and, as such, it is outside the Commission's authority with respect to wage setting for prevailing rate employees. See Public Law 92-392, section 9(b), 86 Stat. 574. The Agency in its submission concludes by stating that it supports the union's request that the new rates, which resulted from a wage survey ordered on August 28, 1975, and conducted in September 1975, be made retroactive to July 1, 1975, if it is within the authority of the Agency to do so. The union, Local 1418 of NFFE, has also written arguing that the Agency had agreed in May 1975 that the effective date of the wage survey would be July 1, 1975, that the Agency then acted erroneously in first seeking Civil Service Commission approval for conducting an early wage survey, and that the effective date of the new wage schedule should not be delayed due to the Agency's erroneous actions.

Our Office has held that an agency and a union may agree in advance on an effective date to implement a negotiated wage schedule, even though the exact amount of the increase has not yet been determined, so long as the effective date is set no earlier than the date of the preliminary agreement setting that date. See B-183083, November 28, 1975, and cases cited therein. We similarly held that the parties can also agree that an arbitrator may set the effective date of a wage increase where negotiations between the agency and the union reached an impasse. 55 Comp. Gen. 1006 (1976). In the present case, it appears that the parties agreed in advance that the effective date of a new wage schedule would be July 1, 1975, and that a delay resulted from the Agency seeking the approval of the Civil Service Commission.

Accordingly, we have no objection to the implementation of the new wage schedule effective July 1, 1975.

[B-185508]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—What Constitutes

Department of Defense employee's claim for reimbursement of temporary quarters subsistence expenses incurred incident to transfer to new official duty station in Canal Zone is allowable where claimant intended to move to family-type

quarters when they became available but lived in permanent bachelor-type Government quarters during 46 days of the 60-day entitlement period.

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Private or Commercial Lodgings *v.* Permanent-Type Government Quarters

The description of temporary quarters in Federal Travel Regulations para. 2–5.2c and 2 Joint Travel Regulations para. C8250 as "any lodging obtained from private or commercial sources" does not prohibit the payment of temporary quarters subsistence allowance when permanent-type Government-owned quarters are occupied temporarily.

In the matter of John Castaneda—claim for temporary quarters subsistence expenses, September 2, 1976:

This is in response to a request by the Per Diem, Travel, and Transportation Allowance Committee, PDTATAC Control No. 75–34, for an advance decision whether Mr. John Castaneda is entitled to temporary quarters subsistence expenses for the cost of lodging, meals and laundry incurred for the period of July 16 through August 30, 1974, during which time he occupied Government-owned quarters.

The pertinent facts as they appear in the record are that Mr. Castaneda was transferred to his new official duty station at the Defense Mapping Agency in the Canal Zone effective July 2, 1974, to be joined later by his wife and two children. Upon arriving in the Canal Zone on July 2, 1974, he was assigned to quarters which were acknowledged to be for transient personnel, and he remained in those quarters until July 16, 1974, when he was assigned to permanent-type Government quarters suitable for a bachelor or unaccompanied employee of his grade level. Upon arrival of dependents on November 1, 1974, the employee and dependents continued to reside in these quarters, on a temporary basis, by special permission of the Housing Officer until November 29, 1974, when family quarters became available.

Mr. Castaneda had been authorized 60 days temporary quarters subsistence expenses (TQSE) under the provisions of 5 U.S. Code § 5724a(a)(3) (1970) and was paid this allowance for the period of July 2 through July 15, 1974. Yet, his claim for expenses incurred from July 16 thorugh August 30, 1974, was not acted upon because of uncertainty as to his entitlement to TQSE for a period in which he occupied permanent, Government-owned quarters rather than temporary, non-Government-owned quarters. Moreover, beginning on July 16, 1974, a regular monthly payroll deduction was initiated as a rental charge for the quarters Mr. Castaneda began to occupy on that date. Yet, the record also indicates that from the time he accepted this assignment of quarters until the time his family joined him, Mr. Castaneda manifested, both by word and action, his belief that he occupied these quarters solely on a temporary basis.

As mentioned above, section 5724a(a)(3) of Title 5, U.S. Code, authorizes the payment of subsistence expenses incurred by an employee "while occupying temporary quarters." In an attmept to describe what is meant by "temporary quarters," the implementing regulations, see Federal Travel Regulations (FPMR 101-7) part 5 (May 1973) and 2 Joint Travel Regulations (JTR) para. C8250 (change 75, December 1, 1971), provides as follows:

> Temporary quarters refers to any lodging obtained from *private or commercial sources* to be occupied temporarily * * *. [Italic supplied.]

The uncertainty as to Mr. Castaneda's entitlement to the allowance arises because of confusion over the significance of the phrase "obtained from private or commercial sources." One argument asserts that since Mr. Castaneda lived in Government-owned, permanent-type quarters his lodging was not "obtained from private or commercial sources," and therefore he is not entitled to the allowance. On the other hand, the opposing argument holds that the controlling factor in this case is Mr. Castaneda's intent at the time he was occupying the Government-owned quarters, and since he viewed these quarters as only temporary until permanent-type family quarters became available, the quarters were in fact only temporary and he is therefore entitled to the allowance. Thus, the question here is whether Mr. Castaneda was occupying "temporary quarters" as defined in the pertinent regulations and as construed in our decisions.

Yet, the term "temporary quarters" is not defined either in 5 U.S.C. § 5724a(a)(3) or in the implementing regulations, FPMR 101-7 and 2 JTR para. C8250. Therefore, in past decisions we have stated that a determination as to whether or not a particular living arrangement constitutes temporary quarters depends on the facts of each case, giving weight to the expressed intent of the employee as manifested at the time the quarters in question are occupied. *See* 47 Comp. Gen. 84 (1967); B-173585, September 17, 1971; B-184618, April 16, 1976.

In this case, Mr. Castaneda gave sufficient evidence of his intent to occupy the Government-owned quarters on a temporary basis until such time as family-type quarters became available. However, the question remains whether one who occupies permanent-type, Government-owned quarters on a temporary basis is precluded from receiving TQSE because the regulations require that lodging be obtained from "private or commercial sources."

Prior to change 38, dated August 1, 1968, 2 JTR para. C8250 provided basically as noted above. However, beginning with change 38 and continuing through change 52, dated January 1, 1970, para. C8250 dropped the requirement that lodging be obtained in "private or commercial facilities." This change was apparently initiated so that the

language in 2 JTR para. C8250 would be the same as that found in Bureau of the Budget (BOB) Circular No. A–56, section 2.5b(3) (revised June 26, 1969). However, with change 75, dated December 1, 1971, the disputed phrase, "lodging obtained from private or commercial sources" was added to 2 JTR para. C8250, apparently to reflect the language in the then most recent version of BOB Circular No. A–56, section 8.2c, dated September 1, 1971. Yet, we do not believe that the addition of this phrase, so similar to the earlier discarded one, was meant to preclude the payment of TQSE to those who occupy Government-owned quarters on a temporary basis.

In explaining the purpose of the changes in what was now entitled Office of Management and Budget Circular No. A–56 (revised September 1, 1971), the "Summary of Changes" stated that there had been:

> * * * an alteration of the wording in 8.2c to make it clear that reimbursement may be allowed even though commercial quarters are not occupied.

In other words, the phrase in question was added in order to authorize the payment of TQSE even in those situations where commercial quarters were not utilized. Therefore, it is clear that the phrase was not intended to be restrictive, but was in fact intended to allow employees greater flexibility in choosing their temporary quarters, even if it meant using Government-owned quarters.

Accordingly, since the General Services Administration's Federal Travel Regulations adopted the same language as that used in Office of Management and Budget Circular No. A–56, section 8.2c, *supra*, it can be assumed that the same overall result was intended. Therefore, since payment of the allowance is not prohibited by the applicable regulations, and since Mr. Castaneda only intended to occupy the quarters temporarily, he may be reimbursed for his expenses for the period July 16 to August 30, 1974, if otherwise correct.

[B–184874]

Pay—Retired—Survivor Benefit Plan—Cost-of-Living Adjustments—Less Than Maximum Coverage

Base amounts designated under 10 U.S.C. 1447(2)(B) upon which Survivor Benefit Plan annuities are computed when member elects less than maximum coverage are not subject to adjustment under 10 U.S.C. 1401a(d) or (e) which apply modified cost-of-living adjustments to retired pay computation at time of retirement.

Pay—Retired—Survivor Benefit Plan—Cost-of-Living Adjustments—Designated Base Amounts

All base amounts designated under 10 U.S.C. 1447(2) upon which Survivor Benefit Plan annuities are based are subject to cost-of-living adjustments under 10 U.S.C. 1401a(b).

Pay—Retired—Survivor Benefit Plan—Cost-of-Living Adjustments—Over Reduction of Retired Pay or Under Payment of Annuities—Disposition

Amounts due members or beneficiaries for over reduction of retired pay or under payment of annuities due to computation of Survivor Benefit Plan base amounts under 10 U.S.C. 1447(2) not in accordance with the rules stated in this decision should be paid to persons entitled thereto, and amounts due the United States are subject to collection or waiver under 10 U.S.C. 1453 or 2774, as applicable.

In the matter of the Survivor Benefit Plan—DOD Military Pay and Allowance Committee Action No. 518, September 9, 1976:

This action is in response to a letter dated September 2, 1975, from the Assistant Secretary of Defense (Comptroller) requesting an advance decision on several questions relating to the proper method of applying cost-of-living increases pursuant to 10 U.S. Code 1401a (1970) to the base amounts prescribed by 10 U.S.C. 1447(2) (Supp. II, 1972) upon which Survivor Benefit Plan (SBP) annuities are computed. The questions presented are contained in Department of Defense Military Pay and Allowance Committee Action No. 518, enclosed with the letter.

Section 1447(2) of Title 10 provides as follows:

(2) "Base amount" means—
(A) the amount of monthly retired or retainer pay to which a person—
(i) was entitled when he became eligible for that pay; or
(ii) later became entitled by being advanced on the retired list, performing active duty, or being transferred from the temporary disability retired list to the permanent disability list; or
(B) any amount less than that described by clause (A) designated by that person on or before the first day for which he became eligible for retired or retainer pay, but not less than $300;
as increased from time to time under section 1401a of this title. [Italic supplied.]

The Committee Action indicates that the provision in section 1447(2) requiring increases under section 1401a could be construed to mean that the base amount designated by a member (under clause (B)) is required to be adjusted on the date of his retirement by the increases applied under 10 U.S.C. 1401a(d) or (e), whichever is applicable, which are used in determining the member's initial retired pay. On the other hand, it is indicated, the provision may be construed to mean that such adjustments are not required in the designated base amounts, but rather it only requires that the designated base amounts be adjusted subsequent to the date of retirement by the increases applied to retired and retainer pay under 10 U.S.C. 1401a(b), which provides for increases in retired pay from time to time based on increases in the Consumer Price Index.

In this regard the Committee Action presents the following questions:

1. Do the provisions of section 1447(2) of title 10, United States Code, require the base amount designated by a member who elects to participate in the

Survivor Benefit Plan (SBP) to be adjusted upon the date of retirement by the same cost-of-living (COL) increases applied under subsection 1401a(d) or (e) of title 10, United States Code, whichever is applicable, in determining the member's initial retired or retainer pay?

2. If the answer to question 1 is in the affirmative, do the provisions of section 1447(2) require *all* designated base amounts to be adjusted by the same COL increases applied under subsection 1401a(d) or (e), whichever is applicable, in determining the member's initial retired or retainer pay, or do they require only those designated base amounts which equal the member's retired or retainer pay before the COL increases are applied to be so adjusted?

3. If the answer to question 1 is in the negative, do the provisions of section 1447(2) require *all* designated base amounts to be adjusted by the same COL increases applied to retired and retainer pay under subsection 1401a(b) of title 10, United States Code, or do they require only those designated base amounts which equal the member's retired or retainer pay to be so adjusted?

4. If the answer to question 1 is in the affirmative and the answer to question 2 is that all designated base amounts are to be adjusted by the same COL increases applied in determining the member's initial retired or retainer pay under subsection 1401a(d) or (e), how should the amount of the adjustments be calculated?

5. May any adjustments of base amounts, amounts deducted from retired or retainer pay, or annuity amounts which may be necessitated by the answer to any of the foregoing questions be made prospectively rather than retroactively?

Concerning question 1, the Committee Action indicates that a majority of the Military Pay and Allowance Committee favors the view that the provisions of section 1447(2) do not require a designated base amount to be adjusted upon the date of retirement by the same increases applied under 10 U.S.C. 1401a(d) or (e) in determining the member's initial retired or retainer pay. In support of that view the Committee Action states in part:

* * * a review of section 1447(2) in conjunction with its legislative history indicates that Congress intended that the designated base amounts be adjusted only by the COL increases applicable to retired and retainer pay under subsection 1401a(b) subsequent to the members' date of retirement. In its report the Senate Armed Services Committee defined the term "base amount" to mean "the *full amount* of retired or retainer pay that an individual receives at retirement unless he designated a smaller amount * * *." S. Rep. No. 92-1089, 92nd Congress, 2nd Session 49 (September 6, 1972). In addition, the Committee stated that "Consumer Price Index (CPI) adjustments will be made to the base amount whenever and in the same manner that retired pay is increased (section 1401a of title 10)." *Ibid.* [Italic supplied.]

On the other hand, in support of the view that the provisions of 10 U.S.C. 1401a(d) or (e) are to be applied to designated base amounts under clause (B), the Committee Action indicates in part that it may be argued—

* * * that the language of section 1447(2) does not restrict the adjustment of designated base amounts to COL increases authorized by subsection 1401a(b) subsequent to the member's date of retirement. Consequently, the increases contemplated by Congress when it enacted section 1447(2) may be said to include all of those COL increases authorized by the various subsections of section 1401a. Since it would appear that subsections 1401a(d) and (e) authorize COL increase adjustments in the retired or retainer pay of certain members on the date of their retirement, it may be argued that the base amounts designated by such members should also be adjusted by the same COL increases on the date of their retirement. To do otherwise, it is claimed, would be to create an unintended inequity in the SBP annuity which would be payable to the survivors of members who are similarly situated. For example, an enlisted member in the grade of E-9

with 20 years of service retired on February 1, 1973, and selected a base amount of $400. Another enlisted member with the same grade and service retired on August 1, 1973, and also selected a base amount of $400. Even though both members are receiving the same gross monthly retired pay because of section 1401a, the SBP annuity which would be payable to the widow of the first member is greater than that which would be payable to the widow of the second member. At the time of the second member's retirement, the first member's base amount would have already been adjusted to reflect the COL increase (3.6%) authorized by subsection 1401a(c) on July 1, 1973.

It is also indicated that one service currently applies subsection 1401a(d) or (e) to clause (B) designated amounts, while the other services do not.

Section 1447(2) provides for two basic types of initial base amounts. The first type under clause (A) is the entire retired or retainer pay to which the member is entitled, the computation of which is based on the statutes applicable to computation of retired or retainer pay and would include the application of 10 U.S.C. 1401a(d) or (e) to arrive at the amount of such pay. The other type, under clause (B), is any amount designated by the member which is less than full retired or retainer pay but not less than $300. It is to those "base amounts" then, that the provision requiring the increases "from time to time under section 1401a" is to be applied. Thus, while it would be necessary to apply 10 U.S.C. 1401a(d) or (e) in computing the retired or retainer pay the member is entitled to receive (which amount is the base amount under clause (A)) that would not be the case in determining the base amount under clause (B) since that is an amount designated by the member. It is our view that the initial base amount under clause (B) is the actual amount designated by the member and not that amount as increased under 10 U.S.C. 1401a(d) or (e). We believe the language of the law and its legislative history support that view. While, as the example given in Committee Action shows, there may be some differences in base amounts (and in premiums deducted from retired pay) between members who retire at different times although they designated the same base amount, we do not view that fact as sufficiently persuasive to permit us to construe the law in a different manner. Accordingly, we agree with the majority of the Committee and question 1 is, therefore, answered in the negative.

In view of the answer to question 1, questions 2 and 4 require no answer.

Concerning question 3, the Committee Action indicates that the majority of the Committee is of the opinion that all minimum base amounts ($300) and base amounts greater than the minimum but less than full initial retired or retainer pay are required to be adjusted for cost-of-living increases in the same manner and at the same time as the maximum base amounts are adjusted under 10 U.S.C. 1401a(b). It

is indicated that all of the services currently make such adjustments. However, it is pointed out that such practice may be questionable for two reasons. First, a strict interpretation of the words "as increased from time to time under section 1401a of this title" in section 1447(2) would preclude its application to base amounts which are less than full retired or retainer pay since increases "under section 1401a" apply to retired and retainer pay and not to base amounts. Second, it is indicated that the legislative history of section 1447(2) provides some indication that Congress may have intended that designated base amounts which are less than full retired or retainer pay were not to be adjusted to reflect section 1401a increases. In this regard the following statement taken from the Senate Armed Services Committee Report on the SBP is cited in the submission:

"A minimum base amount of $300 is established for persons whose retired or retainer pay is in excess of that amount. Such a minimum participation level is desirable from an administrative point of view * * * [A] $300 base amount, which produces a monthly benefit of $165 at a monthly cost of $7.50 is considered a reasonable minimum." S. Rep. No. 92-1089, 92d Congress, 2nd Session 65 (September 6, 1972).

In addition it is noted that the Armed Services Committee Report, at page 50, indicated that a member would not have "to participate beyond the minimum cost of the Plan."

While those arguments are not without merit, clearly the language of section 1447(2) requiring application of section 1401a increases applies to the entire section 1447(2). If it had been the congressional intent that such increases be applied only to maximum base amounts under clause (A) it is our view that a different arrangement of words would have been used. Further, it is consistent with the legislative history of this provision as we view it to hold that base amounts even though less than the full retired pay entitlement are subject to adjustment based upon cost-of-living increases under 1401a. Accordingly, in answer to question 3 all base amounts, including those established under 1447(2)(B), are subject to cost-of-living adjustments under section 1401a(b).

Concerning question 5, it is not entirely clear as to how adjustments which may be required by this decision could be made on a prospective basis only. It would appear that any amounts due as a result of this decision as additional annuities or as reduced reductions in retired pay (premiums) should be computed and paid to the persons entitled thereto. As to amounts due the United States due to overpayments of SBP annuities or under reductions in retired or retainer pay, such amounts would be subject to collection or consideration for waiver under 10 U.S.C. 1453 and 2774 (Supp. II, 1972), respectively. Question 5 is answered accordingly.

[B-186398]

Appropriations—Availability—Traffic Lights—State Highways—Benefit of Government

Costs of procuring and installing traffic control light on Federal property to regulate traffic at intersection of Federal installation and State highway may be paid by the Army since the structure is located entirely on Federal property, for the benefit primarily of Federal employees or military members, and is necessary for safe ingress and egress to the military installations. 36 Comp. Gen. 286 and 51 *id.* 135, distinguished.

In the matter of the Department of the Army—availability of appropriations for traffic light on State highway, September 13, 1976:

This is in response to a request for an advance decision from the Acting Comptroller of the Army as to the availability of money appropriated to the Department of the Army for the acquisition and installation on Federal Government property of a traffic light to regulate traffic at the intersection of a State highway and an Army installation.

The State highway bisects Carlisle Barracks, Pennsylvania, an Army installation. Traffic must cross Claremont Farm Road, the State road, to travel from one part of Carlisle Barracks to the other. A local traffic study as well as two serious accidents at the intersection where traffic moving from one side of the base to the other crosses Claremont Farm Road have convinced both Army and local officials of the need for a traffic light at this intersection. However, local authorities have declined to purchase a traffic light because of insufficient funds. They have agreed, however, to maintain and repair a traffic light if the Army purchases and installs it.

Although recognizing that prior decisions of this Office at 36 Comp. Gen. 286 (1956) and 51 *id.* 135 (1970) have precluded the availability of appropriations for installation of traffic lights, the Army contends that this case may be distinguishable in that the traffic light could be located entirely upon Federal property, and that the local road actually bisects the Federal installation.

It is our view that under the circumstances of this case, appropriated funds may be expended to provide a traffic light on Federal property to regulate traffic at the intersection with the State highway.

In 36 Comp. Gen. 286 (1956), the question arose whether the Army could:

* * * legally procure and install a traffic control device *upon a highway over which the United States exercises no legislative jurisdiction* * * *. [Italic supplied.]

The question was answered in the negative since traffic control is a local governmental function. Local functions are financed from local revenues and taxes, and Federal contributions in lieu of State and

local taxation are not authorized in the absence of specific legislative authorization. *See also* 51 Comp. Gen. 135 (1971).

In this case, however, the traffic control device can apparently be physically located on land over which the United States does exercise legislative jurisdiction, and will be used for the purpose of controlling traffic moving from one portion of the Federal installation to the other. While it would also have the effect of controlling traffic on the State highway, it is apparent that the primary benefit of the traffic control installation would be to the United States.

In 24 Comp. Gen. 599 (1945), we said that local governmental functions are those which are exercised for the benefit and welfare of the community at large. While that is true of traffic control in general, the particular action proposed in this instance is primarily for the benefit of the Federal facility where the traffic light is to be installed. Under the circumstances, we would not be required to object to the procurement, installation and operation by the Army of a traffic control device on United States property at Carlisle Barracks.

[B-117604]

Federal Claims Collection Act of 1966—Debt Collection—Administrative Responsibility—4 GAO 54.1

The Federal Claims Collection Act of 1966, 31 U.S.C. 951–953, places responsibility in the administrative agencies for collecting debts determined to be due the United States which arise as a result of their activities. This includes the authority to compromise, terminate or suspend collection action. B-117604(17), Aug. 20, 1975, modified.

Federal Claims Collection Act of 1966—Cost of Collection Exceeding Recovery

Regulations implementing Federal Claims Collection Act provide that head of agency may terminate collection activity when further collection action will exceed amount recoverable.

Debt Collections—Point of Diminishing Returns

General Accounting Office manual contains provision requiring establishment of realistic points of diminishing returns beyond which further collection efforts are not justified. B-117604(17), Aug. 20, 1975, modified.

Claims—Transportation—Loss and Damage Claims—Minimum of $25

This Office concurs in establishment of any reasonable minimum amount for filing claims involving loss and damage to Government shipments where cost studies indicate such action is warranted.

In the matter of minimum amounts for filing claims for loss and damage, September 17, 1976:

The General Services Administration (GSA) in its letter of June 30, 1076, to the Director, Claims Division, has requested that this Office initiate necessary action to authorize a $25 minimum for the filing

of all claims involving loss and damage to GSA freight shipments. The request is based on our Circular Letter of August 20, 1975 (B-117604(17)), to the Heads of Departments, Agencies, and Others Concerned: Subject: Monetary Limitation on Claims for Loss and Damage. The letter was issued because of a recommendation in the Joint Agency Transportation Study, issued March 6, 1970, that the Government establish a realistic minimum below which it is uneconomical or impractical to file formal claims against carriers for loss and damage and absorb amounts falling below the established minimum.

We stated therein that:

> Departments, agencies, and others concerned are therefore authorized, but not required, to observe a minimum of $25 in processing loss and damage claims against carriers or forwarders and in absorbing amounts falling below that minimum. This minimum shall not be applied, however, to small domestic shipments made on commercial forms and procedures under the provisions of 5 GAO 3017, as amended, since loss and damage claims on those shipments can be handled at relatively little expense.

GSA has requested that the minimum pertaining to small domestic shipments on commercial forms also should be set at $25. In support of this request GSA has produced cost figures which indicate that its internal processing costs for this type of shipment are in excess of $25 per claim. Further, GSA indicates that the distinction between the two types of loss and damage claims necessitates two different sets of external instructions to recipients of GSA shipments, as well as different internal operating procedures within GSA.

The Federal Claims Collection Act of 1966, 31 U.S. Code 951-953 (1970), places the responsibility in the administrative agencies for collecting debts determined to be due the United States which arise as a result of their activities. This includes the authority to compromise, terminate or suspend collection action. See 4 GAO 54.1 (Sept. 1, 1967). Further, regulations implementing the Federal Claims Collection Act, in particular, 4 C.F.R. 104.3(c) (1976), implementing 31 U.S.C. 952(a) (1970), provide that the head of an agency or his designee may terminate collection activity and consider the agency's file closed when it is likely that the cost of further collection action will exceed the amount recoverable. Therefore, the head of GSA or his designee already would have the authority to terminate or suspend collection action if such action is warranted.

The GAO manual also contains a provision requiring the establishment of realistic points of diminishing returns beyond which further collection efforts by the Agency are not justified. 4 GAO 55.3 (June 3, 1968). *See* 49 Comp. Gen. 359 (1969).

The minimum amount established by GSA or by any agency would be subject to review by this Office under our regular audit authority,

31 U.S.C. 41 (1970); 31 U.S.C. 67 (1970). It apparently was felt at the time the Joint Agency Transportation Study was issued in 1970 that it would be in the best interests of the Government and sound auditing policy if the minimum amount for processing loss and damage claims was not applied to small domestic shipments on commercial forms. We now believe, however, that the setting of an appropriate minimum on this type of shipment is the prerogative of the concerned departments and agencies. We note that in our circular letter we state that departments, agencies, and others concerned are authorized, *but not required*, to observe a minimum of $25 in processing loss and damage claims on other types of shipments. This allowed agencies a choice in processing loss and damage freight claims, a choice which already was authorized by the Federal Claims Collection Act of 1966.

This Office would not object to the establishment of any reasonable minimum amount for filing claims involving loss and damage to Government freight shipments where cost studies indicate that such action is warranted.

GSA, in our opinion, has justified its establishment of a $25 minimum for the filing of claims involving loss and damage to all types of GSA freight shipments and we concur in the recommended change in its regulations.

[B-186628]

Station Allowances—Military Personnel—Temporary Lodgings—Dependent(s) Acquired Subsequent To Transfer

Payment of temporary lodging allowance is not authorized where member marries after being transferred to Hawaii and new wife travels to his duty station at his personal expense, since the member had no dependent on the effective date of his transfer to Hawaii and his vacating of the lodgings he originally occupied while looking for family quarters was not for reasons beyond the control of the member within contemplation of paragraph M4303-1, item 2, Volume 1, Joint Travel Regulations.

In the matter of Sergeant Herman Mitchell, Jr., USMC, September 17, 1976:

This action is in response to letter dated March 23, 1976, with enclosures, file reference CRD/HBW/cag 7220, from the Disbursing Officer, Marine Corps Air Station, Kaneohe Bay, Hawaii, FPO San Francisco 96615, requesting an advance decision concerning the entitlement of Sergeant Herman Mitchell, Jr., 566-68-8997, USMC, to receive temporary lodging allowance (TLA) for the period February 19 through 28, 1976, in the circumstances described. The letter was forwarded to our Office by endorsement dated May 20, 1976, from the Per Diem, Travel and Transportation Allowance Committee and assigned PDTATAC Control No. 76-12.

The record submitted here shows that by Division Special Order No. 176–75, Headquarters 3d Marine Division (Reinf) FMF, a permanent change of station (PCS) was directed for Sergeant Mitchell to the 1st Marine Brigade, FMF (Kaneohe Bay, Hawaii), and that pursuant to these PCS orders, the member reported to his new station on June 17, 1975. At this time the member was a bachelor, and was classified as a member without dependents on the effective date of his PCS orders.

On January 10, 1976, the member was married in Los Angeles, California. Thereafter, by letter dated February 9, 1976, to his commanding officer, the member requested military dependent status recognition for his wife, Gail M. Mitchell, and that she be approved as "command sponsored." By endorsement dated February 10, 1976, such request was approved, and it appears that the member's wife traveled to Hawaii on February 19, 1976, at the member's expense.

The record further shows that on February 26, 1976, the member filed a certificate claiming TLA for the period February 19 through 28, 1976, stating that no Government quarters or messing facilities were available for the member and his dependent and that they were required to secure temporary lodgings pending completion of arrangements for permanent living accommodations. In support of that request, the member submitted a receipt from the Pali Palms Hotel showing his payment for lodgings during the period February 19 through March 2, 1976.

Since Sergeant Mitchell became a "member with dependents" subsequent to the effective date of his orders to the First Marine Brigade, Kaneohe Bay, Hawaii, the disbursing officer questions whether there is entitlement to TLA for the member and his dependent in connection with their use of temporary lodging facilities upon his dependent's arrival in Hawaii.

In his discussion of the matter, the disbursing officer says that inasmuch as the member's need for TLA is associated with the search for family-type quarters upon his dependent's arrival, his need is identical to that of members for whom TLA is payable under paragraph M4303–2c(5) of Volume 1, Joint Travel Regulations (1 JTR). However, he expresses doubt as to whether such authority is applicable to members whose dependents arrived subsequent to the member's arrival because the member was a "member without dependents" upon his arrival, as opposed to a member who arrived prior to his dependents for other reasons.

The disbursing officer points out that paragraph M4303–1, item 2, 1 JTR, provides for TLA in connection with the vacation of quarters not the direct result of PCS orders. However, the disbursing officer expresses doubt as to whether the member's vacation of bachelor enlisted quarters to accompany his wife in temporary lodging facilities during his search for family-type quarters, and his dependent's use of the same facilities, was "for reasons beyond the control of the member."

In forwarding the matter here for decision, the Executive, Per Diem, Travel and Transportation Allowance Committees, indicates that the need for TLA does not appear to have been for reasons beyond the control of the member as contemplated by paragraph M4303–1, item 2, 1 JTR, since the member had sufficient time to locate family-type quarters for himself and his wife prior to her arrival in Hawaii.

Section 405 of Title 37, U.S. Code (1970), provides that the Secretaries concerned may authorize the payment of a 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 member who is on duty outside the United States or in Hawaii or Alaska, whether or not he is in a travel status. Regulations providing for payment of the TLA promulgated under this authority are contained in paragraph M4303, 1 JTR.

The purpose of TLA, as stated in subparagraph M4303–1 of those regulations, is to partially reimburse a member for the "more than normal expenses" incurred at hotels or hotel-like accommodations and public restaurants, including upon initial arrival (reporting) at a permanent duty station outside the United States and pending assignment of Government quarters, or pending completion of arrangements for other permanent living accommodations when Government quarters are not available. The allowance is also payable if approved by the overseas commander when a member must vacate quarters for reasons beyond his control. Subparagraph M4303–1 also provides that the uniformed services concerned may issue such regulations as are necessary to implement and judiciously administer this allowance. Subparagraph M4303–2a provides that TLA is payable when a member, his dependents, or both are required to and do occupy hotel or hotel-like accommodations at personal expense.

While paragraph M4303–2c(5), 1 JTR, provides for authorization of TLA in the case of certain members arriving at an overseas station prior to the arrival of their dependents, such authorization relates to members who have dependents on the effective date of transfer to an overseas station, who are not able to have their dependents accompany them at the time of initial assignment.

No provision in 1 JTR specifically covers the case of a command sponsored dependent wife acquired by a member after the effective date of his PCS orders. However, Fleet Marine Force Pacific Order 7220.1H, dated January 2, 1973, prescribing procedures for the administration of TLA in Hawaii, specifically provides that "Payment of arrival TLA is not authorized for a new dependent acquired by marriage after the effective date of the member's PCS orders which direct him to duty in Hawaii." This service regulation parallels the rule that members are entitled to PCS transportation allowances authorized for dependents only as to dependents in existence on the effective date of the PCS orders. *Cf.* 47 Comp. Gen. 710, 712 (1968).

Further, the member's vacation of bachelor enlisted quarters to accompany his new wife in temporary lodging facilities during his search for family-type quarters may not be considered as being covered by paragraph M4303–1, item 2, 1 JTR. This provision and the instruction in subparagraph M4303–2d indicate that payment of this allowance when not incident to arrival or departure of the member will be limited to unusual situations beyond the member's control. In keeping with those regulations the examples given in Fleet Marine Force Pacific Order 7220.1H, January 2, 1973, of circumstances which are considered to be beyond the control of the member are a sudden withdrawal of the housing from the market by the landlord, or extensive damage from fire or flood which renders permanent quarters uninhabitable. Eviction for cause or personal preferences for different quarters are not considered beyond the control of the member. The member's marriage after assignment to Hawaii is not a situation covered by those provisions.

Accordingly, payment of TLA is not authorized in the circumstances presented.

[B–180486]

Compensation—Removals, Suspensions, etc.—Back Pay—Administrative Errors—Failure To Carry Out Agency Policy

Supervisor, whose salary was less than that of wage board employee whom he supervised, was not identified as eligible for pay adjustment. Since prompt identification was required by nondiscretionary agency regulation, noncompliance constitutes administrative error which may be rectified by the granting of back-pay under 5 U.S.C. 5596.

Compensation—Additional—Supervision of Wage Board Employees—Retroactive Pay Adjustments

Pay adjustment for General Schedule supervisor of wage board employee under 5 U.S.C. 5333(b) is conditioned on continued supervision of the wage board employee and is limited to nearest rate of supervisor's grade which exceeds the highest rate of basic pay paid to supervised employee. When these conditions are no longer met, as when wage board employee is separated or reduced in pay,

the adjustment previously granted to the supervisor must be eliminated or reduced, as required by the circumstances.

In the matter of Billy M. Medaugh—retroactive pay adjustment, September 20, 1976:

This matter is before us as the result of the appeal by Mr. Billy M. Medaugh, the claimant herein, of the disallowance by our Claims Division of his claim for retroactive compensation. This claim was filed to correct an administrative failure to adjust Mr. Medaugh's pay from December 12, 1970, to September 30, 1972, during which Mr. Medaugh was the supervisor of a wage board employee whose salary exceeded his.

The record indicates that Mr. Medaugh, an employee of the Department of the Air Force, was appointed as a commissary store manager, GS–4, step 1, at $5,853 per annum effective December 12, 1970. Part of his duties entailed supervising a wage board employee whose rate of pay exceeded his own salary. Although the claimant was promoted to GS–5, step 1, on April 4, 1971, the wage employee's salary still exceeded that of the claimant. The situation persisted until the resignation of the wage employee on September 30, 1972.

The agency concedes that because of an administrative oversight, it failed to identify the claimant as eligible for a pay adjustment as provided by Federal Personnel Manual (FPM) Supplement 990–2, Chapter 531, subchapter S3 (February 8, 1967). As a corrective measure, the employing agency's Civilian Personnel Office issued on June 19, 1973, Notifications of Personnel Action which set the claimant's proper initial salary rate at GS–4, step 9, and changed his promotion rate of pay to GS–5, step 7. A voucher for retroactive compensation was prepared for the period from December 12, 1970, through June 30, 1973, in the gross amount of $3,532.80. Because the legality of these actions was questioned, the matter was forwarded as a doubtful claim to our Claims Division. The agency administratively recommended that the claim be approved.

It should be noted that on November 26, 1972, the employing agency increased Mr. Medaugh's pay to adjust his salary with respect to a second wage board employee who was subject to his supervision subsequent to November 12, 1972. Thereafter, the claimant's salary exceeded that of the second wage board employee. During the period from October 1, 1972, to November 12, 1972, Mr. Medaugh did not supervise any employee whose salary exceeded his own. Under the provisions of 5 U.S. Code § 5333(b) (1970) and implementing regulations at 5 C.F.R. §§ 531.301–531.305, the pay adjustment for supervisors is conditioned upon the regular supervision of a wage grade

employee and is limited to the nearest rate of his grade which exceeds the highest rate of basic pay paid to the supervised employee. When these conditions are no longer met, as when the wage board employee is separated or reduced in pay, the pay adjustment previously granted to the supervisor must be eliminated or reduced, as required by the circumstances. Since, as noted above, Mr. Medaugh's rate of pay was adjusted on November 26, 1972, to exceed that of the second wage board employee and because he did not supervise any wage board employee receiving a rate of pay in excess of his rate of basic pay between October 1 and November 12, 1972, the only period for which Mr. Medaugh may properly claim a salary adjustment is from December 12, 1970, to September 30, 1972.

In Settlement Certificate No. Z–2524194 dated November 5, 1973, the Claims Division disallowed Mr. Medaugh's claim, based on 5 U.S.C. § 5333(b) which provides for pay adjustments for General Schedule employees who supervise wage board employees. The statute merely provides that the salary of a supervisor of wage board employees *may* be adjusted upward within the grade of the supervisor until it exceeds that of the wage employees. Relying on the statute, and on implementing regulations at 5 C.F.R. § 531.305(a), the Claims Division determined that such adjustment is permissive and discretionary with the employing agency. Finding no automatic entitlement, the claim was denied.

Further implementing the program of pay adjustments for General Schedule supervisors of wage board employees, the Department of the Air Force had promulgated regulations at section 5213 of Air Force Manual 40–1 which, although presently rescinded, were in force at all times relevant to this action. Paragraph 3c thereof provided:

> * * * Operating officials, insofar as practicable and in accordance with good management practices, will avoid making or continuing work assignments which result in a situation where Classification Act employees supervise Wage Board employees receiving a higher basic rate of compensation. Where this is not practicable, they *must* initiate a request for pay adjustment. This recommendation must state the basis for the determination of supervision of one or more Wage Board employees receiving a higher basic rate of compensation. [Italic supplied.]

Paragraph 2 states that it is the Department's policy that the pay of such a supervisor "*is* adjusted as provided by this section unless the adjustment would result in inequitable treatment among supervisors in the same or related organizational entities." [Italic supplied.] Thus, although the supervisor's pay adjustment is merely authorized and permitted by statute, and is therefore generally within the discretion of the employing agency, the Department of the Air Force had, by internal regulation, mandated that immediate action be taken to adjust

the salaries of eligible employees. Because of administrative oversight, Mr. Medaugh's employing agency failed to perform the required act of identifying him for the salary adjustment. When he was so identified, the agency admitted error, issued corrective notices of personnel action, and administratively recommended that the claim be paid.

The record in this case indicates some confusion as to whether an administrative error in the nature of that which occurred in the failure to adjust Mr. Medaugh's pay may be corrected by retroactive salary adjustment under the Back Pay Act of 1966. That act, as codified at 5 U.S.C. § 5596 (1970), provides:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of leave authorized for the employee by law or regulation.

(c) The Civil Service Commission shall prescribe regulations to carry out this section * * *.

The Civil Service Commission has promulgated regulations pursuant to the above-quoted statute in 5 C.F.R., Part 550, subpart H. Subsections 550.803(d) and (e) set forth the criteria by which a personnel action is determined to be unjustified or unwarranted as follows:

(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

The relationship between an administrative error resulting in the failure to increase an employee's pay and the remedy afforded by the Back Pay Act for loss of pay resulting from an unjustified or unwarranted personnel action is discussed in 55 Comp. Gen. 836 (1976). As indicated in that decision, 5 U.S.C. § 5596 (1970) provides broad authority to rectify erroneous personnel actions by providing backpay and effectively covers situations such as Mr. Medaugh's in which an

administrative error has resulted in the failure to carry out a nondiscretionary regulation or policy.

The Supreme Court has recently considered the Back Pay Act inapplicable to wrongful classification claims. *United States* v. *Testan*, decided March 2, 1976, — U.S. —, 47 L. Ed. 2d 114, 44 U.S.L.W. 4245. The matter before us is not, however, a claim for reclassification, and we find the *Testan* case is not applicable to the backpay issue in the present case.

The employing agency here has admitted administrative error in its failure to comply with a mandatory administrative regulation requiring it to promptly identify Mr. Medaugh as eligible for a pay adjustment. Upon discovery of the error, notifications of personnel action were processed to retroactively effectuate his entitlement to the adjustment. Further, it has been administratively recommended that the claim be paid. Where an employee is thus entitled to a specific allowance by reason of his position and, because of administrative error, has been denied or delayed in the receipt thereof, he has suffered a withdrawal or reduction in the benefits to which he is entitled and is entitled to backpay therefor.

Accordingly, a settlement in favor of Mr. Medaugh for the period from December 12, 1970, to September 30, 1972, will be issued by our Claims Division.

[B–170675]

Appropriations—Judgments—Agency Appropriations—Sums Due After Judgment Date

Judgment, entered on Feb. 4, 1976, stating in part that plaintiff Federal employees "shall receive for the period subsequent to September 14, 1974" sums representing increased salary increments originally denied under challenged agency action, is treated, for purposes of satisfying judgment, as money judgment for back pay up to date of judgment plus a mandate that agency place employees in higher salary rate as of date of judgment. Therefore, sums due plaintiffs up to date of judgment are payable, upon settlement by General Accounting Office, from permanent indefinite appropriation under 31 U.S.C. 724a, but sums due after judgment date are payable from agency appropriations for salaries and expenses.

In the matter of the source of funds to pay judgment in favor of Jack M. Whaley and Victor C. Wolff, September 22, 1976:

This responds to a request for our decision, pursuant to 31 U.S. Code § 82d (1970), by an authorized certifying officer of the National Aeronautics and Space Administration (NASA). The certifying officer's questions concern the proper appropriations to be applied in satisfaction of a portion of the judgment of the United States District Court, Northern District of California, entered on February 4, 1976, in the case of *Robert Kramer, et al.* v. *United States*, Civil No. C–74–0446–WTS.

The plaintiffs in the suit resulting in the cited judgment are present and former NASA employees who worked regularly alternating day, night, and swing shifts at NASA's Ames Research Center. Effective November 30, 1969, the plaintiffs' jobs were converted from wage board to General Schedule positions. On this date, the plaintiffs worked the day shift. Hence, in accordance with Civil Service Commission regulations as construed in our decision at 51 Comp. Gen. 641 (1972), the rates of basic pay used to calculate their General Schedule salary rates did not include the "night differential."

The February 4, 1976 judgment, which was entered by stipulation of the parties, ordered that the plaintiffs recover sums specified therein, together with fringe benefits:

> * * * representing wages said plaintiffs were entitled to receive in addition to those actually received for and during the period of services described below, because of defendant's failure to extend to plaintiffs the night differential to which they were entitled * * *.

In the case of plaintiffs Jack M. Whaley and Victor C. Wolff, who are apparently still NASA employees, the period of service stated in the judgment for payment of the specified sums was November 30, 1969, to September 14, 1974. However, the judgment further ordered that plaintiffs Whaley and Wolff:

> * * * shall receive for the period subsequent to September 14, 1974, sums equivalent to the difference between salaries actually paid to them and salaries to which they would otherwise have been entitled had the salaries fixed for each such plaintiff under the General Schedule Pay System included the established night differential in addition to the basic Wage Grade hourly rate in arriving at the rate of compensation for pay change purposes.

No issue is raised concerning satisfaction of the judgment insofar as it specifies sums and fringe benefits due to each plaintiff for the periods ending on dates stated in the judgment, including sums due to Whaley and Wolff up to September 14, 1974. This portion of the judgment is being paid, upon settlement by our Office, pursuant to 28 U.S.C. § 2414 (1970) and 31 U.S.C. § 724a (1970), *infra*.

The certifying officer's questions involve satisfaction of that portion of the judgment concerning entitlements due to Whaley and Wolff after September 14, 1974. The certifying officer's submission includes a voucher for sums due Whaley and Wolff for the period September 15, 1974, through April 24, 1976, and poses the following questions:

1. Can the attached voucher, if otherwise proper, be paid from appropriations available to the National Aeronautics and Space Administration in satisfaction of the enclosed judgment?
2. If otherwise proper, should the salaries of Whaley and Wolff be increased for periods subsequent to April 24, 1976, in satisfaction of the judgment and paid for from National Aeronautics and Space Administration appropriations?

The instant judgment is subject to 28 U.S.C. § 2414, *supra*, which provides in part that payment of final judgments rendered by Fed-

eral district courts against the United States shall be made on settlement by the General Accounting Office. The basic source for payment of such judgments is the permanent indefinite appropriation made by 31 U.S.C. § 724a, *supra*, which provides in part:

> There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, *not otherwise provided for*, as certified by the Comptroller General, of final judgments, awards, and compromise settlements (not in excess of $100,000, or its equivalent in foreign currencies at the time of payment, in any one case) which are payable in accordance with the terms of sections 2414, 2517, 2672, or 2677 of Title 28 * * *. [Italic supplied.]

In determining whether sums necessary for the payment of a judgment are provided for other than under 31 U.S.C. § 724a, the well-established rule is that "* * * appropriations or funds provided for regular governmental operations or activities, out of which a cause of action arises, are not available to pay judgments of courts in the absence of specific authority therefor." 40 Comp. Gen. 95, 97 (1960), and decisions cited. Hence, unless NASA has specific authority to use its appropriations for the payment of judgments in cases such as the instant one, the judgment cannot be paid from a NASA appropriation, but must be paid from the appropriation provided in 31 U.S.C. § 724a. To our knowledge, NASA has no such authority. Thus, to the extent that the sums stated in the voucher presented by the certifying officer must be regarded as payments on the judgment, the proper source of payment is the appropriation made by 31 U.S.C. § 724a rather than NASA appropriations.

As noted previously, the judgment states, for purposes relevant here, "that plaintiffs Whaley and Wolff shall receive, for the period subsequent to September 14, 1974" additional sums they would have received had the night differential been included in establishing their General Schedule pay rates. It could be argued, under the literal terms of the judgment, that the additional sums payable from September 15, 1974, into the indefinite future constitute payments on the judgment and are, therefore, payable pursuant to 31 U.S.C. § 724a. However, this construction would require that a portion of the employees' entitlements for each pay period could be paid only after presentation to our Office and issuance of settlements against the judgment appropriation. Such a result would be wholly impractical from the viewpoint of all concerned.

In lieu of the foregoing construction, we would interpret the judgment as an adjudication, effective February 4, 1976, that the night differential should have been included in establishing plaintiffs' General Schedule salary rates on November 30, 1969, with the remedy, as it pertains to Whaley and Wolff, consisting of two elements. The first

element is a money judgment for back pay and fringe benefits which had already accrued as of the date of judgment. The second element is, in effect, a mandate to NASA to pay Whaley and Wolff from that time on at the higher salary rate. Under this construction, NASA should have paid the employees at the higher salary rates effective on the date of the judgment, February 4, 1976, and, in any event, should do so now. Therefore, the additional payments accruing after the date of judgment should be treated as part of the employees' regular salaries, as corrected, and are payable from NASA's salaries and expenses appropriations. *Cf.* 34 Comp. Gen. 221, 224 (1954).

For the reasons stated above, the voucher presented cannot be certified for payment. Instead, NASA should pay Whaley and Wolff at the salary levels to which they are entitled under the judgment, effective February 4, 1976. The salaries, as so increased, may then be paid from NASA appropriations for the amounts due subsequent to February 4, 1976, without submission to our Office.

NASA should also immediately furnish to our Claims Division the information necessary for us to compute certificates of settlement, payable under 31 U.S.C. § 724a, for salary and fringe benefits due to Whaley and Wolff for the period September 15, 1974, to February 4, 1976.

[B–186372]

Contracts—Negotiation—Offers or Proposals—Best and Final—Revised Proposal Submitted—Reopening of Negotiations Not Required

Agency was not required to seek further clarification in negotiated procurement where protester substantially revised building design in best and final offer and failed to support such change with adequate documentation. In such circumstances contracting officer need not reopen negotiations but may lower his rating of final proposal submitted.

Contracts—Negotiation—Evaluation Factors—Price Elements for Consideration—Anticipated Costs

Fact that protester would have to absorb all direct costs exceeding its ceiling price in fixed price incentive contract does not negate evaluator's legitimate concern for anticipated costs over ceiling considering performance and administration problems which reasonably can be expected to result from contractor's loss position.

Contracts—Negotiation—Evaluation Factors—Factors Other Than Price—Technical Acceptability

Source selection authority's conclusion that protester's lower target and ceiling prices for fixed price incentive contract offered little in way of advantages to Government and were not sufficiently significant to overcome selected firm's superiority in technical and operations area is supported by record and is consistent with evaluation criteria which gave more weight to technical and operations area. Protester's contention that negotiations were not conducted in compliance with 10 U.S.C. 2304(g) is denied.

In the matter of the General Electric Company, September 22, 1976:

The General Electric Company (GE) protests the award of a contract to the Raytheon Company (Raytheon) pursuant to request for proposals (RFP) No. F1968-75-R-0014 issued by the Electronic Systems Division (ESD) of the United States Air Force. The solicitation covered a Phased Array Warning System called PAVE PAWS. The contractor is to design, develop, fabricate, install and test two dual faced phased array radars, one each on the east and west coasts, for the detection of submarine launched missiles. The contractor also is required to design and construct a building at each site to house the computer based radars. The RFP specified a fixed price incentive fee (FPIF) type of contract. A sharing arrangement of 80/20 (Government/contractor) for costs over or under the traget price, a firm ceiling price of 130 percent of target costs and a fee of 10 percent of target costs were also specified.

The RFP provided that award would be made to the offeror whose proposal was most advantageous to the Government, cost and other factors considered. Primary emphasis during proposal evaluation was to be placed on technical and operational excellence. Cost was the second most important selection factor and management and logistics were considered third in the order of priority. In addition, the RFP indicated that an offeror would be favorably evaluated for the use of proven technical processes and off-the-shelf components and materials in its hardware and software design approach. The RFP warned that any significant inconsistency between promised performance and price, if unexplained, would raise an issue regarding the offeror's understanding of the work and could result in rejection of such proposal and that the "burden of proof" as to cost credibility rested with the offeror. The instructions also required that the proposals provide sufficient detail for evaluation and offerors were warned that nonconformance with the specified content could be cause for rejection.

Three companies including GE and Raytheon submitted proposals. All offerors were determined to be within the competitive range and oral and written discussions were conducted with them until negotiations were closed on February 13, 1976. These discussions consisted of deficiency reports and clarification requests from the Source Selection Evaluation Board (SSEB) to the offerors, their written responses thereto and face-to-face negotiations. Armed Services Procurement Regulation (ASPR) § 3-805.3(a) defines a deficiency as that "part of an offeror's proposal which would not satisfy the Government's requirements." The Air Force defines a clarification request as relating

either to an area in a proposal which is unclear or to solicitation requirements which the offeror may have misunderstood.

All deficiency reports concerning GE and Raytheon were resolved when the SSEB closed negotiations and requested on February 13, 1976 that best and final offers be submitted no later than February 27, 1976. The SSEB presented its findings to the Source Selection Advisory Council (SSAC) which, in turn, provided the Source Selection Authority (SSA) with its findings and a risk analysis of the three proposals in their final form. On March 22, 1976, the members of the SSAC unanimously recommended to the SSA that award be made to Raytheon. The SSA decision document was signed on April 2, 1976 and on April 12, 1976, a contract for one radar site was awarded to Raytheon.

On April 14, 1976, GE received notice of award which advised of the weaknesses and risks in its proposal as follows:

a. The size and complexity of the software effort was underestimated and reflected a serious weakness in an area where the greatest program risk is identified.
b. Changes in the technical facility as outlined in the BAFO [best and final offer] did not provide sufficient detail for Government evaluation.
c. The risk in these areas reflected concern as to the cost realism of [GE's] best and final offer.

Thereafter, GE requested and obtained a debriefing. The SSEB's minutes of this debriefing indicate that GE was told that the competition had been intense, the overall proposal evaluation results were close and that GE's software design and building design significantly impacted the evaluation of technical risk. Because of major design changes proposed by GE in the data processing area, the SSEB had reevaluated GE's proposal after the oral negotiations and had determined that some weaknesses in the software subsystem still remained. The SSEB stated that further discussions were not conducted to avoid technical levelling which could result from any further design changes. The Air Force informed GE of its belief that the firm had made a major change in software sizing in its best and final offer. Specifically, the Air Force claimed that 79,000 existing instructions would be taken from Cobra Talon and Site Defense radars and would more than double the previous software size of 50,000 mission required instructions. The Air Force stated that this change was not substantiated with enough detail to show that the instructions could be used in PAVE PAWS without conversion or modification and additional costs.

With respect to the building design changes proposed in GE's best and final offer, these changes were viewed as substantial and the Air Force was concerned because only very limited supporting detail had been provided. The Air Force advised that it was not possible to fully

assess and substantiate the adequacy of the new design or to trace technically the substantial cost savings alleged to result from the new facility design.

GE then protested the selection of Raytheon to this Office, contending that its final price was significantly lower than Raytheon's and that GE's proposal was technically superior in most areas. GE contends that the Air Force failed to communicate its concern or negotiate regarding the size and complexity of GE's proposed software and that the Air Force did not treat this as a proposal deficiency even though the Air Force had indentified the size and complexity of software as a program risk. Moreover, GE argues that the concern of the Air Force over technical risk in GE's software instruction count was unfounded because GE's radar system design which used proven techniques and processes reduced the number of source instructions needed. Accordingly, GE contends that the Air Force did not discharge its responsibility under 10 U.S. Code § 2304(g) (1970) to conduct meaningful discussions concerning the weaknesses and technical risks identified in the firm's proposal.

In addition, GE argues that the changes in its facility design as proposed in the firm's best and final offer were not massive as stated by the Air Force. The protester believes that enough information was contained in its best and final offer to permit the Government to evaluate the changes made in the firm's final facility design. Because the building was not designated as a high risk area, GE does not believe that any lack of detail in this regard is a reason for awarding the contract to Raytheon.

THE GE TECHNICAL FACILITY (BUILDING)

The initial building design proposed by GE was evaluated to determine its structural, electrical, mechanical, architectural and facility interface adequacy. During negotiations, the SSEB issued to GE 6 deficiency reports and 26 clarification requests regarding the building design. GE's responses thereto were evaluated as satisfactory and the proposed design was considered adequate to meet the requirements. GE's initial price for the building was $16.5 million. Before receiving best and final offers the SSEB projected that the price for GE's facility, as negotiated, would be $19.4 million because of the modifications made during negotiations and the statements of GE. There is no question as to the adequacy of the meaningful discussions regarding the building design initially proposed.

The call for best and final offers required that a reconciliation by cost element be performed for each proposed line item and sub-line item for which a DD Form 633 had been submitted. It further re-

quired that a narrative description of the specific changes over $24,999 be attached to the line item and sub-line item reconciliations. It advised that any technical revisions or nonconcurrences to contract terms and conditions submitted in the best and final offer would not be negotiated further. GE's best and final offer stated that because of "key changes" in the structural design and operational layout made by a new architectural and engineering subcontractor and a new construction subcontractor, it was able to reduce its building price to $10.7 million. This represented a reduction of $5.8 million or 35 percent from its original price for this item.

The Air Force and GE disagree as to the adequacy of the technical description and detail submitted by GE in support of its changes. The Air Force asserts that the supporting technical information included only a half page description, a sketch of the new design compared to the old design, and cost information, all of which were insufficient to permit proper evaluation of the proposed change. The Air Force claims it needed, among other things, design information regarding electrical loads, air conditioning, construction materials, plumbing, fire protection equipment, and layout of the tactical operations and other rooms. In addition, the change of subcontractors with the large price reduction raised questions as to how well the new firms understood the level of effort required.

GE denies that the building design change was as extensive as the Air Force claims and contends that the new design retained the same square footage of room area and the same functional relationships as the old design. GE asserts that it did not submit information regarding the support facilities because they were not changed and that, by the terms of the call for best and final offers, such information was not required. GE further alleges that the building involved no research and development effort and did not represent a major risk. This, it claims, is evidenced by the fact that the SSEB, in evaluating GE's proposed price, added no factor to cover the financial impact of the risk it claimed to see in the new building design even though the RFP stated that the financial impact of high risk areas would be added to the offeror's proposal to develop the most probable cost to the Government.

We have reviewed the record as it pertains to the building design proposed by GE in its best and final offer and the initial design as it was after oral negotiations. Our conclusion is that the determination of the SSEB was reasonable. We are in agreement with the SSEB that the technical explanation and support was so meager that the adequacy of the new design could not have been determined without additional discussions and documentary support. Although much cost in-

formation was submitted, it was essentially useless because the adequacy of the building itself could not be assessed. The SSEB projected a figure of $12.5 million in evaluating the new design, but it never translated its full concern about the new design into a complete precise dollar amount to be added to the GE proposed building price. Although it may be true, as GE contends, that there was little, if any, research and development involved with the building, the SSEB was properly concerned about the financial impact upon PAVE PAWS resulting from possible construction cost overruns and delivery slippages.

Based on the record before us, we find the two GE designs substantially different and we doubt that the air conditioning, plumbing, fire protection equipment, soil samples, foundations and other support facilities and the analysis for the old building would be appropriate for the new design. The initial building design, as negotiated, involved supporting five floors on a level plateau. The new design incorporated a significant concept change by supporting three floors on the plateau and two floors on the slope of the terrain. No documentation was presented to show that the soil and drainage conditions were such that this change would be acceptable. Although the structure was conceptually shown to rest on the retaining wall foundation, there was no information as to the connection between the superstructure and the substructure. Since it is technically and financially impractical to design for no soil movement, the interaction between the soil, foundation and structure is a matter of paramount importance especially where soil would exist above the lower part of the radar face. There was no indication as to how possible seepage problems on the lower floors could be avoided or whether the soil was amenable for such conventional solutions as waterproofing, weep holes and drainage pipes. It would be futile to transfer the structural analysis, dimensions and member sizes from the November design to that proposed in the best and final offer. In our opinion, the documentation was insufficient to determine the acceptability of the new design and there was very little information from the previously negotiated design which could be transferred for this evaluation.

We agree with the Air Force that in the circumstances it was impossible to include an amount in its most probable cost to the Government to cover the risk inherent in GE's new building design. The failure to do so reflects, in our opinion, on the inadequacy of the proposal rather than the nonexistence of risk. Even though the building would not require research and development, other risks existed as indicated above. In the circumstances, the evaluation board was not required to reopen negotiations after receipt of best and final offers to obtain ex-

tensive supporting information which GE should have submitted with its new design. The burden is on the offeror in submitting its best and final offer to affirmatively demonstrate its merits. When after close of negotiations an offeror submits a revised proposal without such substantiation, the contracting officer need not reopen negotiations but may lower his rating of the final proposal submitted. *Electronics Communications, Inc.*, 55 Comp. Gen. 636 (1976), 76-1 CPD 15. *Decision Sciences Corporation*, B-184438, August 3, 1976, 76-2 CPD 114.

TECHNICAL AND OPERATIONS AREA

The RFP required offerors to prepare and submit a "Cost Format A" which was to show the software development task breakdown. This data would be used to assess the reasonableness of the proposed computer programming effort as compared to an independent Government estimate. The detailed instructions for "Cost Format A" stated that the offeror should indicate "the estimated total number of *source language statement/instructions*," including the size of existing programs which it anticipated would be used to fulfill the performance requirements. Further, it required that the offeror indicate the new source code which was to be generated, the estimated number of instructions required to be changed or deleted and the number of source instructions which were to be converted from one source language to another or from one machine to another. The offerors were instructed to indicate the source language in which the program was to be written and if written in a mixture of source languages to indicate the approximate fraction for each language.

The initial GE proposal, as amended, provided for 141,356 instructions, all of which would be newly developed, modified or converted for PAVE PAWS. GE's instruction count, however, included machine language instructions contrary to the directions on Cost Format A for a statement of source language instructions. Because there can be a ratio of up to five machine language instructions for each source language instruction, this initially misled the SSEB to believe that GE proposed substantially more source language instructions than GE intended, thereby delaying the Air Force's awareness of the weakness ultimately perceived in GE's software package.

After the evaluation of the initial proposal, as amended, the SSEB sent to GE 28 deficiency reports and 120 clarification requests. Four of these related to the software but did not expressly concern the adequacy of the software instruction count. Deficiency Report 14-B stated that the computer memory sizing analysis was not sufficiently described to provide credibility to perform the mission of PAVE

PAWS and that in comparison to other phased array radar systems, the amount of memory allocated to do the function was "gravely underestimated." GE's response of September 11, 1975, to Deficiency Report 14–B consisted of 25 pages and was prefaced by the following:

> The computer memory allocation and memory management requirements for the PAVE PAWS System were poorly described in the GE proposal. Typographical errors, omissions from key tables, and the lack of a single localized discussion of memory have caused concern for the credibility of the memory estimates.

This response was evaluated by the SSEB as providing insufficient data leaving several points for further negotiations. After the evaluation of the second written response, GE had satisfied the SSEB except that:

> Cost Format A was supposed to be broken down by source language, not machine language. This is still inadequate to track cost. Topic will be addressed during formal [oral] negotiations.

The minutes for the oral negotiations of October 30, 1975, with regard to Deficiency Report 14–B stated that "Cost Format A" should be in source language and that the contractor would discuss this at the next meeting. The minutes for the oral negotiation of November 12, 1975 contain the following entry: "DR 14–B Cost Format A Data was presented in source code vs machine language." GE's letter of November 11, 1975 informed the SSEB that the cost impact of the modifications made in response to the Deficiency Report would be an increase of $2.6 million. (These modifications included a substantial increase in proposed hardware.)

The Air Force contends that although its overall concern about the GE software design approach was thoroughly discussed throughout the evaluation process, the inadequacy of the number of software instructions was never pointed out to GE as a deficiency or weakness. It argues that initially it was misled into believing that a large portion of the software instructions were approximately five times greater than they actually were because GE had submitted without explanation its count in machine language rather than source language as required by the RFP. The Air Force states that the system specifications did not require a minimum number of instructions. Moreover, the agency's overall estimate of software instructions had been prepared previously only for pricing purposes and therefore was not used by the SSEB in its evaluation of the adequacy of the software count. It appears that after these negotiation sessions with GE, the Board concluded that GE's software count was low on the basis of its members' general background knowledge and expertise in such matters. Contrary to GE's insistence, there is no clear evidence in the record that a credible estimate of instructions required in each functional area existed prior to the SSAC's presentation of its evaluation to the SSA after

receipt of best and final offers. The SSA then insisted upon such an estimate as an additional measure of credibility concerning the recommended rejection of GE.

The system specification which describes the requirements for the various software categories states with respect to support software that all commercially available support software shall be provided with the deliverable software package. The SSEB determined that GE's proposal included 48,961 developed, modified or converted instructions for the mission software, 79,250 existing instructions for the support software and 14,000 existing instructions for the operating system software for a total of 144,211. The SSEB assumed that 79,750 instructions were existing support software to be supplied by the computer vendors because the instructions were not identified as containing GE existing software. The 48,961 figure for mission software was far below that offered by GE's competitors and other existing radar systems.

GE asserts that 16,000 instructions were computer vendor supplied existing instructions. It states that if these 16,000 instructions are subtracted from the total instructions of 144,211, its November proposal indicated that a total of 128,211 instructions would be delivered by GE. Thus, GE states that the 132,576 instructions proposed in its best and final offer represented an increase of only 4,365 instructions. GE also argues that its November proposal showed that a total of 79,750 support instructions would be delivered, of which 500 would be developed and 79,250 would be existing instructions. GE claims that unlike the "Executive" function software, these existing software instructions were not computer vendor supplied but were existing GE software which could be used on PAVE PAWS. However, in our opinion, the information on GE's "Cost Format A" provides no basis on which the SSEB could have reached such a conclusion. While the anticipated use of existing source instructions which would not be developed, modified or converted for PAVE PAWS could be determined from Cost Format A, there was no way to distinguish between those existing instructions that were supplied by the computer vendor and those that were GE instructions from other programs.

GE's response to Deficiency Report 14–B referred to "adaptable" software modules which could be used on PAVE PAWS. It stated the desirability of reprogramming such modules to JOVIAL computer language and also stated that they could be developed with little risk in terms of performance, schedule, cost and interface. However, GE did not supply any technical documentation to support its statement that 79,250 existing instructions could be reprogrammed in JOVIAL language and adapted to PAVE PAWS with little cost or schedule impact. The SSEB, without asking GE for further infor-

mation, assumed that it could not be done without high risk. In our view, the SSEB was justified in its concern as to how instructions prepared for one computer could be moved to another having a different mission, different word lengths and a different operating system. Such transfers often can require an instruction-by-instruction examination and an extensive rewrite of the existing programs.

In its best and final offer, GE presented its software instructions count in a series of tables. It explained that the PAVE PAWS software is grouped into three categories as follows: (1) software developed for PAVE PAWS; (2) existing GE software applicable to PAVE PAWS; and (3) existing computer vendor software used as the operating system for mission and back-up software control, diagnostic software and support software for software development and maintenance. It did not break down the GE software into those categories requiring modification or conversion.

Table 2–3 of GE's final offer tabulated the developed and deliverable software by computer program configuration item and by code type. The other tables (2–1, 2–4, 2–5 and a summary in the cost section) set forth the same information except that the computer vendor software was broken down into support, operating and diagnostics categories. Tables 2–1, 2–5 and the summary identified the 79,250 instructions as existing GE support software. Table 2–4 also identified the 79,250 instructions as "mission required" and included therein an additional 39,546 "developed/modified/converted" instructions plus 14,780 "developed" instructions for a total of 132,576 GE instructions to be delivered along with the computer vendor instructions.

The Air Force states that there are two possible interpretations of the software submission in the GE best and final offer. The first is that 79,250 instructions should be added to the mission software which results in an increase of 143 percent over the previous proposal of 53,000 mission instructions. The second interpretation is that the 79,250 instructions were in the support area as the Air Force claimed was documented in the GE submission during November.

Even though the 79,250 instructions were identified as support software in tables 2–1 and 2–5 and the summary, the Air Force claims to have adopted the first interpretation because the instructions were included in table 2–4 in a column under the heading of "mission required." The SSEB believed that such a substantial increase in mission required software was technically risky especially in view of the limited supporting technical rationale. The Air Force further claims, however, that the second interpretation, which would leave only 53,326 instructions in the mission software, would have magnified its concern because of its belief that the amount of mission software would be

insufficient to do the job and would require the preparation of additional instructions with unknown impact upon schedule and costs.

The Air Force post-protest statements assert that in the final evaluation after the receipt of the best and final offers, significant concerns were identified in the GE proposal regarding the software design approach. The SSEB doubted that the existing instructions which accounted for 60 percent of the mission required software could be moved between computers without modification or conversion and it believed that the use of a large number of existing instructions would adversely affect the "top-down" [1] design required by the RFP. It feared that the excessive use of several computer languages would complicate the software interface and maintenance. In addition, the Air Force states that the SSEB believed that the frequency and magnitude of the changes made by GE in its software estimates throughout the negotiation process demonstrated that GE did not fully understand the data processing requirements or the complexity of the functions necessary to satisfy such requirements.

GE contends that these concerns were unfounded, never discussed and in conflict with the RFP. In essence, GE questions how the specific factors cited by the Air Force for the nonselection of GE could have been ignored during the discussions and yet be considered so significant as to result in the rejection of its lowest priced proposal. GE further contends that the SSEB mistakenly interpreted its best and final offer as providing for an additional 79,250 mission required instructions rather than providing for an additional 79,250 support instructions and that the SSEB's prior failure to conduct meaningful discussions led to such erroneous interpretation. GE states that support software is never used directly in the operational system and that, therefore, it could not complicate the "top-down" development required by the solicitation, affect the efficiency of the mission required software or have any impact on the timing of the mission required software. GE also points out that the use of multiple computer languages is recognized in the RFP, which provided that if a mixture of computer languages is anticipated, the approximate fraction of each language should be indicated. Further, GE asserts that its radar design was chosen because of proven techniques and processes which reduce the number of software source instructions needed.

The complete record for the period after the call for best and final offers indicates that neither the SSEB nor the SSAC was confused

[1] The "top-down" design approach starts building the software modules in a natural order starting with the broader scope requirements. It then expands downward into many more modules which contain routines of increasing detail. Design is less restricted with this method than it is by interconnecting many existing detailed modules with each other and others at the higher levels, such as in a "bottom-up" design.

as to the total number of source instructions proposed in GE's best and final offer. The main software concern of each was the low number of newly developed, modified or converted source language instructions (53,326). Serious question existed as to the feasibility of transferring the 79,250 existing source instructions to the PAVE PAWS project without modification, conversion or cost and schedule impact.

The SSEB report of March 4, 1976 to the SSAC and the SSA indicated that the software to be developed was approximately 50,000 source language instructions. The weaknesses were identified to be that the applications software was underestimated, the proposed approach to "top-down" development was in fact a combination of "top-down/bottom-up" method and the use of the Fortran programs increased the required support software and complicated the software interface. The SSEB also stated that GE apparently underestimated the instructions by 100,000 and related costs by $600,000.

The SSAC's written report of March 9, 1976 to the SSA stated that the software appeared to be significantly underestimated because only about 50,000 of the 132,000 source instructions proposed were newly developed, modified or converted as compared to 160,000 and 175,000 for the other competitors. It stated that the GE estimate of new source instructions appeared to be understated by approximately 30,000 to 40,000 which the SSAC estimated would have a cost impact of $1.0 million, aside from the cost of any schedule slip. It considered as unrealistic the transfer of 79,250 existing source instructions from other GE software systems and GE had provided no technical description as to how it could be done.

The slide used by the SSAC in its oral presentation to the SSA did not allocate the 79,250 instructions to any of the specific functional areas, such as the support area. Instead, it added the 79,250 to the 48,961 total instructions for all functional areas. The prepared script accompanying the slide indicated that 79,000 instructions would be borrowed from other programs but that no substantiating details were given by GE. It then expressed the expectation that any borrowed code would fall into the executive control and support areas. In this connection, we note that the Air Force has stated during this protest that such instructions were not treated as being in the support area. However, as we see the record, the SSAC included the bulk of the 79,250 instructions in the support area where GE contends they should be.

GE's software submittal in its best and final offer was presented in a series of tables. It was confusing and not easily traceable in all respects to GE's previous submittals. It was difficult to interpret with certainty and required more analysis than should be expected con-

sidering it is the offeror's burden to demonstrate the merits of its proposal. In this connection, we also note that GE's telegram of April 1, 1976, which was rejected as a late modification, stated that errors had been made in the software count which involved the erroneous addition of machine language instructions with source language instructions. By our calculations, this telegram would have increased the software instruction count in source language from 132,576 to 140,000–145,000 instructions. In spite of this, we see no significant misinterpretation by the Air Force of GE's final software presentation. It appears, however, that the Air Force in its post-protest statements may have misinterpreted its own preselection actions pertaining to the 79,250 instructions. This would not, however, be relevant to the validity of the selection which had been made prior to such interpretations. In addition, although GE contends that the number of source instructions needed was reduced because of its proven radar techniques and processes, the record is not convincing in this regard.

During the course of the negotiations the SSEB assumed that 79,250 GE support instructions were computer-vendor supplied and therefore difficult to adapt to PAVE PAWS. Apparently, after GE submitted its best and final offer it became clear to the SSEB that the 79,250 support instructions were GE-supplied but the Air Force evaluators still considered these instructions difficult to adapt to PAVE PAWS. It seems to us, however, that the SSEB would have been in a better position to evaluate the adequacy of the GE software approach, both initially and finally, if it had asked GE to produce the preliminary functional requirements trees which the RFP required to be developed by offerors for each computer program configuration item. In the absence of this information and amplifying technical documentation, we are unable to determine whether GE's existing software would be readily adaptable to PAVE PAWS. Nevertheless, we agree with the Air Force that GE's software approach as outlined in its proposal presented a risk in this area.

As the SSA points out, he did not consider the software instruction count, of itself, to be an issue of paramount significance because GE could provide more instructions with a comparatively modest cost increase. What was of concern to him was GE's apparent lack of understanding of the data processing requirement as indicated by the vacillation perceived in its design approach to both hardware and software, the lack of sufficient detailed documentation to enable the Government to fully understand the overall data processing system

it proposed, and the uncertainties reflected by ambiguities in its proposal through best and final offers. In reaching his final conclusion in this sub-area, the SSA gave GE the benefit of doubt on the judgment calls and still concluded that Raytheon clearly offered the soundest, most realistic and most advantageous proposal of the two. Moreover, he agreed with the evaluators that, on balance, the risks of encountering software problems that would entail program disruptions through schedule slips and the added costs that such slips entail were much greater for GE than they were for Raytheon.

COST AREA

The Air Force points out that the target price in GE's best and final offer was $6 million lower than that of Raytheon for all items evaluated for award, but contends that the realism of GE's cost estimate could not be substantiated. The RFP stated that a determination of cost realism would "include" an evaluation of the proposed costs with the Government estimate. The record indicates that this was done. The RFP further stated that the financial impact of the high risk areas would be added to the proposed costs in order to develop a most probable cost to the Government. GE, in effect, argues that the SSEB was inconsistent in adding to GE's final price only $1 million for software shortages while stating that GE would exceed ceiling price. However, the Air Force argues that it could not use the target cost figure proposed by GE as the base for the addition of the risk factor. Rather, it based its estimate on an analysis of the entire GE system as it was in November 1975 and allocated to the various elements of the GE work breakdown structure, costs based on estimates and costs of similar components, system and efforts. After the receipt of the best and final offers, the most probable cost was adjusted in the light of the technical changes and price reductions. The Air Force states that at this time its estimate, exclusive of risk dollars, was $1 million less than GE's ceiling price and equal thereto with the addition of $1 million for the software shortage. Further, the SSEB considered that an unquantified amount should be added for the schedule slippage which it anticipated would be encountered by GE as a result of software development problems and the uncertainties about the new building design. Although the Air Force asserts that it could not estimate a specific amount to be added to the GE building price of $10.7 million, the SSEB used, throughout its presentation to the SSAC, a most probable cost figure of $12.5 million for the building and included this figure in its estimate for the total system.

After best and final offers, the SSEB and SSAC estimates for the two sites and the prices proposed by GE and Raytheon were as follows:

	BAFO-Target Prices 2 Site System Acquisition Price	BAFO-Target Prices Items Evaluated for Award (2 Sites, Data, O&M)
GE	$67.1	$78.5
Raytheon	70.7	84.5

	BAFO Ceiling Prices	SSEB Most Probable Cost 2 Site System	SSAC Most Probable Cost 2 Site System
GE	$79.3	$75.6	$78.0—$79.0
Raytheon	83.6	77.0	79.0— 82.0

The presentations of the SSEB and the SSAC made it clear that their figures did not include the cost of the expected program slippage or a factor for the risks both saw in the new building design, the precise amount of which both found impossible to assess. The figures for Raytheon included factors for all known risks. The SSA was left with a choice between the superior rated Raytheon proposal, the cost realism of which the SSA was relatively confident, and the lower rated GE proposal, the cost realism of which could not be established beyond the belief that it would exceed ceiling price by several million dollars. In our opinion, the SSEB's estimate of the most probable cost of GE's final proposal, particularly the addition of a factor for developing additional software, was not unreasonable. It was reasonable for the SSEB not to factor in to its most probable cost or to GE's proposed price a precise amount for schedule slippage and building uncertainties, in view of the inadequacy of GE's proposal. The fact that GE would have to absorb all direct costs exceeding its ceiling price of $9.3 million does not negate the legitimate concern of the SSEB for the costs over ceiling and the performance, schedule and administration problems which can reasonably be expected to result from a loss position.

In arriving at this ultimate selection, the SSA considered much more than the costs proposed by the offerors because other factors were considered to be more significant. The SSA determined, in accordance with the solicitation, which proposal provided the most advantageous system to the Government with due consideration to the technical and operations aspects of the proposals. We note that, although GE was advised at the debriefing that the competition was "close," the record shows that in the SSA's opinion Raytheon had

a clear cut margin, in varying degrees, over GE in all three sub-areas within the technical and operations area, that is, radar subsystem, data processing hardware and software subsystem and technical facility. We note that there was no discussion of the SSA's conclusions concerning the radar subsystem in the post award notice to GE. Nevertheless, the record shows that while GE's radar subsystem had the advantage of slightly greater power and range, the SSA considered that this was more than offset by several radar operational advantages in the Raytheon proposal and the fact that Raytheon was evaluated as offering the more reliable radar system, an essential consideration of the operating command. Among the cost factors considered by the SSA were:

(1) What was the most likely eventual cost to the government of the overall system proposed by each offeror? (FPIF contract with a 130% ceiling price.)
(2) Was the price for the system proposed by each offeror a fair and reasonable one to the government? (Each system, of course, was different and each offered some different features.)
(3) Were any added costs involved in feaures of one offeror's approach versus that of another fully justifiable in terms of added value to be received by the government?
(4) How would the conclusions reached on costs affect the offeror's relative standings in the Technical/Operations area? Would the cost ratings, coming as second priority, be sufficient to re-order the overall contractor ranking for award?

The SSA took into account the SSAC's independent cost estimate which indicated that the costs for either GE's or Raytheon's system would be roughly comparable but was influenced by the fact that the differences between GE's offered prices and the SSAC's estimates were much greater than the differences between Raytheon's offered prices and the SSAC's estimates. On the basis of the SSAC's estimates, he found a distinct probability that GE would go beyond its ceiling price. The SSA reasoned that the SSAC's cost estimates for GE's proposal were especially credible because of GE's submission of substantial cost reductions in its best and final offer without adequate explanatory documentation or cost traceability. Although there existed a $6 million difference in total target price for all evaluated items between GE and Raytheon, this was discounted by the SSA because the difference largely was obtained in areas where the Government's concerns over the validity of the GE prices were the greatest. It was also noted that $2.4 million of this difference represented proposal savings in GE's operations and maintenance provisions but that GE was substantially below the Government's estimates in this area because it proposed considerably less manpower to carry out the operations and maintenance function than was considered necessary by the Government.

In the final analysis, the SSA concluded that GE's lower target and ceiling prices offered little in the way of advantages to the Government and, in any event, were not considered to be of sufficient signifi-

cance to overcome Raytheon's superiority in the Technical Operations area. As to the remaining two evaluation areas, logistics and management, it also should be noted that the record indicates that the SSA considered GE and Raytheon to be relatively equal in logistics and Raytheon to be stronger than GE in the management area. It does not appear, however, that either of the latter two areas was determinative in his selection.

Finally, a question has been raised as to whether the report and presentation of the SSEB was properly and fairly presented by the SSAC to the SSA and whether the SSA was denied the essence of the SSEB's evaluation. Our review indicates that while the SSEB report and the SSAC report differed in emphasis and in some details, the essential thrust of each was the same. Moreover, it is unfortunate that an administrative error caused considerable suspicions regarding the source selection process in this case. The Pricing Division, ESD, in accordance with ASPR § 1–308, prepared a price negotiation memorandum on GE which was dated March 30, 1976 and another on Raytheon dated March 31, 1976. Both referenced the same contract number and each gave the impression that the company had been selected for award. These were internal Air Force documents marked "For Official Use Only" and are generally prepared prior to contractor selection and always prior to contract award. They are used during procurement reviews. After award the winner's price negotiation memorandum is sent to the cognizant Defense Contract Audit Agency (DCAA) office so that it can compare the information to its proposal audit recommendations. In this instance, memoranda for both GE and Raytheon were inadvertently distributed and received by the DCAA offices on April 2, 1976, which was the same date that the source selection decision document was signed. When the mistake was discovered, the memoranda were recalled by ESD. While the memorandum for GE was in the DCAA office in Syracuse, GE concluded that it had won the contract. The return of the memorandum to ESD may have led it to believe that there had been a change in contractor selection. Our review of this matter convinces us that contrary to GE's belief, no selection had been made when the memorandum was inadvertently sent to DCAA in Syracuse and that GE had at no time been selected for award.

For the foregoing reasons, we have concluded that the selection of Raytheon was reasonably consistent with the evaluation criterion provided in the solicitation and that the record supports the selection on the basis of Raytheon's superiority in the technical and operations area. We cannot conclude that the Air Force failed to discharge its

responsibilities under 10 U.S.C. 2304(g) (1970) to conduct meaningful discussions with GE.

Accordingly, GE's protest is denied.

[B-186404]

Contracts—Protests—Persons, etc., Qualified To Protest—Interested Parties

In determining whether protester satisfies "interested party" requirement of GAO Bid Protest Procedures, consideration is given to nature of issues raised by protest and direct or indirect benefit or relief sought by protester. Accordingly, division of low bidder company whose bid was rejected, which would have corporate responsibility to perform if awarded contract, is "interested party" and may pursue formal protest.

Contracts—Specifications—Administrative Determination Conclusiveness—Adequacy of Specifications

Drafting of specifications to meet Government's minimum needs and determination whether items offered meet specifications are properly functions of procuring agency. Thus, since determination by procuring agency that two-drum vehicle does not meet intent of specifications to obtain, as stated in IFB, "four (4) wheel drive" vehicle is reasonable, it will not be disturbed by this Office.

Contracts—Protests—Merits

Issue first raised by protester at conference before General Accounting Office will not be considered on its merits, since it was entirely independent of those raised and addressed prior to that time, and its basis was known by protester more than 10 working days before conference.

In the matter of State Equipment Division of Secorp National Inc., September 22, 1976:

Invitation for bids (IFB) number 0260-AA-23-0-6-MW was issued on September 22, 1975, by the Government of the District of Columbia to solicit bids to furnish two sanitary landfill compactors (item 1) and two motor graders (item 2). Addendum No. 4 deleted the original specifications for the compactors and substituted a new specification, reading in part:

Sanitary Landfill Compactor
Special Equipment and/or Service Requirement

Intent: This specification is to obtain a four (4) wheel drive Sanitary Landfill Compactor, with 300 net horsepower (minimum). * * *

Paragraph 7(b) of the IFB Special Conditions provided in part:

Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this Invitation for Bids will require rejection of the Bid. * * *

Bids were opened on February 13, 1976. The low bidder on item 1 was Secorp National Inc. (Secorp). The second low bidder, L. B. Smith Inc. of Va. (L. B. Smith), filed a protest with the D.C. Department of General Services against any award to Secorp, contending that the descriptive literature submitted with Secorp's bid indicated

that the vehicles Secorp proposed to furnish, Hyster C451B compactors, failed to meet the solicitation's specifications as follows:

Bid Specification	Low Bidder—Hyster 451B
"Intent: a four (4) wheel drive Sanitary Landfill Compactor."	Has only two (2) wheels or drums.
"Engine: Diesel, 300 net horsepower."	Has *two* engines.
"4. Transmission: The transmission shall be powershift. . . ."	Has *two* transmissions.
"7. Axles: Planetary type drive, both axles, with no spin type differential on rear axle (minimum)."	Has a bevel gear drive, and no differential or no spin.
"8. Steering: Steering angle in each direction should be a minimum of 40 degrees. . . ."	Has only 30 degrees of angle in each direction.

At the request of State Equipment Division of Secorp National Inc. (State Equipment), which would apparently have the prime corporate responsibility to perform if Secorp were awarded the contract, an informal meeting was held on April 5, 1976, with the D.C. Contract Review Committee (Committee). The Committee was established by part IV of Organization Order No. 9, Commissioner's Order No. 68–399, June 6, 1968, as amended, title I, D.C. Code (1973 ed.) to, in pertinent part:

> * * * review and make recommendations to Contracting Officers on the following:
>
> * * * * * * *
>
> (2) Bids regardless of dollar amount where a Contracting Office proposes to award a contract to a bidder other than the bidder submitting the lowest bid.
>
> * * * * * * *
>
> (7) All protests received from bidders or prospective bidders.

By memorandum dated April 5, the Committee submitted its recommendation to the D.C. Director of General Services, stating that, in its opinion, "* * * the specifications as written provide no latitude of interpretation that a 2 drum compactor meets the requirement for a 4 wheel-drive compactor." Secorp was then advised by letter dated April 14 from the D.C. Director of General Services, received by Secorp on April 15, as follows:

> * * * the Contract Review Committee * * * has sustained the protest of L. B. Smith, Inc., of Virginia on the basis that the Hyster C451B, which you propose to furnish under the specifications in subject invitation, deviates materially from that which was specified, namely: "four (4) wheel drive" vs. your offer of two (2) wheels or drums. Award therefore has been made to L. B. Smith.

By letter to this Office dated and filed April 27, State Equipment protested the rejection of its bid and the award to L. B. Smith. State Equipment states that:

> After preliminary conversations with the contracting and using agencies, State Equipment bid on the theory that the intention of the bid was to seek a vehicle in which all the wheels were motor-driven so the unit will not

mire down or become stuck in rough terrain. Since both drums of the Hyster unit are motor-driven, maneuverability is no problem for this equipment. * * *

State Equipment contends that:

The prime consideration in specifying four wheel drive is not to limit the machine's configuration. "Four wheel drive" is in effect a term of art that specifies that the machine must deliver power to all wheels, whether the configuration be 2, 3, or 4 or any other number of wheels.

State Equipment thus argues that the vehicles it would furnish meet the intent of the specifications. State Equipment further contends that in such case, any differences between the vehicles and the exact requirements of the specifications would have no effect on price, quantity or quality, and should, therefore, be waived by the contracting agency as minor deviations.

In addition to the above arguments raised by State Equipment in its April 27 letter of protest, State Equipment alleged for the first time at a conference before this Office on July 14, and subsequently in a letter filed on July 27, that regardless of whether its bid is found responsive, the vehicles offered by L. B. Smith failed to conform to the solicitation's specifications.

In response to State Equipment's protest, L. B. Smith, in addition to contesting the protester's responsiveness to the solicitation's specifications, submits the following arguments:

(1) since GAO's Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), concern procurement actions by "agencies of the Federal Government" (see section 20.1(a)), this Office has no jurisdiction to consider protests concerning actions by the Contract Review Committee, which was created by order of the Commissioner of the District of Columbia;

(2) State Equipment lacks the standing to protest, since it is not the bidder under the IFB but merely a division of the bidder Secorp, and since it is not "* * * an entity with legal capacity to contract or sue or be sued, except in the name of or for the corporation of which it is a division * * *";

(3) the protest should not be considered because the Committee's decision merely sustained L. B. Smith's protest and therefore does not constitute "adverse agency action," as defined in section 20.0(b) of our Procedures; and

(4) the protest, stated by State Equipment as being against the "decision of the Contract Review Committee," was not timely filed with this Office, since the Committee's "decision" was made on April 5, and since State Equipment should have known the substance of that "decision" on that date, the Committee allegedly having announced that it would act that afternoon.

Before considering the merits of State Equipment's protest, we will address the threshold issues raised by L. B. Smith.

In regard to our jurisdiction, we point out that bid protests against awards or proposed awards by the D.C. Government are considered under our Bid Protest Procedures. Since such protests need only concern "procurement actions" (see heading to our Procedures), and since State Equipment's bid has been rejected by the D.C. Department of General Services in the course of its procurement of equipment, GAO clearly has authority to consider the protest.

Concerning State Equipment's standing, section 20.1(a) of our Procedures provides that "An interested party may protest to the General Accounting Office * * *." In *ABC Management Services, Inc.*, 55 Comp. Gen. 397 (1975), 75-2 CPD 245, we stated as follows:

> The requirement that a party be "interested" serves to ensure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged procurement may be decided. We do not equate, however, the concept of "standing to sue" as developed by the courts with the concept of "interested party" as used in our Procedures. A protester may well be viewed as possessing a sufficient interest in the award selection in question even though the protester may not or does not choose to bid on the procurement. * * * Generally, in determining whether a protester satisfies the "interested party" requirement, consideration should be given to the nature of the issues raised by the protest and the direct or indirect benefit or relief sought by the protester.

In view of those principles, State Equipment clearly qualifies as an "interested party" for purposes of pursuing the present protest with this Office.

In response to L. B. Smith's third argument, the phrase "adverse agency action" appears in section 20.2(a) of our Procedures, which concerns the time limit for filing a protest in this Office by a party that had initially protested to the contracting agency and received a response prejudicial to its position. Here, since the protest with the D.C. Department of General Services was filed by L. B. Smith, not State Equipment, the time limit in section 20.2(b)(2), rather than that in section 20.2(a), would apply.

Finally, concerning the timeliness of State Equipment's protest, section 20.2(b)(2) provides in part:

> * * * bid protests shall be filed not later than 10 [working] days after the basis for protest is known or should have been known, whichever is earlier.

Since we find no indication in the record, other than L. B. Smith's assertion, that State Equipment knew or should have known of the Committee's April 5 "recommendation," or its acceptance by the D.C. Department of General Services, before its receipt of the April 14 letter from the latter on April 15, its protest was filed in this Office in a timely manner.

In this connection, we note that in a letter to L. B. Smith dated March 5 from the Assistant Director for Material Management of the D.C. Department of General Services acknowledging the receipt of its protest, L. B. Smith was advised that "* * * After receipt of the [Contract Review] committee's recommendation, a detailed report will be supplied in response to your protest." Thus, only the contracting activity was to receive the Committee's recommendation, *after* which the parties would be advised of the agency's position; that statement is, therefore, consistent with the view that State Equipment had neither actual nor constructive knowledge of the disposition of L. B. Smith's protest until April 15, Accordingly, the protest, filed April 27, was filed within the required 10-day period.

Proceeding to the merits of State Equipment's protest, the issues initially presented are essentially whether the vehicles which Secorp proposed to furnish, through State Equipment, met the stated intent of the IFB to "* * * obtain a four (4) wheel drive Sanitary Landfill Compactor * * *," and, if so, whether the offered compactors' deviations from the specifications are minor ones which may be waived. We have consistently held that the drafting of specifications to meet the Government's minimum needs and the determination whether items offered meet specifications are properly the functions of the procuring agency. 50 Comp. Gen. 193, 199 (1970). Where there may be a difference of technical opinion, we will accept the judgment of the procuring agency unless such judgment is clearly or unmistakably in error. 49 Comp. Gen. 195, 198 (1969).

In its report responsive to the protest, the D.C. Government states that, in its view, the specifications "* * * clearly set forth the District of Columbia's intent to purchase four (4) wheel drive sanitary landfill compactors. * * *" As noted above, it was the Committee's opinion that a two-drum compactor did not meet the requirement for a four-wheel-drive compactor. In addition, the D.C. Government argues that the specifications could not be met by any type of axle other than a planetary drive type. In this connection, we have been advised that, generally, only four-wheel vehicles in which all wheels drive use the planetary drive method of gear reduction, and that the Hyster C451B, with only two drums, neither has nor requires such method.

Based on our review of the record, we believe that the D.C. Government has reasonably supported its determination that the Hyster C451B does not meet the stated intent of the specifications, and that the deviations from those specifications cannot be waived. In this regard, we note that paragraph 1 of the IFB's instructions to bidders specifically provided that bidders with questions relative to the inter-

pretation of specifications should direct such questions, in writing, to the procurement office before bid opening; State Equipment elected to base its interpretation of the specifications on "preliminary conversations with the contracting and using agencies" rather than follow the designated procedure.

Finally, the issue of whether the vehicles offered by L. B. Smith conform to the solicitation's specifications, first raised at the July 14 conference, is a matter entirely independent of those raised and addressed prior to that time. The basis for State Equipment's allegation was known to State Equipment at the latest upon its receipt of the D.C. Government's report, dated June 11 and received by State Equipment by June 23, the date of its comments thereon, since the report included a copy of L. B. Smith's bid. Accordingly, the issue was not timely raised and will not be considered on its merits in accordance with § 20.2(b)(2) of our Bid Protest Procedures. See *Hammermills, Inc.; The Heil Co.*, B-179265, B-179642, April 10, 1974, 74-1 CPD 184.

In view of the above, the protest is denied. However, on the basis of the strong arguments presented by State Equipment that the equipment it offered would meet the needs of the D.C. Government, we have suggested to the D.C. Government that in future procurements of this type it consider expanding competition to include vehicles similar to the two-drum Hyster compactor, if in fact such equipment will meet its needs.

[B-180257]

Personal Services—Detective Employment Prohibition—Violation

Company whose corporate charter specifically authorizes investigative as well as protective functions, and which is licensed as detective agency under Massachusetts statute prescribing separate licenses for detective and protective agencies, is a detective agency for purposes of 5 U.S.C. 3108 and may not be employed by Federal agency, even though employment is solely to perform guard services.

Contracts—Cancellation—Contractor Misrepresentations—Status—Detective Agencies

Contract for guard services was awarded based on contractor's representations that it was not a detective agency for purposes of 5 U.S.C. 3108. Upon subsequent determination that contractor is a detective agency and thus subject to statutory prohibition, contract should be canceled. Modified by 56 Comp. Gen. — (B-180257, Jan. 6, 1977).

Bidders—Qualifications—Certifications—Adequate Documentation

Since certification by contractor that it is not a detective agency has proved inadequate to prevent violations of statutory prohibition against employment of detective agencies by Federal Government, procuring agency, in procurement for guard services, should require as part of bid or initial proposal adequate documentation concerning bidder's or offeror's corporate authority and licensing status.

In the matter of the Progressive Security Agency, Inc., September 23, 1976:

This decision to the Department of the Navy and the Small Business Administration (SBA) is the result of a congressional inquiry concerning the propriety of a contract with Progressive Security Agency, Inc. (PSA), in the circumstances described below. At issue is whether the contract violates 5 U.S. Code § 3108 (1970), the so-called Anti-Pinkerton Act, which provides:

> An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia.

For the reasons discussed below, we believe the contract contravenes the statutory prohibition.

In late 1975, a number of civil service guards were separated from their positions at the Naval Education and Training Center, Newport, Rhode Island, as part of a reduction in force. The guards had been employed to provide security services at the Naval Underwater Systems Center, Newport. In October 1975, Navy determined that substitute civil service guards were not available and that, since security needs at the Underwater Systems Center continued, the guard services would be contracted out.

By letter dated October 24, 1975, the SBA Region 1 Office, Boston, Mass., requested that the proposed procurement for guard services at the Underwater Systems Center be set aside for contracting with SBA pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1970). Under the so-called 8(a) program, SBA is authorized to enter into procurement contracts with Federal agencies and, in turn, to subcontract the work to small businesses. The program currently emphasizes providing subcontracts to businesses owned by socially or economically disadvantaged persons. 13 C.F.R. § 124.8–1(b) (1976).

On or about December 1, 1975, SBA began negotiations with PSA, a Massachusetts corporation with principal place of business at 54 Devonshire St., Boston. The PSA proposal was found acceptable, and on December 11, Navy approved the proposed award to SBA with the express understanding that the contract was to be performed by PSA. Contract NOO140–76–C–6304 was subsequently awarded to SBA, effective December 11, 1975, and contained the statement: "This is the prime contract for guard services being performed by sub-contractor Progressive Security Agency under 8(a)." The contract price was $314,453.04.

The separated civil service guards have filed an administrative appeal with the Civil Service Commission (CSC), challenging the legiti-

macy of the reduction in force. We are advised by CSC officials that the appeal is still pending and that our decision on the question of the Anti-Pinkerton Act may be treated as separate and distinct from the appeal. We emphasize that we deal here solely with the question of the legality of the contract under the Anti-Pinkerton Act and express no opinion on the merits of the appeal pending before CSC.

In interpreting 5 U.S.C. § 3108 and its predecessor legislation over the years, we have established the following principles:

(1) The Act applies to contracts with "detective agencies" as firms or corporations as well as to contracts with or appointments of individual employees of such agencies. 8 Comp. Gen. 89 (1928).

(2) The Act prohibits the employment of a detective agency or its employees, regardless of the character of the services to be performed; the fact that such services are not to be of a "detective or investigative" nature is immaterial. Thus, detectives or detective agencies may not be employed in *any* capacity. 26 Comp. Gen. 303 (1946).

(3) Although we have never defined "detective agency" for purposes of the Anti-Pinkerton Act, we have drawn a distinction between detective agencies and protective agencies, and have expressed the view that the Act does not forbid contracts with the latter. Thus, the Government may employ a protective agency, but may not employ a detective agency to do protective work. 26 Comp. Gen. 303 (1946); 38 *id.* 881 (1959). *See also* 41 Comp. Gen. 819 (1962); 44 *id.* 564 (1965). The essential question is thus the status of PSA as either a "detective" or a "protective" agency.

Navy, in its administrative report to us, indicates that the following clause is normally included in its solicitations and resulting contracts for guard services:

ADDITIONAL REPRESENTATION/CERTIFICATION BY BIDDER CONCERNING DETECTIVE LICENSING AND/OR DETECTIVE AGENCY AFFILIATION

The offeror represents and certifies as part of his offer that he is not a firm or an individual possessing a detective license.

Bidder is responsible for compliance with State or Local Laws regarding any necessary license for performance hereunder. Bidder represents that he does not have such license or licenses.

The Act of September 6, 1966 (80 Stat. 416; 5 U.S.C. 3108) provides: "An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia."

No award may be made under this invitation to any firm or individual engaged, in whole or in part, in work customarily performed by a detective agency as such, and any bid submitted by such firm or individual will be rejected.

However, the clause was inadvertently omitted from this contract.

The Navy procuring activity's report also states the following:

The Contracting Officer contacted Mr. R. Marvelli, SBA Boston, negotiator for this subcontract. Mr. Marvelli advised that the question of whether Progressive Security participated directly or indirectly in either a detective agency or

performed detective services was raised during negotiations. The reply was that the Progressive Security Agency provided guard services only, has not to date and has no future intentions of participating in any detective or investigative work which would be in violation of [5] U.S.C. 3108. Mr. Marvelli also provided an affidavit signed by an officer of the company on this point. The affidavit refers to another 8(a) subcontract placed by SBA Boston with the same subcontractor. * * *

The "affidavit" (actually titled a "certificate"), is dated October 16, 1975, signed by William W. Green, President of PSA, and reads as follows:

I hereby certify that Progressive Security Agency is not a detective agency within the meaning of the Act of March 3, 1893, 27 Stat. 591, 5 U.S.C. [3108].

The Navy report continues:

Mr. Green of [PSA] was contacted on 18 May 1976 to determine whether there was any recent change in company policy with reference to performing detective or investigative work. Mr. Green re-affirmed that the purpose of the company was to provide guard services only. Enclosure (10) is a telegram from [PSA] confirming that the company is not and does not intend to engage in any activities which would be in violation of [5] U.S.C. 3108. He also advised that he would execute an amendment to the contract incorporating the clause quoted in paragraph 3 above at no cost. By separate action the Contracting Officer is issuing an appropriate amendment and a copy will be forwarded to the addressee after execution by the company.

The "clause quoted in paragraph 3 above" is the above-cited provision which Navy states was inadvertently omitted from the contract. The telegram cited as "Enclosure (10)" reads as follows:

This is to confirm my telephone conversation today with you with reference to my company directly or indirectly participating in detective work. You are advised my company is formed for the sole purpose of providing guard service to Government activities and is not in violation of 5USC3108. Sincerely, William W. Green, President, Progressive Security Agency Inc.

It appears from the foregoing that the conclusion by both Navy and SBA that PSA is not a "detective agency" was based solely on statements by the President of PSA, accepted by both agencies without further inquiry.

PSA advertises in the 1976 Boston area telephone directory "yellow pages" as a "Detective Agency." An examination of the 1976 Boston telephone directories reveals that PSA is listed in the "white pages" at page 734 and in the "yellow pages" twice—under the headings "Detective Agencies" (page 385) and "Guard & Patrol Service" (page 602). In addition, PSA has an advertisement at page 601 of the "yellow pages" containing the following statement: "* * * For more than fifteen years, the PSA Staff has worked effectively in all areas of Security and Investigation. * * *"

We have consistently held that a telephone listing alone is not sufficient evidence that a given firm is a detective agency for purposes of 5 U.S.C. § 3108. B–177137, February 12, 1973; B–176307, March 21, 1973; B–181684, March 17, 1975. We have, however, suggested that the fact of such a listing should prompt further inquiry by the procuring

agency, B–176307 and B–181684, *supra*, but have also noted that a subsequent Anti-Pinkerton Act certification by the contractor may negate any contrary inference which might be drawn from yellow-page listings. B–176307, *supra*. The record in this case does not disclose whether Navy or SBA had actual knowledge of PSA's directory listings. *Cf.* B–181684, *supra*.

The criteria applied in determining whether a given firm is a "detective" or a "protective" agency for purposes of section 3108 have been set forth in our decisions. Essentially, we consider both the functions the firm in fact performs and the nature of the functions it *may* perform under its corporate charter and under licensing arrangements in the States in which it does business. Apart from the statement in PSA's yellow-page advertisement, the record indicates that PSA performs protective rather than investigative functions. However, if a firm is chartered as a detective agency and licensed as a detective agency, the fact that it does not actually engage in detective work will not permit it to escape the prohibition of section 3108.

In B–146293, July 14, 1961, we held that a contract for guard services could not properly be awarded to a firm which, although it did not in fact engage in detective work, was empowered under its corporate charter to operate and conduct a private detective agency and was licensed to engage in the private detective business. In that decision, we stated the test as follows:

> It is our view that the low bidder's actual "performance" under the license granted it pursuant to the Pennsylvania Private Detective Act of 1953 is not the criterion by which its status as a detective agency must be tested. It is rather, we think, the nature of the functions which it *may perform* under such license which determines its status as a detective agency. While it is probably true * * * that World Industrial Security, Inc., has heretofore been engaged exclusively in the business of providing industrial security services, including uniformed guard and carrier services, it appears also to be true that that concern may at any time exercise the power granted by its license to furnish investigative services, and has in fact held itself out as a detective agency.

See also 41 Comp. Gen. 819, 822 (1962), wherein we stated:

> * * * [T]he basic issue which must be resolved is whether Midwest is empowered by its articles of incorporation to engage in investigative or detective work in the ordinary sense of those terms as opposed to their meaning as inclusive of watch, guard or patrol services under the Minnesota statutes. For if the company is authorized to conduct any investigative or detective business, we can see no basis for distinguishing this case from [B–146293]. * * *

We further pointed out, at page 823:

> * * * [C]ertification by a company authorized to conduct any investigative or detective business that it will not engage in such activity during the term of a Government contract would not serve to remove the company from the exclusion laid down in B–146293. Such a certification would not, in fact, limit the company's corporate powers but would merely give rise to a breach of contract if the certification were violated. And the fact that the corporation had never previously actually performed investigative or detective services, is as stated in the cited decision, immaterial.

To determine the nature of the work PSA is authorized to do, we obtained a copy of its Articles of Organization, on file with the Office of the Secretary of the Commonwealth of Massachusetts. The purpose for which PSA was organized, quoting from Item 2 of the Articles, is as follows:

> To provide professional security services to businesses and individuals and organizations and also to provide investigatory services to business, individuals, and organizations.

It thus appears that PSA is empowered under its corporate charter to perform detective or investigative, as well as protective, work.

We have also reviewed Massachusetts statutes prescribing the licensing of detective and guard agencies, contained in General Laws, chapter 147. The statute separately defines "private detective business" and "watch, guard or patrol agency." Mass. G.L., ch. 147, sec. 22. Section 23 prohibits the conduct or solicitation of either business unless licensed in accordance with section 25. Pertinent portions of sections 24 and 25 are quoted below:

> *Sec. 24:* An application for a license to engage in the private detective business or a license to engage in the business of watch, guard or patrol agency shall be filed with the commissioner on forms furnished by him, and statements of fact therein shall be under oath of the applicant. * * *
>
> *Sec. 25:* The commissioner may grant to an applicant complying with the provisions of section twenty-four a license to engage in the private detective business or a license to engage in the business of watch, guard or patrol agency * * *.

The Massachusetts Department of Public Safety, the agency responsible for administering chapter 147, advises us that a license to engage in the private detective business is deemed the broader of the two, and includes the authority to engage in the business of watch, guard or patrol agency. A license to engage in the business of watch, guard or patrol agency does not, however, include authority to engage in the private detective business. Our inquiry with the Licensing Section of the Massachusetts Department of Public Safety disclosed that PSA holds a current license to engage in the private detective business.

In sum, PSA is empowered under its corporate charter to engage in the private detective business as well as the "protective" business. It is also specifically licensed to engage in the private detective business under Massachusetts law. It is significant in this connection, as noted above, that the Massachusetts statutory scheme provides separate licenses for detective and protective agencies. Finally, although there is evidence that PSA may not in fact be engaging in detective work, it has presented itself to the public as a detective agency by virtue of its telephone directory advertisements. Considering these factors, we must conclude that PSA is a detective agency for purposes of 5 U.S.C. § 3108. 41 Comp. Gen. 819, *supra*; B–146293, *supra*. Accordingly, the

statutory prohibition is applicable regardless of the character of the services to be performed under the contract.

One final issue may bear brief mention. In 26 Comp. Gen. 303 (1946), we held that the Anti-Pinkerton prohibition does not extend to subcontracts, stating at 305:

> * * * Where a subcontract is entered into with an independent contractor of the United States, the Government is in nowise a party to the agreement nor is there created any privity of contract between the subcontractor and the United States. * * *

The contract with PSA is technically a subcontract vis-a-vis Navy. Nevertheless, it is a prime contract vis-a-vis SBA, another Government agency, and thus remains subject to the prohibition.

The effect of awarding a contract in contravention of statute was discussed in 52 Comp. Gen. 215, 218 (1972) as follows:

> * * * We are in agreement with the position of the Court of Claims that "the binding stamp of nullity" should be imposed only when the illegality of an award is "plain," * * * or "palpable," * * *. In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor * * * or if the contractor was on direct notice that the procedures being followed were violative of such requirements * * * then the award may be canceled without liability to the Government except to the extent recovery may be had on the basis of *quantum meruit*. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government. * * * [Citations omitted.]

Applying this test to the instant situation, it seems clear that the award was made contrary to statutory requirements, "because of some action or statement by the contractor," *i.e.*, PSA's representations that it was not a detective agency for purposes of 5 U.S.C. § 3108. We conclude therefore that the contract should be canceled. B-167723, September 12, 1969. Since the need for security services at the Underwater Systems Center will presumably continue, resolicitation should adequately precede the cancellation so as to assure continuity of service.

It is apparent from our review of this and similar cases that reliance on the prospective contractor's certification that it is not a detective agency, within 5 U.S.C. § 3108, is not effective to assure compliance with that section. To prevent improper awards in the future, we are proposing the following guidelines and recommend that agency procedures be revised accordingly:

(1) In any procurement for guard or protective services, the procuring agency must be deemed to be on notice of the possibility that the procurement may violate 5 U.S.C. § 3108.

(2) In order to make an accurate determination for purposes of the statute, the procuring agency must have the necessary information available prior to award. Thus, in any procurement for guard or

protective services, the procuring agency should require from each bidder or offeror, as part of the bid or initial proposal, documentation as follows:

(a) A copy of its corporate charter, or, if unincorporated, such other comparable documentation as may exist.

(b) A statement by an authorized official of the bidder or offeror setting forth its licensing status under pertinent State and local laws requiring that agencies or individuals performing detective work be licensed. The statement should include appropriate statutory citations.

(c) A statement by an authorized official of the bidder or offeror that it is not performing detective work.

These procedures are not intended to eliminate the need for, or desirability of, an appropriate contract provision. The provision used by Navy does not appear adequate to provide the desired protection, and we recommend that it be revised in accordance with the guidelines set forth above.

Since this decision contains recommendations for corrective action, copies are being sent to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970). Navy and SBA are subject to the reporting requirements of that section. The General Accounting Office should be advised of the actions taken.

[B-185842]

Contracts—Multi-Year Procurements—Third Program Year Funding—Option Prices *v.* Offered Prices Under RFP

Contention that Army is required to fund third program year of multi-year contract before procuring similar supplies under request for proposals (RFP) is without merit, because there is no showing that award under RFP would eliminate any requirements covered by third program year.

Contracts—Negotiation—Prices—Comparison—Option Prices *v.* Offered Prices Under RFP

Grant of extraordinary contractual relief under Public Law 85-804—which has effect of making exercise of contract option viable possibility and leads agency to compare contract option price with prices of proposals received under RFP—does not constitute improper use of Public Law 85-804 authority to negotiate contract. Proscription in act is that extraordinary authority cannot be used to negotiate contracts for supplies or services which are required to be procured by formal advertising, which is not what occurred in this case.

Contracts—Options—Price Comparison Prior to Exercising Option

No basis is seen to object to contracting officer's finding that radio sets available under existing contract option will fulfill existing need of Government. While comparison of option prices (including effect of possible price escalation) and prices of proposals submitted under RFP may be difficult, this does not establish that consideration of option as means of satisfying Government's requirements is precluded.

Contracts—Negotiation—Specifications Unavailable—Basis for Exception to Formal Advertising

Impossibility of drafting adequate specifications is criterion for authorizing negotiation under 10 U.S.C. 2304(a)(10); Armed Services Procurement Regulation 3-210.2(xiii). Where record does not show reasonable grounds to support conclusion of "impossibility," neither difficulty of drafting adequate specification for radio sets nor desire for negotiations in order to enhance or assure offerors' understanding of requirements justifies negotiation in lieu of advertised procurement. General Accounting Office (GAO) recommends that if Army cannot find other basis to authorize current ongoing negotiated procurement, RFP should be canceled.

Contracts—Negotiation—Disclosure of Price, etc.—Auction Technique Prohibition

Fact that contractor's prices under prior contract are public information does not establish that issuing new solicitation for similar items subjects contractor, as offeror under new procurement, to auction.

Foreign Governments—Military Assistance—Sales Prohibitions—Commercial Sources Availability—Exceptions

In regard to contention that Army is not following foreign military sale (FMS) requirements, recent GAO decision declined jurisdiction over similar transaction and in any event Army points out that item is not commercially available for FMS purposes if government-to-government agreement is in effect.

Contracts—Protests—Interested Party Requirement

Contentions raised by prior contractor for radio sets—which did not submit proposal under RFP—will be considered despite allegations that contractor is not sufficiently interested to protest, because they are interrelated with Buy American Act issues raised in separate protest. Prior contractor's protest was premature at time of filing (issuance of RFP) but contentions are appropriately for consideration at present time.

Contracts—Buy American Act—Foreign Products—Component *v.* End Product

Allegation that Mexican-assembled modules and other materials are directly incorporated into competitor's radio set, and that these foreign components make end product foreign under Buy American Act, is not supported by GAO decisions relied on by protester. While domestic-made parts are purchased in United States, shipped to Mexico for some manufacturing and returned to United States for additional manufacturing, there is no showing that separate "stages" of manufacturing are involved. GAO view is that domestic parts purchased in United States are components of end product.

Bids—Buy American Act—Foreign Product Determination—Component *v.* End Product

A 1975 GAO audit report expressed reservations whether contractor's 85 to 90 percent manufacturing of radio sets in Mexico satisfies Buy American Act requirement that materials must be "manufactured in the United States" in order to qualify as domestic end product, and recommended ASPR Committee consideration of issue. Recent protest decision in different factual context repeated recommendation. Considering Mexican manufacturing issue in present protest is therefore viewed as inappropriate.

In the matter of Cincinnati Electronics Corporation; Bristol Electronics, Inc.; E-Systems, Inc., September 27, 1976:

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This is our decision on protests filed by Cincinnati Electronics Corporation (CEC), Bristol Electronics, Inc. (Bristol) and E-Systems, Inc., in connection with request for proposals (RFP) No. DAAB07-76-R-0181, which was issued on December 9, 1975, by the United States Army Electronics Command (ECOM). The RFP contemplates the award of a contract for 3,201 AN/PRC-77 radio sets, 1,193 RT-841 receiver-transmitters, and ancillary items.

The major issues raised in the protests are (1) what are the Army's rights and obligations with respect to satisfying its needs under CEC's current contract No. DAAB05-73-C-0006 (hereinafter contract -0006) as opposed to making an award under the RFP; (2) whether the Army should have formally advertised the present procurement rather than negotiating it; and (3) the manner in which the Buy American Act, 41 U.S. Code § 10a-d (1970), applies to the procurement.

Satisfying Needs Under Current Contract v. Award Under RFP

CEC protests that the RFP should be canceled because the Army must first satisfy its contractual obligations by funding the third program year under CEC's contract -0006. E-Systems protests that the Army must satisfy its requirements by an award under the RFP and cannot exercise any options under contract -0006. The Army disagrees with both protesters. (The Bristol protest relates to the Buy American Act and is discussed beginning on page 17.)

Contract -0006, awarded in 1973, is a multi-year contract which calls for the furnishing of a quantity of AN/PRC-77's and RT-841's in three program years with an option quantity provision for each year. The record indicates that the first program year has been or is being completed, with some portion of the option having been exercised. By contract modification dated March 22, 1976, the second program year was funded but the option for that year was not ex-

ercised. So far as the record shows, there has been no funding of the third program year.

In performing the contract, CEC reportedly experienced production and financial difficulties. The contractor applied for and received extraordinary contractual relief under Public Law 85–804, August 28, 1958, 50 U.S.C. § 1431, *et seq.* (1970) and Armed Services Procurement Regulation (ASPR) section XVII (1975 ed.). The Army Contract Adjustment Board (ACAB) decision No. 1185, December 31, 1975, authorized an increase in total contract price by an amount not to exceed $2,119,000. Also, ACAB clarification letter No. 1185a, April 20, 1976, authorized the contracting officer to increase the price of the option quantities to a maximum of $557 per unit before escalation.

The contracting officer has stated that ACAB's action gave him the tools to reasonably consider exercise of the CEC contract option which had not theretofore been considered viable. By message dated April 14, 1976, he advised the offerors that the CEC option would be considered after negotiations under the RFP. This prompted the protest by E-Systems.

CEC argues essentially that if the Army has funds available, it is required to fund all 3 program years under CEC's multi-year contract –0006 prior to any procurement of comparable supplies by other means, such as by issuing the present RFP. This is based on precedent that the multi-year contract does not afford the Government an election to buy or not to buy any year's requirement on the basis of the market. See, generally, *Condec Corporation*, ASBCA No. 14234, 73-1 BCA 9808, and decisions discussed therein. CEC argues that by issuing the RFP, the Army has indicated its intent to ignore its obligations under contract –0006, and that an award under the RFP may effectively terminate for convenience the unfunded third program year of the contract. CEC contends that the termination for convenience costs must be included in the RFP as an evaluation factor to be applied against other offerors' prices.

E-Systems contends first that extraordinary relief under Public Law 85–804 cannot be used for the negotiation of purchases or contracts for property. E-Systems does not argue that CEC was prohibited from receiving the relief, but points out that ECOM's considering the exercise of option provisions under contract –0006 could not or would not be possible but for the ACAB's action. If ECOM could not exercise the CEC option, purchase by other means—such as under the current RFP—would be necessary. Thus, in E-Systems' view, exercising the option would be using Public Law 85–804 for negotiation purposes, which is prohibited. See 50 U.S.C. § 1432(c) (1970).

E-Systems' second contention is that exercise of the contract -0006 option is prohibited under ASPR § 1-1505 (1975 ed.) because (1) the radio sets to be furnished under CEC's option are substantially different from those called for under the RFP, and therefore do not fulfill an existing need of the Government as required by ASPR § 1-1505(c)(ii), and (2) comparison of the option prices with the prices under the RFP is impossible because it could not include adjustment of the option prices to account for necessary technical changes; the actual cost of unpriced change orders; the effect of price escalation (up to 15 percent) under the second and third year of CEC's contract; the price of items which are Government-furnished under CEC's contract but contractor-furnished under the RFP; and the increased costs attributable to CEC compliance with the RFP production evaluation clause (if incorporated into contract -0006).

The Army's position, briefly stated, is that the requirements being sought under the RFP are in addition to those which would be obtained under the basic program year quantities of contract -0006. The agency states that at the time the RFP was issued (December 9, 1975), there was doubt that CEC's option was a viable alternative because Public Law 85-804 relief had not yet been granted by ACAB. It is reported that the RFP was issued for a portion of the accumulating requirements instead of exercising an option to the first program year under contract -0006. The agency believes that these facts effectively moot CEC's contentions.

Further, the Army denies E-Systems' assertion that Public Law 85-804 is being used for negotiation authority, citing in this regard ACAB No. 1040, April 27, 1962, where the Board held that correction of a bid mistake which increased the contract price over the $2,500 small purchase negotiating authority limit did not constitute use of the act as negotiating authority. The agency further contends that despite changes in the contract -0006 radio set drawings which have occurred since 1973, the function and capacity of the radios furnished under the contract are the same as the radios called for in the RFP, and that CEC's contract -0006 option can therefore fulfill an existing need of the Government. The contracting officer also believes that he is required to consider the option prices vis-a-vis the prices offered under the RFP, and that while a comparison of the two may be difficult it is not impossible.

CEC's protest, in our opinion, is without merit. In light of the Army's statements, there is no showing that an award under the RFP would eliminate or supplant any of the program year requirements (as opposed to option quantity requirements) under contract -0006. In other words, there is no reason to believe that the Army will not

at some point in the future fund the third program year of contract -0006. We do not find that the general principles discussed in *Condec Corporation*, *supra*, and other ASBCA decisions relied on by CEC support the result which CEC requests in its protest—i.e., that the RFP must be canceled.

We likewise believe that E-Systems' argument concerning the improper use of Public Law 85-804 as negotiation authority is without merit. 50 U.S.C. § 1432(c) provides that nothing in Public Law 85-804 as amended shall be construed to constitute authorization for the negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising or competitive bidding. The Army is not relying on Public Law 85-804 in the present case to negotiate a contract with CEC which otherwise would be required to be advertised. Rather, relief granted under Public Law 85-804 has had the effect of making viable the possible exercise of a contract option—a preexisting right which the Government obtained when contract -0006 was awarded—in lieu of an award under the RFP. We do not see how this violates 50 U.S.C. § 1432(c).

ASPR § 1-1505 provides that options should be exercised only if it is determined that certain circumstances are present; for instance, that the requirement covered by the option fulfills an existing need of the Government and that the exercise is the most advantageous method of fulfilling the Government's needs, price and other factors considered. Also, if the contract or its option provides for price escalation and the contractor requests a revision of price pursuant to this provision, the effect of escalation on prices must be ascertained before the option is exercised.

We believe the basic issue regarding the option is whether anything presented by E-Systems demonstrates that the contracting officer is precluded from considering the CEC option along with the offers submitted under the RFP. First, we see no basis to question the contracting officer's finding that CEC's radio sets—despite the technical differences between them and the radio sets being procured under the RFP—will fulfill an existing need of the Government. The record indicates in this regard that relatively few of the technical changes are regarded as significant by ECOM. Further, we do not agree with E-Systems' suggestion that the terms and conditions of CEC's performance under the option must actually be modified so that they are identical with the terms and conditions of performance of a contract awarded under the RFP. Rather, as the contracting officer indicates, a comparison is possible if both the option and a contract awarded under the RFP are considered to be methods of obtaining equipment which will fulfill the Government's needs—though there may be some

differences in the equipment and the terms and conditions under which it is furnished.

As for the effect of price escalation and the problem of comparing the option prices with the proposal prices, the contracting officer has stated:

> It is the intention of the Contracting Officer to determine what an appropriate adjustment would be, if at all necessary, at the time the price comparison would occur and use same as an evaluation factor to be added to the -0006 option price of $545. This would be one of the adjustments necessary for a fair comparison of the respective prices. * * *

ASPR § 1-1505 requires, in our opinion, that a reasonable and good faith effort be made to determine whether exercise of the option is most advantageous, price and other factors considered—not that the effect of price escalation or other adjustments must be determined with absolute certainty before any exercise of the option can be contemplated. The fact that it may be difficult to make such determinations does not preclude consideration of the option as a means of satisfying the Government's requirements. We see no basis to object to the contracting officer's position in this matter.

Advertising v. Negotiation

CEC also contends that the procurement should have been formally advertised rather than negotiated. ECOM's determination that it was impracticable to obtain competition by formal advertising (10 U.S.C. § 2304(a)(10) (1970)), ASPR § 3-210.2(xiii) (1975 ed.) was based on these findings:

> 1. Under RFP DAAB07-76-R-0181, the USAECOM proposes to procure by negotiation 4394 Radio Sets AN/PRC-77 and subassemblies thereof, along with associate test equipment and data. The estimated cost is approximately * * *. The procurement will include a 100% option.
> 2. Due to the lengthy period of performance (32 months, plus 5 months with exercise of the option provision), the difficulty in foreseeing the rate of inflation, and the necessity to eliminate contingency allowances, it has been determined to use a Fixed Price contract with economic price adjustment. The clause is set forth in ASPR 7-107. This clause is not permitted in formally advertised procurements.
> 3. Due to the revision of drawings pertinent to the radio design, several modular changes, and the numerous Engineering Change Proposals (ECPs) (approved, pending approval, and expected), procurement by negotiation is necessary. Prior to the award of the contract, and due to the inclusion of Pre-Production Evaluation in the solicitation, it is necessary to have the opportunity for discussions and specification changes subsequent to receipt of proposals.

Additionally, the Army has stated that the contractors performing under the two existing contracts awarded pursuant to formal advertising in 1973 (CEC and Sentinel Electronics, Inc.) have experienced great difficulty in performing under the specifications, leading to what are described as tragic results. It is reported that the delivery schedule

under the contracts has been extended four times; that deliveries did not commence until earlier this year, and that both contractors have sought extraordinary contractual relief under Public Law 85-804. The contracting officer has repeatedly stated that in his judgment, technical discussions were needed in the present procurement to obtain effective competition and to insure full understanding of the specifications by the offerors.

The Army also makes reference to the numerous changes in the specifications which have occurred (a total of at least 440 drawing changes and 65 engineering change proposals) under the two prior contracts.

In short, it is the Army's view that since the items being procured are very complex, negotiations are necessary to require offerors to give a detailed explanation of their technical approaches and to thereby insure that offerors attain a complete understanding of the requirements. In these circumstances, the agency states that a broad interpretation was given to the following language in ASPR § 3-210.2 (xiii), *supra*, which can authorize procurement by negotiation:

> * * * when it is impossible to draft * * * adequate specifications or any other adequately detailed description of the required supplies or services * * *.

The Army also cites *Design Concepts, Inc.*, B-184754, December 24, 1975, 75-2 CPD 410; *Electronic Communications, Inc.*, 55 Comp. Gen. 636 (1976), 76-1 CPD 15; B-164596, September 20, 1968, and other decisions of our Office in support of its position.

We note that the RFP as drafted emphasizes the need for offerors to show their understanding of the requirements. Some pertinent sections in this regard are B.43 (offerors bear the burden of showing the cost realism of their proposals); section C.21 (sufficient detail must be presented to show how the contract requirements will be met by implementation of the offeror's plans; each and every technical factor and subfactor in the RFP must be addressed in proposals; a milestone chart must be presented to show the major events which will occur over the duration of the contract); section D.2 (the technical approach must demonstrate an understanding of the requirements and the means to fulfill them); section D.3 (6 major technical factors to be addressed in proposals--Production Engineering; Manpower Application and Qualifications; Schedules and Control; Production; Quality Assurance Plan; and Data Items).

Included as a subfactor under Production Engineering is Production Evaluation, whereunder the offeror is required to describe the detailed procedures it will employ to satisfy the RFP's Production Evaluation provision. The provision states essentially that while the Government warrants the basic design represented by its engineering drawings as being inherently capable of meeting the

equipment specification requirements, the contractor shall make a detailed review of all Government-furnished technical data, for the purpose of identifying any errors and proposing steps to correct them.

CEC's principal arguments may be summarized as follows: Past procurements for these supplies have been formally advertised. The present RFP contains detailed design specifications, provides for waiver of first article testing, and does not call for contractor design initiative. There is no showing by the Army in this case that it was impossible to draft specifications adequate for formal advertising. Also, the Government's desire to utilize a particular clause, such as the economic price adjustment clause, cannot in itself justify negotiated procurement. Moreover, ASPR §§ 2–104 and 3–404.3 (1975 ed.) authorize use of economic price adjustment provisions, generally, in advertised procurement; Defense Procurement Circular (DPC) 74–5, issued October 3, 1975, authorizes such use of the particular clause in question here. Similarly, there is nothing in the preproduction evaluation clause which requires negotiations. The real reason for negotiated procurement is ECOM's desire to assure itself that the selected contractor will have the capability to perform satisfactorily. Such assurance should be obtained through a preaward survey, not negotiations. Mere "complexity" of an item being procured cannot justify negotiations. Also, the record shows that the technical changes in the specifications were not the justification for negotiated procurement, because a memorandum prepared by a cognizant ECOM technical person states:

> This office is not prepared to defend the essentiality of the technical changes contained in the solicitation over either Cincinnati or E-Systems. The fact that the present solicitation contains changes above the current contracts was not the basis for recommending competitive negotiation in the procurement data clearance. That recommendation was based on a change in ECOM policy allowing competitive negotiation for procurement of complex equipments, such as the AN/PRC–77. The complexity of the AN/PRC–77 is supported by examination of the difficulties experienced throughout the procurement history.

The record further shows that only a few of the technical changes are regarded as "significant" by ECOM.

In support of its position, CEC cites 41 Comp. Gen. 484 (1962); also *ALS Electronics Corporation*, B–181731, October 18, 1974, 74–2 CPD 214, and *Fechheimer Brothers, Inc.*, B–184751, June 24, 1976, 76–1 CPD 404, are cited for the proposition that a specification itself, not the agency's experience with it, is the criterion for deciding whether advertising is feasible and practicable.

10 U.S.C. § 2304(a) provides that purchases and contracts "shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances." If advertising is not feasible and practicable, a deter-

mination and findings (D&F) may be executed authorizing procurement by negotiation, providing that the circumstances described in one of 17 exceptions are applicable. The tenth exception is where the purchase or contract is for property or services for which it is impracticable to obtain competition. The findings of a D&F are final; however, our Office is not precluded from reviewing the determination based on those findings. 51 Comp. Gen. 658 (1972). In 41 Comp. Gen. 484, *supra*, at 492, we indicated that we would not object to a determination to negotiate on the basis that it is impracticable to obtain competition where any reasonable ground for the determination exists.

CEC's contention that the specification itself, not past experience with it, is the only relevant criterion is not persuasive. *ALS Electronics Corporation* and *Fechheimer Brothers, Inc.*, *supra*, involved situations where the contracting agency had no prior experience with the specification. We have recognized that where the specifications in an advertised procurement perhaps cannot be stated with sufficient clarity to insure the same understanding by all bidders, it is appropriate for the agency to consider using a more flexible procurement method. B-175585, November 8, 1972.

However, the fact that a procurement is for "complex" supplies or services does not *per se* preclude the use of formal advertising. *Sorbus, Inc.*, B-183942, July 12, 1976, 76-2 CPD 31; *Bob Milner and Associates*, B-181637, January 22, 1975, 75-1 CPD 41. Also, we have observed that the statute contemplates the impossibility of drafting adequate specifications, not merely the inconvenience or difficulty of doing so. 52 Comp. Gen. 458, 461 (1973); *Cf.* 46 *id.* 631, 640 (1967).

In the present case, CEC correctly points out that the specification is detailed and that the record does not show the impossibility of revising the specification to incorporate the technical changes which have occurred. It appears that the Army's position is not that it is impossible to draft a detailed specification describing the agency's needs; rather, it is based upon the belief that it is impossible to draft a specification or description of the work adequate enough to assure that offerors obtain a satisfactory understanding of the requirements without negotiations.

However, we find that the principal decision relied upon by the Army—*Design Concepts*, *supra*—does not support its position. *Design Concepts* involve a factually dissimilar situation where the agency believed it could not draft specifications adequate for formal advertising because the nature of the design services being procured was such that a variety of individual "approaches" could be taken by offerors. We agreed that the agency could not describe its needs with sufficient specificity to permit formal advertising. The decision then

recognized that factors traditionally associated with responsibility—such as understanding of the requirements, experience, and facilities—could be used in the technical evaluation of proposals. However, the decision clearly indicated that this was so only if the propriety of procurement by negotiation had been established in the first place.

The difficulty with the Army's position in this case is that the record does not demonstrate the impossibility of drafting a specification which will be adequate enough to describe in detail what the agency wants to buy and to make competition among bidders on the basis of that specification feasible and practicable in an advertised procurement. If it is possible to draft a description of the product or service adequate enough to permit such competition, the desire to conduct discussions with offerors to assure their understanding of the specification or to cover matters traditionally related to responsibility cannot, in our opinion, authorize a negotiated procurement under 10 U.S.C. § 2304(a)(10).

The Army has cited the past performance difficulties under CEC's and Sentinel's contracts. However, the record before us does not demonstrate that the contractors' inability to understand the specification was the sole or even the primary cause of the performance problems. ACAB No. 1185, *supra*, raises the inference that some of CEC's difficulties may have been due to its business judgment in bidding on the 1973 procurement in the expectation that it would receive both the non-set-aside and set-aside portions of the award. As it developed, the total award was split between CEC and Sentinel. The ACAB decision further indicates that a sharp escalation in material costs may also have been a factor in CEC's performance difficulties.

In any event, even assuming that difficulties with the specification used in the 1973 ECOM IFB have been a factor in CEC's and Sentinel's performance problems, the record before us does not establish reasonable grounds for a conclusion that it was in fact impossible to revise the specification for the 1976 procurement so that bidders could obtain a reasonably accurate understanding of what is called for. *Cf.* B–175585, *supra*, where the IFB initially issued was canceled, and our decision on protests under the second IFB concluded that the specifications perhaps could not be stated with sufficient clarity to insure the same understanding by all bidders. Also, B–164596, *supra*, concerned the third of three negotiated solicitations which included complex rate structures for container and warehousing services. The fact that the Government had to explain the specifications to offerors under the first and second RFP's, which in turn led to price reductions in the offers, was cited as experience justifying the determination to conduct

the third procurement on a negotiated basis. Neither case involved a factual situation substantially similar to the one here.

In short, we believe the pertinent criterion is not the difficulty of drafting an adequate specification or the desirability of negotiations with offerors to enhance their understanding of the requirements, but the impossibility of drafting a reasonably adequate description of what is to be purchased. In a protest connected with the 1973 ECOM advertised procurement of AN/PRC–77 radio sets, we recognized that no data package or specification can be expected to be totally without defects. 52 Comp. Gen. 219, 222 (1972). While we are not unaware of the administrative difficulties which can result during contract performance because of problems with the specifications, we do not believe that the hope of minimizing these difficulties through negotiations authorizes procurement by negotiation unless it is impossible to draft a specification adequate for advertising. *Cf. Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693, 696 (1976), 76–1 CPD 71. To permit the use of negotiation under the circumstances of this case would be to suggest, in effect, that negotiation is authorized in any instance where a complex product is being procured and the agency desires to insure the offerors' understanding of an admittedly detailed specification. We think the correct approach is to attempt to revise and improve the specification, and to rely on a preaward survey to establish the prospective contractor's capability to perform.

The Army also suggests that *Electronics Communications*, *supra*, supports the use of a production evaluation provision as a justification to procure by negotiation. That case did involve the question of an offeror's compliance with such a provision in a negotiated procurement, but does not stand for the proposition advanced by the agency. The Army further cites one of its internal procurement pamphlets which discusses the preproduction evaluation concept and indicates that offerors' understanding of the special responsibilities imposed by such provisions can best be obtained by negotiation. We see no basis to disagree with the view that negotiation is desirable, but this does not establish that advertising is impracticable. A prospective contractor's understanding of the requirement could also be ascertained in a preaward survey. We note also that a production evaluation provision was used in ECOM's 1973 formally advertised AN/PRC–77 procurement. *See* 52 Comp. Gen., *supra*, at 222.

As for the economic price adjustment clause, the contracting officer points out that DPC 75–4, authorizing use of the clause in an advertised procurement, was not received by ECOM until after the RFP had been issued, and that under ASPR § 1–106.2(d) (1975 ed.), there is no requirement to use new DPC clauses if doing so would delay a

solicitation. Since we have found that procurement by negotiation in this case is otherwise unsupported, we do not believe that it could be justified based solely on the circumstances described by the contracting officer.

Since a negotiated procurement in this case is not, in our view, authorized under 10 U.S.C. § 2304(a)(10), there is the question of what action should be taken. By letter of today to the Secretary of the Army, we are recommending that the Army consider whether authority to support the current procurement can be found under one of the other exceptions in 10 U.S.C. § 2304(a), such as where the public exigency will not permit the delay incident to advertising (10 U.S.C. § 2304(a)(2)). If the Army believes other authority can be used, an appropriate D&F should be executed. While an after-the-fact authorization of this kind is somewhat irregular, our Office would have no objection to such action in light of the lengthy procurement and protest process in this case, and the Army's need for the supplies. Also, we understand that the funds appropriated for the procurement are available only until September 30, 1976. However, if appropriate negotiation authority cannot be found, we see no alternative other than cancellation of the RFP.

Alleged Conduct of Auction by Army

CEC also contends that by issuing the present RFP, the Army has subjected CEC to what amounts to an auction, because CEC's prices under its prior contract are public information. The protester points out that auctions are improper, citing ASPR § 3-805.3(a) (1975 ed.), B-170142, October 22, 1970, and B-151976, October 15, 1963.

An auction situation usually arises when there has been an improper disclosure of offerors' identities and/or the contents of their proposals during an ongoing negotiated procurement. This was what occurred in the procurements involved in the two decisions of our Office cited by CEC. In the present case, we see no reason why the public availability of CEC's prices under a prior contract creates an auction situation with reference to the present ongoing procurement.

Foreign Military Sales

CEC has also raised several contentions concerning the Foreign Military Sales (FMS) aspect of this procurement. A small portion of the total quantity of AN/PRC-77's and RT-841's are being procured for FMS purposes. CEC argues, among other things, that ASPR § 6-705.2(a) (1975 ed.) (which proscribes sales of commercially available supplies to economically developed countries) and

established DOD policies are being violated under the circumstances prevailing in this case.

The Army believes that our Office lacks jurisdiction in this matter because the funds for the FMS quantities are not appropriated funds, but rather are payable from the Army Military Sales Trust Fund pursuant to "dependable undertakings" with the countries involved.

In a recent decision involving similar circumstances (*Tele-Dynamics, Division of AMBAC Industries*, 55 Comp. Gen. 674 (1976), 76-1 CPD 60), we declined to render a decision on a protest as to the proper recipient of an award since payments from appropriated funds were not involved. In any event, as the Army points out, we have previously held that even if a product is in fact commercially available, it may nevertheless be considered not commercially available for FMS purposes if the Department of Defense determines that a government-to-government agreement is compelled by the national interest. *Hy-Gain Electronics Corporation, et al.*, B-180740, December 11, 1974, 74-2 CPD 324. The Army's August 23, 1976, report points out that the only units being procured for an economically developed nation are certain Government-furnished equipment for Norway, and that a government-to-government agreement has been executed covering this sale.

Buy American Act

The protest filed by Bristol alleges that the Army is not properly applying the Buy American Act to this procurement. Before reaching the merits of this complaint, two procedural issues must be addressed: (1) Is Bristol an "interested party" eligible to protest under our section 20.0(b) of our Bid Protest Procedures (4 C.F.R. § 20.0(b) (1976))? (2) Is Bristol's protest timely?

The Army and CEC have expressed doubts that Bristol is an interested party to protest in light of the fact that Bristol did not submit a proposal under the RFP. We do not find it necessary, however, to decide this issue. We note that E-Systems, whose status as a protester is unquestioned, has also raised issues regarding the application of the Buy American Act. As described *infra*, the thrust of E-Systems' contentions is somewhat different from Bristol's, but both parties' contentions are also interrelated. In these circumstances, we believe it is appropriate to consider Bristol's contentions as though Bristol were determined to be a party sufficiently "interested" to protest in this case.

The timeliness question arises because on January 16, 1976, Bristol requested of the contracting officer a formal determination as to the amount of manufacturing labor which had to be done in the United

States in order to comply with the act. ECOM responded on January 29, 1976, that the question could not be answered in the abstract because compliance with the act must be determined on a case-by-case basis. Bristol's protest to our Office was filed on February 20, 1976, apparently more than 10 working days after it received the ECOM response.

We believe—as suggested by several statements in the Army's reports—that Bristol's February 20, 1976, protest was premature. Bristol's protest at that time complained that the solicitation did not contain a clear interpretation of the act's requirements and also that a current contractor (CSC) possessed an unfair advantage because of its foreign manufacturing operation. We agree with the Army that the question of proper compliance with the act by a contractor ordinarily arises at the time a bid or proposal appears to be in line for award. Even if the bid or proposal takes no exception to the certification that a domestic source end product will be furnished (paragraph 7, Standard Form 33 (Nov. 1969)), the contracting agency may nevertheless be required under the circumstances to reasonably satisfy itself that the offeror intends to comply with the certification. See *Unicare Vehicle Wash, Inc.*, B–181852, December 3, 1974, 74–2 CPD 304.

No award has yet been made under the RFP. However, in view of the time which has elapsed since the filing of Bristol's protest and the possibility that CEC may receive an award, we see no valid reason to regard the Buy American Act issues as premature at this time.

The Buy American Act requires that only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured in the United States shall be acquired for public use unless the head of the agency concerned determines it to be inconsistent with the public interest or the cost to be unreasonable. 41 U.S.C. § 10a. Executive Order 10582, December 17, 1954, provides that materials (including articles and supplies) shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes 50 percent or more of the cost of all the products used in such materials. The applicable contract clause prescribed by ASPR § 6–104.5 (1975 ed.) further provides that "end products" are those articles, materials, and supplies which are to be acquired under a contract for public use; that "components" are those articles, materials or supplies which are directly incorporated in the end products; and that a "domestic source end product" is an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States or Canada exceeds 50 percent of the cost of all its components.

We do not believe that an end product can be considered domestic when it is completely manufactured abroad from domestic components. *Cf.* 52 Comp. Gen. 13 (1972). In other words, we believe that the act imposes two requirements: that manufactured articles, materials or supplies must be manufactured both (1) *in* the United States, and (2) substantially all *from* "components" mined, produced or manufactured in the United States. *Cf. Unicare Vehicle Wash, Inc., supra.*

The issues raised in this case involve both of these requirements. Bristol argues primarily that CEC's end product will not be "manufactured in the United States" because 85 to 90 percent of the manufacturing is accomplished in Mexico. E-Systems, on the other hand, contends that more than 50 percent of the components of CEC's end product are foreign. Both protesters reach the same conclusion—that CEC's end product is foreign.

It is to be noted that procurement of foreign end products is not prohibited; however, a percentage factor or differential is added to offers of foreign end products in the evaluation of proposals. See ASPR § 6-104.4.(1975 ed.).

The factual background is as follows: CEC's manufacture of AN/PRC-77 radio sets under its contract -0006 was discussed in an audit report of our Office (B-175633, November 3, 1975, PSAD 76-41) wherein we stated:

> * * * Components are purchased by Cincinnati's Ohio plant, inspected there, and shipped to a wholly owned subsidiary (CE Sonora) in Hermosillo, Sonora, Mexico, for assembly. The Sonora plant ships back a nearly fully assembled radio for final assembly, testing, conditioning, and adjusting at the Ohio plant.
>
> The Defense Contract Administration Services District in Cincinnati, Ohio, inspects all components before they are shipped to the Sonora plant. The District administrative contracting officer stated that virtually all are of domestic origin.
>
> * * * * * * *
>
> Documents in the Army Electronics Command's contract files indicated that Sonora assembles an essentially complete radio and that only 10 to 15 percent of the total assembly man-hours are performed at the Ohio Plant.

To this, CEC adds that the parts purchased and shipped to Mexico are transistors, diodes, metal housings, capacitors, and other hardware. When they are returned from Mexico, CEC states that it performs "several additional assembly operations, 'burn-in,' alignment, adjustment, testing and packaging." E-Systems, on the other hand, believes that the end product consists of the following components: (1) the front panel assembly, which includes the chassis, gear train, wiring harness, and miscellaneous parts; (2) 29 modules, 24 of the "plug-in" type and 5 which require soldering; and (3) the battery box and dust cover. E-Systems contends that CEC's end product is substantially manufactured in Mexico and shipped to the United

States with all 29 modules in it, and that at least the front panel assembly and all of the modules are Mexican assembled and therefore foreign components.

E-Systems' contentions in this regard may be summarized as follows. A component is something directly used in the manufacture of the end product. 45 Comp. Gen. 658, 659 (1966); under the contract clause and ASPR it means those articles, materials and supplies which are directly incorporated into the end product. 50 Comp. Gen. 697, 701 (1971). GAO has recognized foreign-made subassemblies as being components. 39 Comp. Gen. 695 (1960). Moreover, mere assembly of parts constitutes "manufacture" and foreign parts may be assembled into a domestic component. 46 Comp. Gen. 813 (1967); 47 *id.* 21 (1967); *Hamilton Watch Company*, B–179939, June 6, 1974, 74–1 CPD 306. If foreign parts lose their identity when assembled as domestic components, it follows that CEC's domestic parts lose their identity when assembled in Mexico. The above decisions and 49 Comp. Gen. 606 (1970) and 52 *id.* 13, *supra*, show that CEC's Mexican manufacturing operation makes foreign components. Thus, since the domestic components do not exceed 50 percent of the cost of all components, CEC's radio sets are not a domestic source end product. Under E-Systems' reasoning, it is unnecessary to decide the question whether CEC's end product is "manufactured in the United States" because the cost of its domestic components does not exceed 50 percent of the cost of all its components.

Our Office has not attempted to define "component"; rather, the meaning and application of the term are considered in light of the particular facts of each case. *See* 47 Comp. Gen. 21, *supra*, at 25. Also, the act does not use the term component but rather speaks of the manufacture of articles, materials or supplies from other manufactured articles, materials and supplies. It appears to us that CEC's manufacture begins with the parts shipped to Mexico and ends with the completion of the radio set. We have no difficulty in regarding the parts purchased by CEC as being directly used in the manufacture of and directly incorporated into the end product. Decisions such as 45 Comp. Gen. 658, *supra* (see also *Davis Walker Corporation*, B–184672, August 23, 1976), involved identifiable, separate manufacturing stages which were viewed as significant in determining the identity of the components and the scope of the manufacturing. In this regard, CEC asserts that its manufacturing involves one continuous "process." We see no basis on the record to find that the manufacture of the radio sets involves separate "stages." *Cf. Davis Walker Corporation, supra.*

While E-Systems' argument proceeds logically based upon the ASPR definitions and the holdings of past GAO decisions, we must note that the definitions are only a conceptual guide, and that each decision involved its own particular factual situation. For instance, 39 Comp. Gen. 695, *supra*, indicates that "sub-assemblies" were a component of hydraulic turbines; in 46 Comp. Gen. 813, *supra*, electric motors were regarded as a component of circulating pump units; 50 Comp. Gen. 697, *supra*, held that a power unit was a component of a low-noise microwave transistor amplifier with integral power supply; in *Hamilton Watch Company*, *supra*, assembled watch movements were regarded as components of watches; and in 52 Comp. Gen. 13, *supra*, softball cores were stated to be components of softballs. In general, we believe that none of these decisions involved a factual situation so similar to the present case as to be controlling. At the same time, we recognize that distinguishing these decisions is complicated by the fact that some of them do not discuss in detail the rationale for determining that certain materials were components. However, the facts involved in 46 Comp. Gen. 813, 50 *id.* 697 and 52 *id.* 13, *supra*, do raise the inference that—unlike the present case—separate manufacturing stages may have been involved in producing the electric motors, the power units and the softball cores, respectively. Additional grounds for distinction of some of these decisions, for example, 39 Comp. Gen. 695 and *Hamilton Watch Company*, *supra*, may rest on the time and method of acquisition of the materials by the end product manufacturer. In this view, "manufacture" would commence at the time the end product manufacturer undertakes to fashion its product from materials it has acquired elsewhere for that purpose. *Cf.* 52. Comp. Gen. 886, 904 (1973). In the present case, acquisition occurs when CEC purchases the parts in the United States.

While Bristol also advances the "foreign component" argument espoused by E-Systems, it primarily contends that the legislative history shows that the intent of Congress in passing the act was to require 100-percent American assembly of the end product or at least "a substantial amount" of American assembly. Bristol believes that CEC's 10 to 15 percent manufacturing of the radio sets in the United States cannot be considered "substantial."

CEC suggests that our 1975 audit report, *supra*, ruled that its manufacturing did not violate the act, and contends that this position should not be reversed. However, our report stated that we had reservations whether CEC's manufacturing complied with the "manufactured in the United States" requirement. We recommended in the report that the Secretary of Defense amend ASPR to define and clarify the

"manufactured in the United States" requirement. While Bristol maintains that no effort has been made to amend the ASPR, we understand that our recommendation has received and is receiving active consideration by the ASPR Committee.

The Army, in this regard, suggests that since the matter is before the ASPR Committee, it would be inappropriate for our Office to decide the issue in the present protest. In this connection, we note that in the recent decision in the matter of *Davis Walker Corporation, supra*, we repeated our recommendation that ASPR be amended to define and clarify "manufactured in the United States." Thus, the recommendation for ASPR Committee consideration of the issue has been made in the context of both our audit and protest functions. In these circumstances, we agree with the Army that further consideration of the issue in the present protest would be inappropriate. Accordingly, the protests of Bristol and E-Systems in regard to the Buy American Act issues are denied.

Conclusion

In view of the foregoing, the protests of Bristol and E-Systems are denied. CEC's protest is sustained insofar as the "Advertising v. Negotiation" issue is concerned and is otherwise denied.

[B–186535]

Departments and Establishments—Services Between—Appropriation Obligation—Automated Payroll System

Interagency agreement entered into in fiscal year 1976 by General Services Administration and Administrative Office of U.S. Courts for design and implementation of automated payroll system under section 111 of Federal Property Act, 40 U.S.C. 759, rather than Economy Act, 31 U.S.C. 686, is not subject to 31 U.S.C. 686–1, which limits duration of appropriation obligations only in Economy Act transactions. Such agreement constitutes valid obligation against fiscal year 1976 Administrative Office appropriation to meet *bona fide* 1976 need.

In the matter of an interagency agreement—Administrative Office of the U.S. Courts, September 27, 1976:

This decision is to the Director, Administrative Office of the United States Courts, in response to his questions about the obligation of appropriations pursuant to an interagency agreement between the Administrative Office and the General Services Administration (GSA) under which GSA "* * * is to provide the automated data processing services of designing, programming, and implementing a uniform payroll system * * *" for the judicial branch of the United States Government.

Requests were made to GSA for development of the system in fiscal year 1975. For reasons not relevant here, GSA declined at that time to develop the system, and consequently granted authority to the Administrative Office to contract with a commercial source for development of the system. See 40 U.S. Code 759, *infra*. The Administrative Office requested proposals for development of the automated payroll system, but none were found acceptable. Subsequently, GSA indicated it would be able to develop the system within the Government, utilizing GSA personnel. Consequently, the Administrative Office completed and submitted GSA Form 2068 formally requesting development of the system. While it is unclear from the record precisely when this form was submitted, it appears that this occurred some time during fiscal year 1976. Since adequate cost estimates were not available at the time the form was submitted, the Administrative Office did not at that time obligate the applicable appropriation. Subsequent to submission of GSA Form 2068, discussions were apparently held between the Administrative Office and GSA leading to execution, on April 5, 1976, of an interagency agreement.

Appropriations of the Administrative Office were obligated at the time of execution of the April 5 agreement in the amount of $282,939, which represented the total estimated cost of the project. The agreement further provides that if it appears at any time that total incurred costs will exceed $282,939, specific written authorization from the Administrative Office is necessary before GSA may proceed further or incur additional costs.

It is anticipated that necessary work for developing the system will be performed in both fiscal year 1976 and fiscal year 1977, and that the system will not be operational until the first pay period in calendar year 1977. The question arises, therefore, whether fiscal year 1976 appropriations of the Administrative Office may be obligated for the full estimated cost, and whether the obligation may be liquidated by disbursements from the fiscal year 1976 appropriation throughout the entire life of the project.

In the absence of other statutory authority, the legal authority for such Federal interagency agreements or orders is section 601 of the Economy Act of 1932, as amended, 31 U.S.C. § 686 (1970). The availability of appropriations for Economy Act transactions was restricted, however, by section 1210 of the General Appropriation Act, 1951, Public Law 759, 64 Stat. 765 (September 6, 1950), codified in part at 31 U.S.C. § 686–1 (1970), which reads, as codified:

> No funds withdrawn and credited pursuant to section 686 of this title, shall be available for any period beyond that provided by the Act appropriating such funds.

Pursuant to section 1210, where work is performed or rendered by one agency for another for a period covering more than one fiscal year, and payments are to be made in advance or by way of reimbursement, the respective annual appropriations are to be charged *pro tanto* with the work performed or services rendered in a particular fiscal year. *See* 31 Comp. Gen. 83, 86–87 (1951). Agreements entered into pursuant to the Economy Act, *supra*, are to be recorded as obligations pursuant to section 1311(a) of the Supplemental Appropriation Act, 1955, 31 U.S.C. § 200(a) (1970). However, they are required by section 1210 of the General Appropriation Act, 1951, to be deobligated at the end of the fiscal year charged to the extent that the performing or procuring agency has not incurred valid obligations under the agreement. *See* 34 Comp. Gen. 418, 421–422 (1955).

Nevertheless, the Economy Act, *supra*, does not constitute the sole authority for interagency agreements. *See*, in this regard, 52 Comp. Gen. 128 (1972); 51 *id.* 766 (1972); *Federal Election Commission*, B–130961, April 21, 1976. Where the agreement is based upon some statutory authority other than the Economy Act, 31 U.S.C. § 686–1 does not apply. In this regard, section 111 of the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377 (June 30, 1949), as amended by the so-called Brooks Act, Public Law 89–306, 79 Stat. 1127 (October 30, 1965), codified at 40 U.S.C. § 759 (1970) reads, in pertinent part, as follows:

(a) Authority of Administrator to coordinate and provide for purchase, lease and maintenance of equipment by Federal agencies.

The Administrator [of General Services] is authorized and directed to coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies.

(b) Procurement, maintenance and repair of equipment; transfer between agencies; joint utilization; establishment and operation of equipment pools and data processing centers; delegation of Administrator's authority.

(1) Automatic data processing equipment suitable for efficient and effective use by Federal agencies shall be provided by the Administrator through purchase, lease, transfer of equipment from other Federal agencies, or otherwise, and the Administrator is authorized and directed to provide by contract or otherwise for the maintenance and repair of such equipment. In carrying out his responsibilities under this section the Administrator is authorized to transfer automatic data processing equipment between Federal agencies, to provide for joint utilization of such equipment by two or more Federal agencies, and to establish and operate equipment pools and data processing centers for the use of two or more such agencies when necessary for its most efficient and effective utilization.

(2) The Administrator may delegate to one or more Federal agencies authority to operate automatic data processing equipment pools and automatic data processing centers, and to lease, purchase, or maintain individual automatic data processing systems or specific units of equipment, including such equipment used in automatic data processing pools and automatic data processing centers, when such action is determined by the Administrator to be necessary for the economy and efficiency of operations, or when such action is essential to national defense or national security. * * *

Thus, 40 U.S.C. § 759(a)–(b) clearly provides GSA with authority independent of the Economy Act, *supra*, to procure ADP *equipment* for Federal agencies.* Moreover, subsection (b)(1) provides for the establishment and operation of "* * * equipment pools and data processing centers for the use of two or more * * * agencies when necessary for * * * efficient and effective utilization * * *" of ADP equipment. We understand that 12 such centers have been established by GSA, which offer a full range of data processing services to agencies including programming, systems analysis and design. See Report, "Further Actions Needed to Centralize Procurement of Automatic Data Processing Equipment to Comply with Objectives of Public Law 89–306" (LCD–74–115), October 1, 1975. GSA's regulations implementing 40 U.S.C. § 759 provide procedures to be followed by agencies which seek to acquire such ADP services. See 41 C.F.R. §§ 101–32.201(c)(2) and 101–32.203.1 (1975). The Administrative Office apparently followed these procedures in originally seeking development of the system. Moreover, in accordance with the terms and conditions of the interagency agreement, the costs of performance to GSA are to be funded initially by the Automatic Data Processing Fund (ADP Fund) established pursuant to 40 U.S.C. §§ 759(c)–(d) (1970) to carry out the purposes of subsections (a) and (b).

In light of the above, it appears that GSA has construed 40 U.S.C. § 759 as providing authority for the provision of not only ADP equipment to other agencies but also the necessary ADP services incident thereto. In view of the broad statutory mandate in sections 759(a) and (b) to provide for the economic and efficient utilization of ADP equipment through the establishment of equipment pools and data processing centers, we cannot conclude that this construction is erroneous.

We are of the view, therefore, that section 111 of the Federal Property and Administrative Services Act, as amended, 40 U.S.C. § 759, provides authority independent of the Economy Act for the provision of ADP services such as are involved here to Federal agencies. Therefore, 31 U.S.C. § 686–1, which applies only to Economy Act transactions, is not controlling in the instant case.

It appears that in the instant transaction, the Administrative Office committed itself for the payment of a definite sum of money, for the delivery and installation of an ADP system to meet a *bona fide* need arising in fiscal year 1976. Accordingly, we are of the view that the applicable appropriation was properly obligated pursuant to 31 U.S.C. § 200(a) for the full amount stipulated in the agreement on the date of

*The term "Federal agency" is defined in 40 U.S.C. § 472(b) (1970), as meaning:
"* * * any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction)."
This definition would thus include the Administrative Office of the United States Courts.

execution thereof (see 39 Comp. Gen. 317 (1959)), and is available for liquidation of the obligation during the entire period of performance. *Cf.* 51 Comp. Gen. 766 (1972).

Finally, we note that when the Administrative Office submitted Order Form 2068 to GSA no obligation was recorded. The obligation was recorded instead when the interagency agreement between GSA and the Administrative Office was executed on April 5, 1976. It is unnecessary to decide whether the obligation arose, and should have been recorded under 31 U.S.C. § 200, at the time the order was placed or when the agreement was executed since both events occurred in fiscal year 1976.

[B–186239]

Contracts—Specifications—Failure To Furnish Something Required—Addenda Acknowledgment—Wage Determinations

Award to bidder failing to acknowledge presumptively applicable solicitation amendment increasing Davis-Bacon wage rate may be made only if agency demonstrates (a) that increase rate does not relate to work to be performed under contract and (b) that it either was not reasonable for bidders to consider increased rates in bid preparation or that reliance upon amended rates was not prejudicial to protesting bidder in circumstances.

Contracts—Specifications—Ambiguous—Different Interpretation by Bidders

Specifications which could be reasonably construed to permit work covered by inapplicable wage rate amendment misstated Government's minimum needs and had effect of placing bidders on unequal bidding basis. However, where impact of protester's reliance was not such as to affect its relative position as second low bidder, no corrective action is recommended.

In the matter of the North Landing Line Construction Company, September 29, 1976:

BACKGROUND

North Landing Line Construction Co. (North Landing) protests award to Service Electric Corporation (Service) of a contract for refurbishment of interior panel board and high bay area lighting at the National Aeronautics and Space Administration (NASA), Langley Research Center. North Landing contends that Service's bid was nonresponsive by virtue of its failure to acknowledge Amendment No. 1 to invitation for bids No. 1–73–5992.

The unacknowledged amendment contained modified wage rates which increased the minimum wages payable to certain employees, including ironworkers, protected by the Davis-Bacon Act, 40 U.S. Code § 276a (1970). Service submitted the low bid of $13,672; North Landing was the second low bidder at $13,820. North Landing filed a protest with NASA concerning award to Service based on the company's failure to acknowledge the amendment and NASA denied the protest

citing NASA Procurement Regulation 2.405 which permits the agency to waive minor informalities or irregularities in bids where there will be no prejudice to other bidders. The contracting officer held:

> In view of the fact that * * * there is no requirement for ironworkers under the specifications and drawings on this project, failure to acknowledge the Amendment in this instance can be waived as a minor informality or irregularity in accordance with NASA Procurement Regulations and Comptroller General decisions.

DISCUSSION

NASA's contention that "there is no requirement for ironworkers under the specifications and drawings on this project," is disputed by the protester who contends that the specifications required bidders to consider the use of ironworkers for the purpose of moving a test aircraft situated in the high bay area to facilitate overhead work and for the movement of other machinery. In support of this position, North Landing refers to note 5 of specification drawing No. LD–751247 which states:

> The contractor shall be responsible for moving any equipment to facilitate overhead work.

North Landing contends that relocation of the aircraft and other machinery falls within the scope of note 5. Other relevant requirements of the specifications state:

> The site will be made available "as is", and unless otherwise specified, the contractor shall be responsible for clearing the site, area for roads, utilities, and other off-side areas of all obstructions, both natural and artificial, which would interfere with the performance of the work under the contract.
>
> * * * * * * *
>
> The contractor shall repair all damages caused by him to government premises.
>
> * * * * * * *
>
> Existing equipment or facilities shall be properly protected by the contractor during his construction operations, and if damaged shall be promptly repaired.

It is the protester's position that, not only do these statements require the movement of obstructions but, in addition, they place the risk of damage to equipment squarely on the contractor. Based on its interpretation of the specifications and a visual inspection of the site, the protester contends that it contemplated moving the test aircraft and other equipment by employing the rigging skills of ironworkers in order to facilitate performance of the contract work and to limit its potential liability for damage to Government property.

In response, NASA argues that it should have been apparent to all bidders who viewed the work site that the aircraft was undergoing tests and could not be relocated. NASA maintains that "the work directly overhead the aircraft can be performed by use of a cherry picker or some other extendible scaffolding or conveyance." Further-

more, NASA states that it orally advised all bidders who attended a March 3 site visit that the airplane would not be permitted to be moved. However, North Landing did not attend the March 3 site visit. Moreover, the specifications state:

> The Government also assumes no responsibility for any understanding or representations made by its officers or agents during or prior to the execution of the contract, unless (1) such understanding or representations are expressly stated in the contract and (2) the contract expressly provides that the responsibility therefor is assumed by the Government. Representations which are not expressly stated in the contract and for which liability is not expressly assumed by the Government in the contract shall be deemed only for the information of the contractor.

Thus, bidders would have relied on such oral advice at their own risk in computing their bids. Finally, NASA contends that there are no other pieces of equipment which could have reasonably necessitated the use of ironworkers.

NASA contends that this case falls squarely within the rule of *Prince Construction Co.*, B–184192, November 5, 1975, 75–2 CPD 279, in which we held that, where the unrebutted evidence indicated that a Davis-Bacon wage amendment was inapplicable to the work required, there is no danger that employees will be deprived of protected rights and the contractor's failure to acknowledge the amendment may be waived as a minor informality. Our denial of the protest in *Prince* was accompanied by a recommendation that, in future procurements, the agency survey the amended wage rates to avoid the issuance of inapplicable amendments.

In a subsequent decision, *Porter Contracting Company*, 55 Comp. Gen. 615 (1976), 76–1 CPD 2, we held that the contracting agency acted properly in rejecting a bid which failed to acknowledge a Davis-Bacon wage rate amendment even though the work to be performed by the craft affected by the amendment was not specifically required by the specifications. In *Porter*, we quoted from our letter to the contracting agency involved in *Prince*, where we stated:

> Finally, today's decision, B–184192, is based on an after-the-fact determination that amendment No. 1 was inapplicable. We consider the necessity for employing hindsight regrettable where the matter could have been resolved by a similar determination prior to issuance. Consequently, our decision recommends that Davis-Bacon wage rate determinations be surveyed prior to issuance to ascertain their applicability to the contract work involved.

Notwithstanding our Office's recommendations in *Prince* and *Porter*, *supra*, NASA issued the allegedly inapplicable amendment and yet made no effort to either cancel the amendment or to advise all bidders of its inapplicability during the period between its issuance (February 27) and bid opening (March 10).

CONCLUSION

Our decision and recommendations in *Prince* and *Porter*, *supra*, provide for the presumptive applicability of solicitation amendments containing increased Davis-Bacon wage rates. Agencies were advised to survey the amended rates in order to prevent the issuance of inapplicable amendments. Consequently, where an agency proposes to make award to a low bidder who fails to acknowledge a Davis-Bacon wage rate amendment, the agency must bear the burden of showing (a) that the amendment does not relate to the work to be performed and thereby does not affect the rights of workers protected by the Act and (b) that it either would have been unreasonable for bidders to have relied on the amended wage rates or that reliance on such rates was not prejudicial to the protesting bidder.

In the instant case, the rights of workers protected by the Act are not affected adversely by the wage amendment because NASA will not permit movement of the aircraft and the other obstacles are relatively lightweight pieces of equipment which sit on wheeled dollies or can be moved with ease without the use of rigging or hauling procedures.

However, since the specifications did not indicate that the aircraft could not be moved, bidders could well have assumed that ironworkers would be needed. In fact, the protester has advised our Office that its total bid included 120 hours for ironworkers. Since the amendment increased the wage rate by $.50 per hour, including fringe benefits, the effect of the amendment was limited to a maximum of $60. In view of the fact that the difference between the two bids amounted to $148, the practical effect of the wage rate change was not such as to injure the protester's competitive position relative to the low bidder. Consequently, the protester was not adversely affected by the agency's decision to accept the bid of Service. However, we recommend that in future procurements, NASA more carefully review its specifications to insure that they are not susceptible to bids based on factors other than the Government's actual needs.

[B-187136]

Officers and Employees—Transfers—Relocation Expenses—Taxes—Application of *Allstate Ins. Co.* v. *U.S.*—Prior to 1970

Court of Claims in *Allstate Insurance Co.* v. *U.S.*, 530 F. 2d 378, held that reimbursement of moving expenses was not compensation for services. That decision does not affect withholding of income tax from relocation expense payments for 1970 and following years, because case dealt with tax year 1965–1969, and statute was amended for tax years beginning after December 31, 1969. Section 82 was added to Internal Revenue Code by 1969 amendment and includes reimbursement of moving expenses within gross income as compensation for services.

In the matter of Richard L. Young—relocation expenses—withholding of income tax, September 30, 1976:

This matter arises from a request for an advance decision dated August 3, 1976, from Ms. Orris C. Huet, an authorized certifying officer of the United States Department of Agriculture, regarding a claim from Mr. Richard L. Young for repayment of income taxes withheld from reimbursed relocation expenses in 1975.

Mr. Young contends that the decision in *Allstate Insurance Co.* v. *United States*, 530 F. 2d 378 (Ct. Cl. 1976), precludes the withholding of Federal income taxes from reimbursement of "moving expenses" paid to Federal employees. Allstate sued in the Court of Claims to recover money it had withheld, for the years 1965 to 1969, from reimbursement of transferred employees' indirect moving costs. The Court held that reimbursement of moving expenses was not compensation for services within the meaning of 26 U.S. Code § 3401 (1964).

There were extensive changes in the tax treatment of moving expenses included in the Tax Reform Act of 1969, Public Law 91–172, 83 Stat. 487, 577–580, December 30, 1969. Among other things, section 82 was added to the Internal Revenue Code (26 U.S.C. § 82 (1970)). That section provides that:

> There shall be included in gross income (as compensation for services) any amount received or accrued, directly or indirectly, by an individual as a payment for or reimbursement of expenses of moving from one residence to another residence which is attributable to employment or self-employment.

This section applies to taxable years beginning after December 31, 1969.

In light of section 82, which specifically defines reimbursement of moving expenses as compensation for services, we do not believe that *Allstate Insurance Co.* v. *United States*, *supra*, has any applicability to 1970 and following tax years. It is based upon a statute that has been amended, specifically dealing with the point covered by the Court.

Accordingly, Mr. Young's voucher is returned and may not be certified for payment.

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Grant of extraordinary contractual relief under Public Law 85-804—which has effect of making exercise of contract option viable possibility and leads agency to compare contract option price with prices of proposals received under RFP—does not constitute improper use of Public Law 85-804 authority to negotiate contract. Proscription in act is that extraordinary authority cannot be used to negotiate contracts for supplies or services which are required to be procured by formal advertising, which is not what occurred in this case 1479

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Advertising *v.* negotiation

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Acquisition by agencies of aircraft and passenger motor vehicles by purchase or transfer is prohibited by 31 U.S.C. 638a, unless specifically authorized by appropriation act or other law, and this prohibition applies to acquisition by transfer by Law Enforcement Assistance Admin. of aircraft or passenger motor vehicles for use by grantees in their regular law enforcement functions because agency obtains custody and accountability and exception would reduce congressional control over aircraft and vehicles. See 44 Comp. Gen. 117 348

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Bills of lading

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Bills of lading *v.* tariffs

Claim against air carrier for damage to shipment moved on Govt. bill of lading is not subject to notice requirements of governing air tariff because use of Govt. bill of lading—which in Condition 7 contains waiver of usual notice requirements—is required by air tariff and creates ambiguity over applicability of notice requirements which is resolved in favor of shipper 958

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HEW employee may use foreign flag air carriers during travel while performing temporary duty because the use of one such carrier saved more than 12 hours from origin airport to destination airport than use of American flag air carrier, and use of other such carrier is essential to accomplish the Dept.'s mission, which would render American flag air carriers "unavailable" under § 5 of International Air Transportation Fair Competitive Practices Act of 1974, Pub. L. 93-623, 88 Stat. 2104 (49 U.S.C. 1517) 52

Consistent with the Fly America Guidelines, traveler should use certificated service available at point of origin to furthest practicable interchange point on a usually traveled route. Where origin or interchange point of such route is not serviced by a certificated carrier, noncertificated service should be used to the nearest practicable interchange point to connect with certificated service. Travelers will not be held accountable for nonsubstantial differences in distances between points serviced by certificated carriers. The foregoing principles are not controlling where their application results in use of noncertificated service for actual travel between the United States and another continent 1230

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When Bureau of Indian Affairs (BIA) contracts with hotel or motel to provide housing and subsistence to Indian students in transit, the Federal agency and not the beneficiary is the renter. The legal incidence of the hotel-motel rental tax imposed by Anchorage, Alaska, therefore, falls on the BIA which is constitutionally immune from State and local taxes. 53 Comp. Gen. 69 is modified accordingly_____ 1278
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Subcontracts. (*See* **CONTRACTS, Subcontracts, Anti-Kickback Act violations**)

APPOINTMENTS

Absence of formal appointment

Reimbursement for services performed Page

Army officer, assigned as Executive Assistant to Ambassador-at-Large, retired from Army in anticipation of civilian appointment to that position. After retirement he continued to serve as Executive Assistant for 7 months before Dept. of State determined he could not be appointed. Claimant is *de facto* officer who served in good faith and without fraud. He may be paid reasonable value of services despite lack of appointment in view of fact that had compensation been paid, claimant could retain it under *de facto* rule or recovery could be waived under 5 U.S.C. 5584. Although he was not paid, administrative error arose when claimant in good faith entered on duty with understanding of Govt. obligation to pay for services. On reconsideration, B–181934, Oct. 7, 1974, is overruled, and 52 Comp. Gen. 700, amplified 109

Conversion

Continuation *v.* new appointment

A renewed 30-day exemption from reduction in retired pay in the fiscal year in which a retired Regular military officer's previous excepted appointment as a consultant to a Federal agency is converted would be in violation of the Dual Compensation Act (5 U.S.C. 5532). Where an appointment conversion is merely in the nature of a continuation and an extension of a previous excepted appointment, it is not a "new appointment" for purposes of applying the multiple appointment rule of 5 U.S.C. 5532(c)(2)(ii), but is, instead, a routine personnel action 1305

Military personnel

Effective date

Retired grade advancement

Admirals

Navy officer whose permanent grade was rear admiral (O–8) and who was serving as admiral (O–10) under 10 U.S.C. 5231, was transferred directly to temporary disability retired list (TDRL) pursuant to 10 U.S.C. 1202 and then died before Senate could confirm him on the permanent retired list as admiral (O–10) pursuant to 10 U.S.C. 5233. Regardless of grade to which he was entitled on retired list under 10 U.S.C. 1372, or other law, under Formula No. 2, 10 U.S.C. 1401, such member's retired pay while on the TDRL is to be computed on basic pay of admiral (O–10) and Survivor Benefit Plan annuity based thereon 667

APPOINTMENTS—Continued
Status
Determination of rights and benefits
Dual Compensation Act Page
Where a retired military member consultant receives a second intermittent appointment, and an entire fiscal year has intervened since the expiration of the consultant's previous intermittent appointment, he is not entitled to an additional 30-day exemption from reduction in military retired pay if the second appointment appears to be only a renewal of the initial appointment 1305
Term
Status
Relocation expenses incident to transfer
Employee who was separated by RIF by NASA and employed after break in service of less than 1 month by term appointment with HEW, may be reimbursed expenses of selling house at NASA duty station since term appointment with HEW was "nontemporary appointment" and eligibility for relocation expenses arose under that section incident to RIF by NASA and employment by HEW 664

APPROPRIATIONS
Agriculture Department
Domestic food programs
Continuing resolution
Appropriation of funds in continuing resolution for fiscal year 1976 for domestic food programs established under National School Lunch Act and Child Nutrition Act confers upon Dept. of Agriculture necessary authority to continue such programs until termination of continuing resolution, notwithstanding expiration of funding authorization in enabling legislation on Sept. 30, 1975 289
Proviso in section of continuing resolution, which suspends effectiveness of provisions in appropriation acts making availability of appropriations contingent upon enactment of authorizing legislation, was intended to apply only to appropriation bills prior to their final enactment. Thus, enactment of appropriation act with such contingency provision will supersede continuing resolution and will suspend availability of funds pending enactment of necessary legislative authority .. 289
Allocations
Not specified in appropriation act
Allocation of Navy appropriation for DLGN nuclear powered guided missile frigate program between DLGN 41 and DLGN 42, which was based on Navy's budget request and contained in committee reports to 1975 Defense Dept. Appropriation Act, is not legally binding on Navy since it was not specified in Appropriation Act itself 812

APPROPRIATIONS—Continued

Augmentation

Official travel reimbursement by private parties Page

Internal Revenue Service (IRS) proposal that it pay expenses of employee attending meetings and accept reimbursement directly from eligible tax exempt organizations, crediting such reimbursement to its own appropriation, is not authorized by applicable statutes. Provisions of 5 U.S.C. 4111 permit employee only to accept payments from eligible organizations, which payments are to be deducted from amounts otherwise due from employing agency. Moreover, in absence of specific authority to accept voluntary contributions or travel reimbursements, IRS would be requireed to deposit such funds into miscellaneous receipts of the Treasury by 31 U.S.C. 484 (1970)..... 1293

Silver-gold exchange

Space shuttle program—NASA

General Services Administration acted reasonably under section 201(c) of Federal Property and Administrative Services Act of 1949, as amended, and its implementing Federal Property Management Regulations, in disapproving proposed exchange of certain quantities of silver for an equivalent dollar amount of gold. Since it appears that gold to be acquired would not serve the same specific purpose as the replaced silver, as required by regulations, proposed exchange is not of "similar" items as required by section 201(c). 41 Comp. Gen. 227 distinguished... 1268

Availability

Administrative Office of U.S. Courts

Court reporter fees

Whenever a Federal District Judge, pursuant to Rule 71A(h) of the the Federal Rules of Civil Procedure, appoints a Land Commission to hear suits for just compensation in land condemnation cases, and the order of reference indicates a desire for the proceeding to be recorded, attendance fees of the court reporter are chargeable to the appropriations of the Administrative Office of United States Courts since the Judiciary determines if reporter shall be in attendance and normally pays attendance fees in other cases..... 1172

Ambulance services

Employee, while on temporary duty, lost consciousness during a high-blood-pressure seizure. Ambulance expense for his transportation to hospital at temporary duty post is not reimbursable under Federal Travel Regulations..... 1080

Bombing incident to rescue operation

Use of funds to make punitive bombing strikes, *i.e.*, those unrelated to protection of *Mayaguez* crew being rescued or forces protecting crew would appear to be in contravention of seven funding limitation statutes. However, Executive branch testimony indicates that bombing strikes were related to the rescue operation..... 1081

APPROPRIATIONS—Continued
Availability—Continued
Books and periodicals. (*See* **BOOKS AND PERIODICALS, Appropriation availability**)
Contracts
Base bid and deductive items
Recording Page

FPR, unlike ASPR, imposes no duty on contracting officer to record amount of funds available prior to bid opening for base bids and alternates when amount of funding is in doubt. Therefore, determination of actual available funding, and the consequential determination whether alternates, if any, will be applied, may properly be made after bid opening in case of civilian agency. However, adoption of uniform Govt-wide policy is recommended 443

Nuclear power guided missile frigate program

Proviso in Appropriation Act requires DLGN 41 to be "follow ship" of DLGN 38 class. Proviso is not violated since DLGN 41 has same basic characteristics as prior ships of that class, notwithstanding nonincorporation of series of modifications and absent showing that unincorporated modifications would significantly alter those characteristics 812

Court costs and attorney fees
Suits against officers and employees

Where U.S. Attorney undertook defense of former SBA employee who was sued as result of actions committed while acting within scope of his employment and during course of proceedings U.S. Attorney withdrew for administrative reasons, necessitating former employee's retaining services of private counsel although Govt.'s interest in defending employee continued throughout proceedings, we would not object to SBA's reimbursing former employee amount for reasonable legal fees incurred. 28 U.S.C. 516–519, 547, and 5 U.S.C. 3106 are not a bar in such circumstances since to hold otherwise would be contrary to rule that cost of defending such cases should be borne by Govt 408

Domestic food programs
Agriculture Department

Proviso in section of continuing resolution, which suspends effectiveness of provisions in appropriation acts making availability of appropriations contingent upon enactment of authorizing legislation, was intended to apply only to appropriation bills prior to their final enactment. Thus, enactment of appropriation act with such contingency provision will supersede continuing resolution and will suspend availability of funds pending enactment of necessary legislative authority .. 289

Evacuation of foreign nationals

There is no significant support for constitutional presidential authority to rescue foreign nationals as such. However, in the case of Saigon evacuation, since decision to rescue foreign nationals was determined to be incidental to and necessary for rescue of Americans, General Accounting Office cannot say expenditure of fund for such evacuation was improper 1081

APPROPRIATIONS—Continued
Availability—Continued
Examination costs
Accredited rural appraisers Page

Exams not integral part of course of instruction are not within definition of "training" in 5 U.S.C. 4101(4). Therefore, Govt. reimbursement of costs of exam leading to certification of Govt. employee as accredited rural appraiser is not permitted by terms of Govt. Employees' Training Act, 5 U.S.C. 4101–4118 759

Expenses incident to specific purposes
Necessary expenses

Appropriated funds may not be used to buy paperweights and walnut plaques for distribution by U.S. Army Criminal Investigation Command (USACIDC) to governmental officials and other individuals in recognition of their support for USACIDC. Plaques may, however, be purchased with appropriated funds to honor employees who died in the line of duty if the use is proper under the Government Employees Incentive Awards Act, 5 U.S.C. 4501–4506, and related regulations 346

Where handicapped employee selected to be honored under Govt. Employees Incentive Awards Program is unable to travel unattended because of his particular handicap and would otherwise be unable to attend award ceremony, travel expenses for attendant to accompany him in traveling to and from award ceremony may be paid by employing agency as "necessary expense" for honorary recognition of that particular employee under 5 U.S.C. 4503. 54 Comp. Gen. 1054, distinguished 800

Appropriation of INS may be used to repair International Boundary fences on private property if expenditures and improvements are necessary for effective accomplishment of purposes of Service's appropriation, are in reasonable amounts, are made for principal benefit of U.S. and interests of Govt. are fully protected 872

Appropriated funds may be used to purchase subscription to periodical if subscription is justified as a "necessary" agency expense. Subscription need not be considered indispensable. 21 Comp. Gen. 339 is no longer applicable 1076

If travel of Department of Defense civilian employees and military members to receive non-Federally sponsored honor awards includes attending meetings or conventions of organizations covered by 37 U.S.C. 412 (1970), 5 U.S.C. 5946 and 4110 (1970), proposed regulations which would authorize such travel at Government expense must be in accord with those statutes 1332

The Secretaries concerned may issue regulations authorizing the payment of travel and transportation expenses of civilian employees of the Department of Defense and military members who travel on temporary duty to receive non-Federally sponsored honor awards provided such awards are determined in each case to be reasonably related to the duties of the employee or member and the functions and activities of the agency to which the recipient is attached. Travel to receive awards in which such determination cannot clearly be made is not travel on public (official) business and no authority exists for such travel at Government expense 1332

APPROPRIATIONS—Continued
Availability—Continued
Furnishings for personal use
Military members. (*See* **APPROPRIATIONS, Availability, Personal furnishings for military members**)
Insurance. (*See* **INSURANCE**)
Items necessary in enforcement of immigration laws Page
INS's "necessary expenses" appropriation is available to repair boundary fences under jurisdiction of other Federal agencies provided INS determines expenditure is necessary to enforcement of immigration laws and other agencies do not intend to make repairs as promptly as necessary to deter unlawful immigration. Rule that where appropriation is made for particular object, it confers authority to incur expenses which are necessary, proper, or incident thereto, unless there is another appropriation that makes more specific provision therefor, is inapplicable since there is no specific appropriation for repair of boundary fences 872
Judgments, decrees, etc. (*See* **COURTS, Judgments, decrees, etc., Payment**)
Loans
Rehabilitation
Under section 312 of Housing Act of 1964, as amended, and language of 1977 appropriation act, Department of Housing and Urban Development may make new commitments for rehabilitation loans immediately after August 22, 1976, from previous appropriation balances which would otherwise become unavailable after that date. Ambiguous reference to such prior appropriations in 1977 appropriation act could be read as making prior appropriations available only during fiscal year 1977. However, this narrow construction would create hiatus in funding from August 22 to October 1, 1976, which was clearly not intended by Congress 1415
Necessary expenses. (*See* **APPROPRIATIONS, Availability, Expenses incident to specific purposes, Necessary expenses**)
Objects other than as specified
Prohibition
Proposed cooperative agreement provision which would permit recipient of funds to use funds for unspecified purposes in future at its own option is not proper. Appropriated funds may be used only for purposes for which appropriated. Proposed provision does not limit future use of funds to authorized purposes only 1059
Paperweights and plaques
Appropriated funds may not be used to buy paperweights and walnut plaques for distribution by U.S. Army Criminal Investigation Command (USACIDC) to governmental officials and other individuals in recognition of their support for USACIDC. Plaques may, however, be purchased with appropriated funds to honor employees who died in the line of duty if the use is proper under the Government Employees Incentive Awards Act, 5 U.S.C. 4501–4506, and related regulations 346
Parking space
Where GSA pursuant to 40 U.S.C. 490(j) charges VA for parking space for use of employees, and related services, VA appropriations are available to pay such charges subject to 90 percent limitation contained in VA annual appropriations 897

APPROPRIATIONS—Continued
Availability—Continued
Parking space—Continued Page
Federal Aviation Administration (FAA), Department of Transportation, questions propriety of implementing three arbitration awards requiring FAA to provide parking accommodations for employees. FAA does not consider it would be justified in making a determination, as required for expenditure of funds by applicable regulations, that such leased parking accommodations are necessary to avoid impairment of its operational efficiency. Inasmuch as FAA regulations incorporated by reference in the collective bargaining agreement have already made the required determination, FAA is not required to make a further determination. Accordingly, FAA may expend appropriated funds to implement awards 1197
Periodicals. (*See* **BOOKS AND PERIODICALS, Appropriation availability**)
Personal furnishings for military members
Rugs, curtains, drapes, etc.
Military members required to relocate their households incident to base closings in Japan without permanent changes of station may not be reimbursed personal expenses incurred for purchase of rugs, drapes, curtains, and service charges for items of personal convenience not essential to the occupation of quarters. Also, reimbursement for telephone installation charges is specifically prohibited by 31 U.S.C. 679 932
Refund of fines paid to IRS
Violation of wagering tax
Refund by IRS of fine paid pursuant to conviction for violation of wagering tax statutes, which refund was ordered in connection with subsequent vacation of judgment, should be charged against account 20X0903 (Refunding Internal Revenue Collections) rather than account 20X1807 (Refund of Moneys Erroneously Received and Covered), since initial receipt of fine by IRS was apparently treated as internal revenue collection, and account 20X1807 is available only when refund is not properly chargeable to any other appropriation 625
Secret Service operations
Protection for Secretary of Treasury
Holding in 54 Comp. Gen. 624 that funds appropriated to Secret Service are not available for protection of Secretary of Treasury because authorizing legislation, 18 U.S.C. 3056(a), does not include Secretary among those entitled to protection, is reaffirmed. Administrative transfer to Secret Service of function of protecting Secretary does not, without more, make Secret Service appropriations available for that purpose 578
Retroactive payments
Because intended use of Secret Service appropriation for protection of Secretary of Treasury was disclosed to and apparently acquiesced in by Congress in connection with fiscal year 1976 appropriation request, that appropriation is available for such protection 578

APPROPRIATIONS—Continued
Availability—Continued
Secret Service operations—Continued
Protection for Secretary of Treasury—Continued
Retroactive payments—Continued Page

Since purpose of 54 Comp. Gen. 624, to stop then unauthorized use of Secret Service funds for protection of Secretary of Treasury, has been achieved, Dept. apparently acted in good faith, and Congress has acquiesced in use of fiscal year 1976 Secret Service appropriation for protection of Secretary, no useful purpose would be served by requiring reimbursement of Secret Service appropriation from appropriation for Office of Secretary of Treasury for period from decision in 54 Comp. Gen. 624 until fiscal year 1976 ---------- 578

Traffic lights
State highways
Benefit of Government

Costs of procuring and installing traffic control light on Federal property to regulate traffic at intersection of Federal installation and State highway may be paid by the Army since the structure is located entirely on Federal property, for the benefit primarily of Federal employees or military members, and is necessary for safe ingress and egress to the military installations. 36 Comp. Gen. 286 and 51 *id.* 135, distinguished ---------- 1437

Travel and transportation expenses of State officials
Environmental Protection Agency

Decision B–166506, July 15, 1975, holding payment by EPA of transportation and lodging expenses of State officials attending National Solid Waste Management Association Convention is prohibited by 31 U.S.C. 551, unless otherwise authorized by statute, is affirmed. Provision of Administrative Expenses Act (5 U.S.C. 5703(c)), permitting payment of such expenses for persons serving Govt. without compensation does not provide necessary exception to 31 U.S.C. 551 since attendees at conference are not providing direct service to Govt. and are therefore not covered by 5 U.S.C. 5703(c) ---------- 750

Travel expenses
Return to official station on nonworkdays

Where agency after cost analysis determines that the costs of reimbursing employees who are required to perform extended periods of temporary duty for expense of periodically traveling between the temporary duty point and official station for nonworkdays is outweighed by savings in terms of employee efficiency and productivity, and reduced costs of employment and retention of such employees, the cost of authorized weekend return travel may be considered a necessary travel expense of the agency ---------- 1291

Continuing resolutions
Availability of funds
In absence of regular appropriations

Proviso in section of continuing resolution, which suspends effectiveness of provisions in appropriation acts making availability of appropriations contingent upon enactment of authorizing legislation, was intended to apply only to appropriation bills prior to their final enactment. Thus, enactment of appropriation act with such contingency provision will supersede continuing resolution and will suspend availability of funds pending enactment of necessary legislative authority --- 289

APPROPRIATIONS—Continued
Defense Department
Contracts
Absence of statutory restrictions Page
Allocation of Navy appropriation for DLGN nuclear powered guided missile frigate program between DLGN 41 and DLGN 42, which was based on Navy's budget request and contained in committee reports to 1975 Defense Dept. Appropriation Act, is not legally binding on Navy since it was not specified in Appropriation Act itself 812
Deficiencies
Antideficiency Act
Contract options
Where exercise of contract option required Navy to furnish various items of Govt. furnished property (GFP), but contract clause authorized Navy to unilaterally delete items of GFP and make necessary equitable adjustments, full value of unobligated and undelivered GFP should not be considered "obligation" as of time of option exercise for purposes of assessing violation of 31 U.S.C. 665 or 41 U.S.C. 11. Exercise of DLGN 41 contract option did not violate these statutes since recorded obligations and other binding commitment did not exceed available appropriations 812
Full funding *v.* requirements of Antideficiency Act
"Full funding" of military procurement programs is not statutory requirement, and deviation from full funding does not necessarily or automatically indicate violation of 31 U.S.C. 665 or 41 U.S.C. 11 812
Violations
Army proposal to terminate for convenience of Govt. contracts executed in violation of Antideficiency Act is authorized since proposed termination action would mitigate consequences of Antideficiency Act violation with respect to these contracts, in that termination costs would presumably be less than obligations now attributable to contracts 768
Contracts
Modification
Army proposal to modify contracts executed in violation of Antideficiency Act, to make Govt.'s obligation to pay subject to future availability of funds, but under which Govt. would continue to accept benefits, is of dubious validity as means of mitigating effects of Antideficiency Act violation, since contractors might recover under contracts or on *quantum meruit* theory even if appropriation was not subsequently made available by Congress. Moreover, proposal may prejudice congressional options by requiring Congress to fully appropriate for continued performance or allow Army to receive benefits at expense of contractors .. 768
Overobligations
Army proposal to complete prior years contracts executed in violation of Antideficiency Act by applying current year funds is improper in light of longstanding rule that, except as otherwise provided by law, expenditures attributable to contracts made under particular appropriations remain chargeable to those appropriations 768

APPROPRIATIONS—Continued
Deficiencies—Continued
To liquidate obligations incurred Page
Army proposal to enter into contract modification providing for no cost stop work order, for partially performed contracts executed in violation of Antideficiency Act, would freeze Government liability at amount already due, unless supplemental appropriation is enacted. We perceive no legal objection to proposal since it would maintain status quo and reserve to Congress maximum flexibility in deciding whether to make deficiency appropriation in amount necessary to liquidate actual obligations already incurred or to permit Army to realize full contract benefits by making appropriation greater than actual existing deficiency---- 768
Estimates
Effect on noninclusion in lump-sum appropriations
Navy is not required as matter of law to expend funds provided in lump-sum appropriation act for a specific purpose when statute does not so require, notwithstanding language contained in Conference Report. Absence of statutory restriction raises clear inference that Report language paralleled and complemented, but remained distinct from, actual appropriation made. Therefore, Navy selection of particular aircraft design for its Air Combat Fighter and resultant award of sustaining engineering contracts cannot be regarded as contrary to law---- 307
Federal Aviation Administration
Parking accommodations
Federal Aviation Administration (FAA), Department of Transportation, questions propriety of implementing three arbitration awards requiring FAA to provide parking accommodations for employees. FAA does not consider it would be justified in making a determination, as required for expenditure of funds by applicable regulations, that such leased parking accommodations are necessary to avoid impairment of its operational efficiency. Inasmuch as FAA regulations incorporated by reference in the collective bargaining agreement have already made the required determination, FAA is not required to make a further determination. Accordingly, FAA may expend appropriated funds to implement awards---- 1197
Federal grants, etc., to other than States. (*See* **FUNDS, Federal grants, etc., to other than States**)
Federal Home Loan Bank Board
Appropriation availability
Insurance on bank building
Federal Home Loan Bank Board may purchase insurance covering risk of loss to new building. Government policy of insuring its own risks of loss, based on wide distribution of type and geographical location of its risks, does not apply here since total loss may be ultimately sustained by Federal Home Loan Bank System due to nature of funding for building-- 1321

APPROPRIATIONS—Continued
Fiscal year
Availability beyond
Continuation of projects Page
Under section 312 of Housing Act of 1964, as amended, and language of 1977 appropriation act, Department of Housing and Urban Development may make new commitments for rehabilitation loans immediately after August 22, 1976, from previous appropriation balances which would otherwise become unavailable after that date. Ambiguous reference to such prior appropriations in 1977 appropriation act could be read as making prior appropriations available only during fiscal year 1977. However, this narrow construction would create hiatus in funding from August 22 to October 1, 1976, which was clearly not intended by Congress ---- 1415
Contracts
Replacement contract
Fiscal year funds to be used for June 30, 1975, award under small business set-aside, conditioned on SBA determination that awardee is small business concern, can be used in subsequent fiscal year to fund replacement contract where award is withdrawn because of negative SBA size determination since conditional contract (1) was binding agreement obligating 1975 funds; (2) was sufficiently definite; (3) represented *bona fide* 1975 need; and (4) replacement contract to be awarded after resolicitation will cover same continuing need encompassed by conditional contract. 24 Comp. Gen. 555, overruled ---- 1351
Prior year contracts charged to current appropriations. (*See* **APPROPRIATIONS, Obligation, Contracts, Prior year**)
Interior Department
Availability
Books and periodicals
Subscriptions
Appropriated funds may be used to purchase subscription to periodical if subscription is justified as a "necessary" agency expense. Subscription need not be considered indispensable. 21 Comp. Gen. 339 is no longer applicable ---- 1076
Judgments
Agency appropriations
Sums due after judgment date
Judgment, entered on Feb. 4, 1976, stating in part that plaintiff Federal employees "shall receive for the period subsequent to September 14, 1974" sums representing increased salary increments originally denied under challenged agency action, is treated, for purposes of satisfying judgment, as money judgment for back pay up to date of judgment plus a mandate that agency place employees in higher salary rate as of date of judgment. Therefore, sums due plaintiffs up to date of judgment are payable, upon settlement by General Accounting Office, from permanent indefinite appropriation under 31 U.S.C. 724a, but sums due after judgment date are payable from agency appropriations for salaries and expenses ---- 1447
Indefinite appropriation availability. (*See* **APPROPRIATIONS, Permanent indefinite, Judgments**)

APPROPRIATIONS—Continued
Limitations
Authorization limitation Page
Proviso in section of continuing resolution, which suspends effectiveness of provisions in appropriation acts making availability of appropriations contingent upon enactment of authorizing legislation, was intended to apply only to appropriation bills prior to their final enactment. Thus, enactment of appropriation act with such contingency provision will supersede continuing resolution and will suspend availability of funds pending enactment of necessary legislative authority---- 289
Combat activities in Southeast Asia
Seven funding limitation statutes prohibit use of appropriated funds for combat activity in Indochina. While legislative history of seven acts is not entirely clear respecting President's rescue power, there are some specific statements that such power is not restricted, and the overall intent of seven acts was to curtail bombing and offensive military action in Southeast Asia. Therefore, President's recent evacuation of Americans from Saigon did not conflict with such statutes---------- 1081
National Sea Grant College and Program Act
Sec. 204(d)(2) of National Sea Grant College and Program Act of 1966, which prohibits Federal funding for purchase or rental of land, or purchase, rental, construction, preservation or repair of building, dock or vessel applies only to Federal grant payments for direct costs for listed categories. This section does not prohibit payments computed by using standard indirect overhead cost rates, even though such rates may include factors technically attributable to prohibited categories--- 652
Purchases
Aircraft
Acquisition by agencies of aircraft and passenger motor vehicles by purchase or transfer is prohibited by 31 U.S.C. 638a, unless specifically authorized by appropriation act or other law, and this prohibition applies to acquisition by transfer by Law Enforcement Assistance Admin. of aircraft or passenger motor vehicles for use by grantees in their regular law enforcement functions because agency obtains custody and accountability and exception would reduce congressional control over aircraft and vehicles. See 44 Comp. Gen. 117---------- 348
Navy Department
Contracts
Absence of statutory restriction
Navy is not required as matter of law to expend funds provided in lump-sum appropriation act for a specific purpose when statute does not so require, notwithstanding language contained in Conference Report. Absence of statutory restriction raises clear inference that Report language paralleled and complemented, but remained distinct from, actual appropriation made. Therefore, Navy selection of particular aircraft design for its Air Combat Fighter and resultant award of sustaining engineering contracts cannot be regarded as contrary to law---- 307
Necessary expenses. (*See* **APPROPRIATIONS, Availability, Expenses incident to specific purposes, Necessary expenses**)

APPROPRIATIONS—Continued
Obligation
Contracts
Compliance with DOD reprogramming directives Page
Although protester argues that Navy did not comply with DOD reprogramming directives, those directives are based on nonstatutory agreements and do not provide a proper basis for determining legality of expenditures ---- 307
Contractor's equipment
Option requirement *v.* contract clause
Where exercise of contract option required Navy to furnish various items of Govt. furnished property (GFP), but contract clause authorized Navy to unilaterally delete items of GFP and make necessary equitable adjustment, full value of unobligated and undelivered GFP should not be considered "obligation" as of time of option exercise for purposes of assessing violation of 31 U.S.C. 665 or 41 U.S.C. 11. Exercise of DLGN 41 contract option did not violate these statutes since recorded obligations and other binding commitment did not exceed available appropriations ---- 812
Prior year
Charged to current appropriations
Army proposal to complete prior year contracts executed in violation of Antideficiency Act by applying current year funds is improper in light of longstanding rule that, except as otherwise provided by law, expenditures attributable to contracts made under particular appropriations remain chargeable to those appropriations ---- 768
Replacement contracts
Withdrawal of small business set-asides
Fiscal year funds to be used for June 30, 1975, award under small business set-aside, conditioned on SBA determination that awardee is small business concern, can be used in subsequent fiscal year to fund replacement contract where award is withdrawn because of negative SBA size determination since conditional contract (1) was binding agreement obligating 1975 funds; (2) was sufficiently definite; (3) represented *bona fide* 1975 need; and (4) replacement contract to be awarded after resolicitation will cover same continuing need encompassed by conditional contract. 24 Comp. Gen. 555, overruled ---- 1351
Section 1311, Supplemental Appropriation Act, 1955
Department transfers
Interagency agreement entered into in fiscal year 1976 by General Services Administration and Administrative Office of U.S. Courts for design and implementation of automated payroll system under section 111 of Federal Property Act, 40 U.S.C. 759, rather than Economy Act, 31 U.S.C. 686, is not subject to 31 U.S.C. 686–1, which limits duration of appropriation obligations only in Economy Act transactions. Such agreement constitutes valid obligation against fiscal year 1976 Administrative Office appropriation to meet *bona fide* 1976 need ---- 1497

APPROPRIATIONS—Continued
Permanent indefinite
Judgments
Against Government Page

Judgment, entered on Feb. 4, 1976, stating in part that plaintiff Federal employees "shall receive for the period subsequent to September 14, 1974" sums representing increased salary increments originally denied under challenged agency action, is treated, for purposes of satisfying judgment, as money judgment for back pay up to date of judgment plus a mandate that agency place employees in higher salary rate as of date of judgment. Therefore, sums due plaintiffs up to date of judgment are payable, upon settlement by General Accounting Office, from permanent indefinite appropriation under 31 U.S.C. 724a, but sums due after judgment date are payable from agency appropriations for salaries and expenses ---- 1447

Refunding moneys erroneously received and covered

Annual charge assessed pursuant to User Charge Statute, 31 U.S.C. 483a, by SEC upon investment advisers and deposited in Treasury as miscellaneous receipts, which charge is now considered erroneous by SEC because of recent Supreme Court decisions, may be refunded by SEC out of permanent indefinite appropriation established by 31 U.S.C 725q–1 to pay moneys "erroneously received and covered." This refund is authorized to all who paid such invalid fee regardless of whether payment was made under protest ---- 243

Prohibitions. (*See* **APPROPRIATIONS, Restrictions**)
Restrictions
"Follow ship"

Proviso in Appropriation Act requires DLGN 41 to be "follow ship" of DLGN 38 class. Proviso is not violated since DLGN 41 has same basic characteristics as prior ships of that class, notwithstanding nonincorporation of series of modifications and absent showing that unincorporated modifications would significantly alter those characteristics ---- 812

National Sea Grant College and Program Act

Sec. 204(d)(2) of National Sea Grant College and Program Act of 1966, which prohibits Federal funding for purchase or rental of land, or purchase, rental, construction, preservation or repair of building, dock or vessel applies only to Federal grant payments for direct costs for listed categories. This section does not prohibit payments computed by using standard indirect overhead cost rates, even though such rates may include factors technically attributable to prohibited categories --- 652

Reprogramming action
Effect on legal contract award

Provision in appropriation act which prohibits use of funds for presenting certain reprogramming requests cannot operate to invalidate contract awards even if awards resulted from reprogramming action since violation of such provision cannot serve to invalidate an otherwise legal contract award ---- 307

APPROPRIATIONS—Continued
Supplemental
In excess of deficiency Page
Army proposal to enter into contract modification providing for no cost stop work order, for partially performed contracts executed in violation of Antideficiency Act, would freeze Government liability at amount already due, unless supplemental appropriation is enacted. We perceive no legal objection to proposal since it would maintain status quo and reserve to Congress maximum flexibility in deciding whether to make deficiency appropriation in amount necessary to liquidate actual obligations already incurred or to permit Army to realize full contract benefits by making appropriation greater than actual existing deficiency. 768
Transition period
Fiscal year 1977
Under section 312 of Housing Act of 1964, as amended, and language of 1977 appropriation act, Department of Housing and Urban Development may make new commitments for rehabilitation loans immediately after August 22, 1976, from previous appropriation balances which would otherwise become unavailable after that date. Ambiguous reference to such prior appropriations in 1977 appropriation act could be read as making prior appropriations available only during fiscal year 1977. However, this narrow construction would create hiatus in funding from August 22 to October 1, 1976, which was clearly not intended by Congress. 1415
Veterans Administration
Parking facilities
Where GSA pursuant to 40 U.S.C. 490(j) charges VA for parking space for use of employees, and related services, VA appropriations are available to pay such charges subject to 90 percent limitation contained in VA annual appropriations. 897

ARBITRATION
Award
Collective bargaining agreement
Violation
Grievance charged violation of provision in collective bargaining agreement that consultants would not be hired to perform work that could be performed by agency employees. Agency stipulated that it had violated agreement but refused union's demand that consultant repay salary to U.S. Treasury. Prior to arbitration hearing, the consultant resigned. Arbitrator's award of punitive damages to be paid by agency to union may not be implemented since there is no authority to award punitive damages against U.S. or one of its agencies. 564
Federal Labor Relations Council requests decision on legality of arbitration award of backpay to 54 shipyard employees for overtime and time not worked. The arbitrator found that Shipyard changed basic workweek of employees without complying with consultation requirements of negotiated agreement. However, because arbitrator did not find that but for failure of Shipyard to consult with union, change in basic workweek would not have occurred, award does not satisfy criteria of Back Pay Act, 5 U.S.C. 5596 and, therefore, it may not be implemented. 629

ARBITRATION—Continued
Award—Continued
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Agency implementation Page

Federal Aviation Administration (FAA), Department of Transportation, questions propriety of implementing three arbitration awards requiring FAA to provide parking accommodations for employees. FAA does not consider it would be justified in making a determination, as required for expenditure of funds by applicable regulations, that such leased parking accommodations are necessary to avoid impairment of its operational efficiency. Inasmuch as FAA regulations incorporated by reference in the collective bargaining agreement have already made the required determination, FAA is not required to make a further determination. Accordingly, FAA may expend appropriated funds to implement awards 1197

Consistent with law, regulations and GAO decisions

Federal Labor Relations Council questions propriety of implementing arbitration award that sustains grievance of two Community Services Admin. employees for retroactive promotions and backpay. Because record contains substantial evidence that grievants would probably have been demoted shortly after they should have been promoted—evidence which arbitrator apparently did not consider—award is indefinite. Matter should be remanded to arbitrator for additional proceedings with instructions that he hear evidence on whether demotions would have occurred and, if so, on what date 427

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Violation of collective bargaining agreement

Federal Labor Relations Council questions the propriety of sustaining an arbitration award that orders backpay for employees deprived of overtime work in violation of a negotiated agreement. Agency violations of negotiated agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act, 5 U.S.C. 5596. Improper agency action may be either affirmative action or failure to act where agreement requires action. Thus, award of backpay to employees deprived of overtime work in violation of agreement is proper and may be paid 171

Fed. Labor Relations Council questions propriety of sustaining arbitration award of 1 hour backpay to employee deprived of overtime work in violation of negotiated labor-management agreement. Agency violations of such agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by Back Pay Act, 5 U.S.C. 5596. Therefore, where agency obligated itself in a labor-management agreement to provide 2 hours of productive work when employee is held on duty beyond his regular shift and, in violation of such agreement, provided him only 1 hour, arbitration award providing backpay to employee for the additional hour may be sustained 405

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Implementation by agency
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Federal Aviation Administration (FAA), Department of Transportation, questions propriety of implementing three arbitration awards requiring FAA to provide parking accommodations for employees. FAA does not consider it would be justified in making a determination, as required for expenditure of funds by applicable regulations, that such leased parking accommodations are necessary to avoid impairment of its operational efficiency. Inasmuch as FAA regulations incorporated by reference in the collective bargaining agreement have already make the required determination, FAA is not required to make a further determination. Accordingly, FAA may expend appropriated funds to implement awards---- 1197
Night work
Denial of assignment to night shift
Violation of collective bargaining agreement
Labor union appealed General Accounting Office decision holding arbitrator's award of backpay for night shift work improperly denied to employees in violation of collective bargaining agreement could not be implemented since agency's action was not unjustified or unwarranted personnel action under Back Pay Act and no night work was actually performed. Subsequent decisions have held that omission such as failure to afford opportunity for overtime work in violation of agree-

ARBITRATION—Continued
Award—Continued
Night work—Continued
Denial of assignment to night shift—Continued
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ment may constitute unjustified or unwarranted personnel action although overtime work was not performed. Therefore, upon reconsideration, arbitrator's award may be implemented where employees were improperly denied assignment to night shift. B–181972, August 28, 1974, reversed 1311
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Federal Labor Relations Council requests decision on legality of arbitration award of backpay to 54 shipyard employees for overtime and time not worked. The arbitrator found that Shipyard changed basic workweek of employees without complying with consultation requirements of negotiated agreement. However, because arbitrator did not find that but for failure of Shipyard to consult with union, change in basic workweek would not have occurred, award does not satisfy criteria of Back Pay Act, 5 U.S.C. 5596 and, therefore, it may not be implemented 629
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Grievance charged violation of provision in collective bargaining agreement that consultants would not be hired to perform work that could be performed by agency employees. Agency stipulated that it had violated agreement but refused union's demand that consultant repay salary to U.S. Treasury. Prior to arbitration hearing, the consultant resigned. Arbitrator's award of punitive damages to be paid by agency to union may not be implemented since there is no authority to award punitive damages against U.S. or one of its agencies 564
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Federal Labor Relations Council requested decision on legality of arbitrator's award of retroactive promotion and backpay. Arbitrator found grievant was assigned higher duties but was not given temporary promotion as provided in negotiated agreement. Award may not be implemented since new position had not yet been classified and grievant cannot be promoted to a position which did not exist 1062
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Classification actions
Not covered by negotiated grievance procedure
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Federal Labor Relations Council questions propriety of implementing arbitration award that sustains grievance of two Community Services Admin. employees for retroactive promotions and backpay. Because record contains substantial evidence that grievants would probably have been demoted shortly after they should have been promoted—evidence which arbitrator apparently did not consider—award is indefinite. Matter should be remanded to arbitrator for additional proceedings with instructions that he hear evidence on whether demotions would have occurred and, if so, on what date---------- 427
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Dependents. (*See* **MILITARY PERSONNEL, Dependents**)

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Suits against officers and employees
Official capacity
Where U.S. Attorney undertook defense of former SBA employee who was sued as result of actions committed while acting within scope of his employment and during course of proceedings U.S. Attorney withdrew for administrative reasons, necessitating former employee's retaining services of private counsel although Govt.'s interest in defending employee continued throughout proceedings, we would not object to SBA's reimbursing former employee amount for reasonable legal fees incurred. 28 U.S.C. 516–519, 547, and 5 U.S.C. 3106 are not a bar in such circumstances since to hold otherwise would be contrary to rule that cost of defending such cases should be borne by Govt---------- 408

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Non-Federally sponsored
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Travel expenses to attend award ceremonies
Attendants for handicapped award recipients Page
Where handicapped employee selected to be honored under Govt. Employees Incentive Awards Program is unable to travel unattended because of his particular handicap and would otherwise be unable to attend award ceremony, travel expenses for attendant to accompany him in traveling to and from award ceremony may be paid by employing agency as "necessary expense" for honorary recognition of that particular employee under 5 U.S.C. 4503. 54 Comp. Gen. 1054, distinguished---------- 800
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Paper weights and plaques
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Rational support is found for rejection by grantee and concurrence by grantor agency of low bid submitted by "Ethridge & Griffin Const. Co. * * * a corporation, organized and existing under the law of the State of Ga * * *" and signed by individual as secretary. Corporation was and is nonexistent. Award to Griffin Construction Company would be an improper substitution. Rationale for objecting to award to entity other than named in bid is that such action could serve to undermine sound competitive bidding procedures 1254
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Duty to inquire
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Late bidder acted unreasonably in assuming that bid opening under IFB, which designated bid opening time as either ".30 PM" or "30 PM," would occur at 3 p.m. (actual bid opening was at 1:30 p.m.), and had duty to inquire of agency regarding patent discrepancy, even though agency improperly failed to notify bidder of bid opening time discrepancy when agency was made aware of it. Rule under which IFB's terms would be interpreted against Govt. as IFB drafter has no application where such a patent discrepancy exists 735
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Advertised procurement is open and public to protect interests of both Govt. and bidders. Agency's position that no regulation obliged it to notify apparently successful bidder of fact that undisclosed late bid was being considered for award is not persuasive justification for declining to provide information where apparently successful bidder makes several preaward inquiries attempting to ascertain procurement status. Record does not show whether there was actual failure to furnish advice, or merely poor communication. But procurement officials should be sensitive to position of bidder and make reasonable efforts to respond to inquiries 494
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Where validity of contracting officer's nonresponsibility determination is challenged on basis it was erroneously predicated primarily upon criminal indictment which had been dismissed, such determination is nevertheless reasonable since findings of grand jury underlying indictment adequately support findings of lack of integrity, indictment was dimissed because of procedural deficiencies rather than for insufficiency of evidence, and dismissal has been appealed. Contracting officer's failure to contact prospective contractor regarding responsibility did not affect validity of determination 343

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Small business concerns Page

Examination of "social disadvantage" determination made of owner of firm proposed for 8(a) award shows that SBA did consider factors regarding disadvantage other than racial identity of owner or owner's alleged inability to obtain bonding. Determination is considered rationally supported, given broad guidelines conveyed in SBA policy and regulation concerning what constitutes "disadvantage." 397

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Where bidder never successfully passes demonstration required by IFB to establish technical ability to perform in responsible manner—a specific and objective responsibility criterion contained in solicitation—GAO finds there was no reasonable basis upon which contracting officer could find bidder responsible 1043

Certifications
Adequate documentation

Since certification by contractor that it is not a detective agency has proved inadequate to prevent violations of statutory prohibition against employment of detective agencies by Federal Government, procuring agency, in procurement for guard services, should require as part of bid or initial proposal adequate documentation concerning bidder's or offeror's corporate authority and licensing status. Modified by 56 Comp. Gen. (B–180257, Jan. 6, 1977) 1472

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Literal requirements

Cases which hold that in absence of finding of nonresponsibility, bid may not be rejected solely for bidder's failure to meet literal requirement of responsibility criteria set forth in solicitation will no longer be followed. 53 Comp. Gen. 36, 52 *id.* 647, 45 *id.* 4 and other similar decisions are therefore overruled in part. Meeting such definitive criteria of responsibility, either precisely or through equivalent experience, etc., is actual prerequisite to affirmative determination of responsibility, since waiver of such requirement may prejudice other bidders or potential bidders who did or did not bid in reliance on its application 1051

Newly organized firm
Capabilities of officials, etc., considered

Experience of corporate officials prior to formation of corporation can be included when examining corporation's overall experience level for bidder responsibility determination. Therefore, mere fact that corporation had only existed since early 1975 is not determinative of its ability to meet "approximately 5 years" experience requirement 1051

Specialized, etc.

Record does not support affirmative responsibility determination where agency made *sub silentio* finding that bidder had demonstrated level of achievement equivalent to or in excess of minimum level of experience set forth in IFB, i.e., that it had worked on more complex equipment for requisite length of time (approximately 5 years) wherein same sort of expertise needed in instant contract was brought to bear,

BIDDERS—Continued
Qualifications—Continued
Experience—Continued
Specialized, etc.—Continued Page
since record indicates only that bidder (1) had some experience with equipment; (2) had some experience with highly sophisticated equipment; and (3) had 5 years' general experience, and does not indicate extent of experience with either specific or more complex equipment..... 1051
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Contention that bidder is not "manufacturer" or "regular dealer" within purview of Walsh-Healey Act is not for consideration by General Accounting Office, since responsibility for applying criteria of Walsh-Healey Act is vested in contracting officer subject to final review by Department of Labor..... 1204
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Protest that surplus dealer is not "regular dealer" within purview of Walsh-Healey Public Contracts Act, 41 U.S.C. 35–45, and related implementing regulations, ASPR 12–601 and 12–607, and therefore is ineligible for award, is not for consideration, since such determinations are exclusively vested with contracting officer subject to final review by Dept. of Labor..... 1
Preaward surveys
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Contracting officer's determination that bidder was nonresponsible for QPL procurement, which was based on negative preaward survey conducted over 5 months previous for procurement of different article, had no reasonable basis..... 1
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Where validity of contracting officer's nonresponsibility determination is challenged on basis it was erroneously predicated primarily upon criminal indictment which had been dismissed, such determination is nevertheless reasonable since findings of grand jury underlying indictment adequately support findings of lack of integrity, indictment was dismissed because of procedural deficiencies rather than for insufficiency of evidence, and dismissal has been appealed. Contracting officer's failure to contact prospective contractor regarding responsibility did not affect validity of determination..... 343

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Tenacity and perseverance Page

Contracting officer's determination that bidder is nonresponsible because of lack of tenacity and perseverance based on bidder's poor performance on recent contracts is sustained notwithstanding SBA's appeal of that determination which was denied by head of agency. Fact cited by SBA that bidder's performance record recently had shown marked improvement does not establish that contracting officer's determination is unreasonable where record indicates that decrease in number of bidder's delinquent contracts resulted from delivery date extensions granted by Govt. and completion of already delinquent contracts rather than from bidder's tenacity and perseverance ---------- 571

Qualified products procurement

Agency's position that only bids submitted by manufacturers or their authorized distributors under QPL procurements can be considered responsive is overly restrictive interpretation of QPL requirements contained in ASPR 1-1101 *et seq.*, and would constitute QPL a qualified bidders list ---------- 1

Surplus material offered
Presumption of unacceptability

Agency's presumption that bidders offering surplus material can meet QPL requirements only if bidder affirmatively volunteers and shows in its bid that it could meet acceptance test, QPL, and other Govt. requirements, is contrary to basic procurement policy ---------- 1

Security clearance

Where it is alleged that definitive responsibility criterion--IFB security clearance requirement—was waived, contracting officer's affirmative determination of responsibility is for review on merits. Determination was supported by objective evidence before contracting officer, who had received information from bidder that adequate personnel working at nearby facilities could be used to perform contract, and that predecessor contractor's qualified personnel might also be hired. GAO has no objection to determination in view of facts of record and absence of evidence from protester demonstrating that determination lacked reasonable basis ---------- 494

Whether guard services contractor is, as protester claims, in default of contract is matter of contract administration, which is function of contracting agency, not GAO. In any event, contracting officer states that contractor beginning performance using personnel with Confidential security clearances adequately meets initial needs under contract; that necessary administrative processing to transfer Secret clearances from old to new contractor is being accomplished; and that in event Secret tests or equipment are utilized at site, contractor has capability to furnish Secret-cleared personnel ---------- 494

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Where small business size protest is received 1½ hours after award made on bid opening date, last day of fiscal year, termination of contract is recommended, since SBA subsequently sustained protest; contracting officer has indicated that procurement would have been referred to SBA under standard operating procedure if received before award; and contracting officer exceeded authority in that ASPR 1-703(b)(5) precludes small business set-aside award prior to expiration of 5 working days after bid opening in absence of urgency determination---------- 439
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Examination of "social disadvantage" determination made of owner of firm proposed for 8(a) award shows that SBA did consider factors regarding disadvantage other than racial identity of owner or owner's alleged inability to obtain bonding. Determination is considered rationally supported, given broad guidelines conveyed in SBA policy and regulation concerning what constitutes "disadvantage."---------- 397
State, etc., licensing requirements
IFB provision that successful bidder meet all requirements of Federal, State or City codes does not justify rejection of bid for failure to have city license to operate ambulance service since need for license under such general requirement is matter between local governmental unit and contractor. However, where bidder conditions bid upon possession of license, such qualification renders bid nonresponsive---------- 597
Tenacity and perseverance
Prior unsatisfactory service. (*See* **BIDDERS, Qualifications, Prior unsatisfactory service, Tenacity and perseverance**)
Responsibility *v.* bid responsiveness
Bid deviations
Bidder's failure to complete blanks in "Descriptive Schedules" made bid nonresponsive and was not matter of bidder's responsibility as claimed by agency---------- 999
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Contracting officer's determination that bidder is nonresponsible because of lack of tenacity and perseverance based on bidder's poor performance on recent contracts is sustained notwithstanding SBA's appeal of that determination which was denied by head of agency. Fact cited by SBA that bidder's performance record recently had shown marked improvement does not establish that contracting officer's determination is unreasonable where record indicates that decrease in number of bidder's delinquent contracts resulted from delivery date extensions granted by Govt. and completion of already delinquent contracts rather than from bidder's tenacity and perserverance---------- 571
Where bidder never successfully passes demonstration required by IFB to establish technical ability to perform in responsible manner—a

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specific and objective responsibility criterion contained in solicitation—GAO finds there was no reasonable basis upon which contracting officer could find bidder responsible 1043
Responsibility *v.* responsiveness
Descriptive literature requirement
Inclusion in IFB of six pages of "Descriptive Schedules" containing over 200 blanks in which bidders were to insert specific information concerning equipment being supplied; which were expressly made part of specifications; which were to be furnished with bid; and as to which bidders were advised to fill in all blanks or be found nonresponsive, was descriptive literature requirement even though agency failed to use descriptive literature clauses prescribed by regulations 999
Experience
Cases which hold that in absence of finding of nonresponsibility, bid may not be rejected solely for bidder's failure to meet literal requirement of responsibility criteria set forth in solicitation will no longer be followed. 53 Comp. Gen. 36, 52 *id.* 647, 45 *id.* 4 and other similar decisions are therefore overruled in part. Meeting such definitive criteria of responsibility, either precisely or through equivalent experience, etc., is actual prerequisite to affirmative determination of responsibility, since waiver of such requirement may prejudice other bidders or potential bidders who did or did not bid in reliance on its application 1051
Information
Confidential
Low bid to provide computer services which is stamped "CONFIDENTIAL" is nonresponsive since stamp restricted public disclosure of information concerning essential nature of services and product offered, as well as price, quantity and delivery terms and affords that bidder opportunity, after bid opening, of accepting or refusing award, which is contrary to requirements of competitive bid system 445
Minority hiring goals
Where Washington Plan bid appendix requires bidder to insert goals and sign appendix, bid which includes signed appendix without insertion of goals is nonresponsive since noncompliance with appendix requirements is not minor deviation which may be waived. Although appendix mistakenly made one reference to bidder "responsibility" instead of responsiveness, appendix read as whole indicated that compliance was to be matter of responsiveness, and record indicates that protester, who was on constructive notice of correct terminology, was not prejudiced by error 1160
Technical deficiencies of equipment, etc., offered
Scope of work understanding
Where bidder never successfully passes demonstration required by IFB to establish technical ability to perform in responsible manner—a specific and objective responsibility criterion contained in solicitation—GAO finds there was no reasonable basis upon which contracting officer could find bidder responsible 1043
Responsiveness *v.* responsibility. (*See* **BIDDERS, Responsibility *v.* bid responsiveness**)

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Contracting officer's determination that bidder is nonresponsible because of lack of tenacity and perserverance based on bidder's poor performance on recent contracts is sustained notwithstanding SBA's appeal of that determination which was denied by head of agency. Fact cited by SBA that bidder's performance record recently had shown marked improvement does not establish that contracting officer's determination is unreasonable where record indicates that decrease in number of bidder's delinquent contracts resulted from delivery date extensions granted by Govt. and completion of already delinquent contracts rather than from bidder's tenacity and perserverance 571
Right to response to inquiries
Advertised procurement is open and public to protect interests of both Govt. and bidders. Agency's position that no regulation obliged it to notify apparently successful bidder of fact that undisclosed late bid was being considered for award is not persuasive justification for declining to provide information where apparently successful bidder makes several preaward inquiries attempting to ascertain procurement status. Record does not show whether there was actual failure to furnish advice, or merely poor communication. But procurement officials should be sensitive to position of bidder and make reasonable efforts to respond to inquiries 494
BIDS
Acceptance
Unbalanced bids
Where agency receives mathematically unbalanced bids and determines that quantity estimates in IFB are valid representation of actual needs, award may be made to low bidder notwithstanding its bid is unbalanced 488
Improper
Proposed acceptance of apparent low mathematically unbalanced bid is not proper where (1) agency determines bid is low through reevaluations using substantially revised estimates of work requirements, which, in themselves, indicate that "material unbalancing" (existence of reasonable doubt that any award would result in lowest cost to Govt.) is present; (2) under reevaluation using one of revised estimates, bid is not low, confirming existence of material unbalancing; (3) reevaluation procedure has effect of introducing new evaluation factors into procurement and contravenes requirement that bidders compete equally based on objective factors in IFB. B-161208, Aug. 8, 1967, modified 231

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Acceptance time limitation
Waiver
Not prejudicial to other bidders Page
Low bidder would not be precluded from waiving 10-day bid acceptance period after expiration, since, by offering to keep bid open for 60-day period contemplated by IFB, bidder assumed risk of price increases during period and did not gain advantage over other bidder 546
Additives. (*See* **BIDS, Aggregate *v.* separable items, prices, etc., Additives**)
Aggregate *v.* separable items, prices, etc.
Additives
Correction
Not prejudicial to other bidders
Where bid included alternate item price, bid deviated from amended bidding requirement that alternate work and price therefore be included in base bid price. However, bid may nevertheless be accepted if otherwise proper since deviation did not prejudice other bidders as bidder is obligated to perform all work and bid is low overall whether price under alternate item is included or is in addition to base bid price 168
Appropriation availability
FPR, unlike ASPR, imposes no duty on contracting officer to record amount of funds available prior to bid opening for base bids and alternates when amount of funding is in doubt. Therefore, determination of actual available funding, and the consequential determination whether alternates, if any, will be applied, may properly be made after bid opening in case of civilian agency. However, adoption of uniform Govt-wide policy is recommended 443
Award basis
Where solicitation provided for insertion of bid price for entire work (basic bid) and insertion of bid prices for deductive items (alternates), and stated that evaluation of bids would be made on bases of basic bid and all alternates, it was proper to evaluate basic bid without deductive items since award was made for entire work. However, agency is advised to clarify its evaluation provision for future use 443
All or none
Qualified. (*See* **BIDS, Qualified, All or none**)
Ambiguous
Bid modification
Not prejudicial to other bidders
Bid containing allegedly ambiguous price term may be accepted where no prejudice could result to other bidders because bid is low under all possible interpretations and bidder agrees to be bound by interpretation yielding lowest bid 1146
Two possible interpretations
Both reasonable
Bid which omitted pages of IFB is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear 894

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Where agency issues telegraphic solicitation amendment one day before bid opening and telephonically notifies bidders of that fact who, without objecting, expressly acknowledge receipt of amendment, one bidder's assertion that agency did not issue written amendment and did not provide bidders with sufficient time to consider amendment is without merit ---- 1160
Bid bonds. (*See* **BONDS, Bid**)
Bid shopping. (*See* **CONTRACTS, Subcontracts, Bid shopping**)
Bidders, generally. (*See* **BIDDERS**)
Bond. (*See* **BONDS, Bid**)
Buy American Act
Foreign product determination
Component *v.* end product
A 1975 GAO audit report expressed reservations whether contractor's 85 to 90 percent manufacturing of radio sets in Mexico satisfies Buy American Act requirement that materials must be "manufactured in the United States" in order to qualify as domestic end product, and recommended ASPR Committee consideration of issue. Recent protest decision in different factual context repeated recommendation. Considering Mexican manufacturing issue in present protest is therefore viewed as inappropriate ---- 1479
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Contention that "all or none" qualification on bidding schedule was change in bid requiring initialing by bidder is without merit because (1) qualification was not change; (2) assuming qualification was change, bidding schedule was initialed; and (3) lack of initialing of change could have been waived as minor informality ---- 100
Collusive bidding
Allegations unsupported by evidence
Unsupported allegation that successful bidder, issued COC by SBA, bid collusively with another bidder, and was not unaffiliated bidder as represented in bid is not sufficient to overcome certification of unaffiliation in bid and lack of evidence to show violation of certification -- 97
Referral to Justice Department
Questions of alleged collusive pattern of bidding by small business firms should be referred to Attorney General by procuring agency for resolution pursuant to ASPR 1–111.2, since interpretation and enforcement of criminal laws are functions of Attorney General and Federal courts, not GAO ---- 372

BIDS—Continued
Competitive system
Adequacy of competition
One bid inadequate Page
Award may not be made under Navy total small business set-aside to firm found to be other than small business concern by Small Business Administration (SBA), even though firm's bid was the only one received. Retrospective determination by Navy that there was not sufficient competition to justify set-aside and suggestion that invitation for bids (IFB) size classification may be erroneous do not allow direct award to sole bidder. Requirement must be resolicited so that all potential bidders, including other large business firms, may have opportunity to compete.. 1351
Bid acceptance time
Bidder, who submitted bid 30 minutes after 1:30 p.m. bid opening because it unreasonably interpreted IFB bid opening time designation of either ".30 PM" or "30 PM" as 3 p.m., and did not inquire as to correct bid opening time, may not have its late bid considered, despite substantial contribution to bid lateness of defective IFB and Government's improper failure to notify bidders of correct bid opening time, because bidder caused own lateness and integrity of competitive bid system may be jeopardized if late bid is considered since other bids had been publicly opened 735
"Buy Indian Act"
Proposed award of school design contract to Indian school board under title I, Public Law 93-638—"Indian Self-Determination Act"—is not objectionable, provided requirements of act and its regulations are satisfied. Act provides contracting authority covering broad range of Indian programs and independent of contracting laws and regulations ordinarily applicable to Interior Department, including Brooks Bill architect-engineer selection procedure (40 U.S.C. 541, *et seq.*, and FPR subpart 1-4.10). Therefore, protest by architectural firm competing in Brooks Bill procurement initiated prior to school board's application for contract under P.L. 93-638 is denied 765
Confidential bid
Prejudicial to other bidders
Low bid to provide computer services which is stamped "CONFIDENTIAL" is nonresponsive since stamp restricted public disclosure of information concerning essential nature of services and product offered, as well as price, quantity and delivery terms and affords that bidder opportunity, after bid opening, of accepting or refusing award, which is contrary to requirements of competitive bid system 445
Equal bidding basis for all bidders
Bidders' superior advantages
Protests against award of contracts because possible competitive advantages may accrue to competitors availing themselves of "WIN" program (providing for limited wage rate reimbursement and tax benefits for hiring and training of welfare recipients) are denied since matter is conjectural and any competitive advantages would not result from preferential or unfair treatment by Govt. While possible ramification of WIN program might be inconsistent with one purpose of Service Contract Act of 1965, program is not contrary to any provision of Act 656

BIDS—Continued
Competitive system—Continued
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Not prejudicial to other bidders Page
Bid responsive to reasonable interpretation of invitation for bids which is unclear as to basis for price computation may have price converted mathematically to intended basis and evaluated---------- 1406
Federal aid, grants, etc.
Basic principles
Basic principles of Federal norm of competitive bidding are intended to produce rational decisions by those who purchase for Federal Govt.; to extent, therefore, that grantee's procurement decision (and concurrence in decision by grantor agency) is not rationally founded, it may be in conflict with fundamental Federal norm. Procurement under "rational basis" test does not require detailed knowledge of GAO decisions---------- 390
Bidder substitution
Improper
Rational support is found for rejection by grantee and concurrence by grantor agency of low bid submitted by "Ethridge & Griffin Const. Co. * * * a corporation, organized and existing under the law of the State of Ga * * *" and signed by individual as secretary. Corporation was and is nonexistent. Award to Griffin Construction Company would be an improper substitution. Rationale for objecting to award to entity other than named in bid is that such action could serve to undermine sound competitive bidding procedures---------- 1254
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Where applicable regulations of Federal Govt. agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated---------- 139
Integrity of system. (*See* **BIDS, Competitive system, Preservation of system's integrity**)
Late bids
Hand-carried bid may be accepted even though received late since lateness is result of bid opening officer's erroneous rejection of initial tender which was timely made and consideration of bid does not compromise integrity of competitive bid system---------- 267
Totality of information of record more reasonably supports conclusion that hand-carried bid did not arrive at designated depositary room by time for bid opening, notwithstanding time/date stamp showing timely receipt. Time/date stamp was mechanical hand stamp, not automatic timepiece, and manually adjustable to show approximate time in 15-minute intervals---------- 1103

BIDS—Continued
Competitive system—Continued
Minor deficiencies in bid
Listing of subcontractors
No valid purpose served Page

Although solicitation requirement for listing of pipe suppliers is not fully met by low bidder who lists two possible suppliers for certain categories of pipe, award may be made to low bidder. Facts show that listing requirement was inadvertently included in solicitation by agency and that second low bidder who complied fully with listing requirement was not prejudiced thereby. Moreover, listing requirement serves no valid purpose for Govt. where item being procured is commercially available as in instant case 955

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)
Preservation of system's integrity

Bidder, who submitted bid 30 minutes after 1:30 p.m. bid opening because it unreasonably interpreted IFB bid opening time designation of either ".30 PM" or "30 PM" as 3 p.m., and did not inquire as to correct bid opening time, may not have its late bid considered, despite substantial contribution to bid lateness of defective IFB and Government's improper failure to notify bidders of correct bid opening time, because bidder caused own lateness and integrity of competitive bid system may be jeopardized if late bid is considered since other bids had been publicly opened 735

Invitation canceled and resolicited

While fact that specifications are inadequate, ambiguous or otherwise deficient is not compelling reason to cancel invitation, absent showing of prejudice, where specification is restrictive of competition and record indicates that additional firms would bid on revised specifications included in a resolicitation, cancellation is proper course of action 464

Workmanship requirements providing "all parts shall be free from defects or blemishes affecting their appearance" and "workmanship shall be first class throughout" are highly subjective and vague in that they fail to provide clear standard upon which bid samples will be evaluated. As such, although we agree with General Services Administration that rejection of bid samples would have been legally questionable, bids should have been rejected and procurement resolicited in terms indicating what specific characteristics, if any, bid samples would have to meet ... 1204

Nonexistence of compelling reason

Although IFB was patently defective in indicating bid opening time and contracting officer improperly failed to inform bidders of correct bid opening time when he was made aware of IFB discrepancy prior to bid opening, no compelling reason exists to cancel IFB after bid opening and resolicit requirement since late bidder contributed to own lateness by failing to inquire regarding patent deficiency and there is adequate competition, a reasonable price and absence of any indication of prejudice to other bidders 735

BIDS—Continued
Competitive system—Continued
Restrictions on competition
Prohibition
Surplus material Page

Navy "blanket" prohibition of all surplus material (whether new and unused surplus or reconditioned surplus) is not in compliance with requirements for "free and open" competition and drafting specifications stating Govt.'s actual needs. Navy contracting officer and cognizant technical personnel should determine, if possible under circumstances of particular procurement, at time solicitation is issued whether surplus and/or reconditioned material will meet its actual needs---------- 1

Small business awards

Any situation which could reasonably be construed as being one in which procuring agency advocates use of size standard differing from that then applicable under SBA regulation would amount to encroachment whether intentional or unintentional on SBA's exclusive jurisdiction. Thus, where, as here, applicable SBA regulations were changed 7 days prior to bid opening and IFB can reasonably be construed as setting forth size standard differing from SBA's, encroachment has occurred and impact of encroachment on competition must be analyzed-- 617

Subcontractors

National Aeronautics and Space Administration's (NASA) exercise of general administrative functions in determining technical approaches to problem solving is not sufficient involvement in selection of subcontractor to cause our review of subcontract award since parallel development to test multiple approaches to problem solving was reasonable and specification prepared as a result thereof for use in subcontract award permitted competition, even by protester, and NASA was not involved in selection as envisioned in 54 Comp. Gen. 767---------- 1220

Superior advantage of some bidders
"Win" program

Protests against award of contracts because possible competitive advantages may accrue to competitors availing themselves of "WIN" program (providing for limited wage rate reimbursement and tax benefits for hiring and training of welfare recipients) are denied since matter is conjectural and any competitive advantages would not result from preferential or unfair treatment by Govt. While possible ramification of WIN program might be inconsistent with one purpose of Service Contract Act of 1965, program is not contrary to any provision of Act----- 656

Unbalanced bids

Proposed acceptance of apparent low mathematically unbalanced bid is not proper where (1) agency determines bid is low through reevaluations using substantially revised estimates of work requirements, which, in themselves, indicate that "material unbalancing" (existence of reasonable doubt that any award would result in lowest cost to Govt.) is present; (2) under reevaluation using one of revised estimates, bid is not low, confirming existence of material unbalancing; (3) reevalution procedure has effect of introducing new evaluation factors into procurement and contravenes requirement that bidders compete equally based on objective factors in IFB. B-161208, Aug. 8, 1967, modified---------- 231

BIDS—Continued
Competitive system—Continued
Unfair practices allegation Page
Contention raising allegedly "questionable" pattern of bidding by certain small business firms is not for consideration, since ASPR 1-111.2, "*Noncompetitive Practices,*" provides that such matters should be referred by procuring agency to Attorney General for prosecution 475
Conformability of articles to specifications. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
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Cover letter. (*See* **BIDS, Letter accompanying bid**)
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Evaluation. (*See* **BIDS, Evaluation, Delivery provisions**)
Deviations from advertised specifications. (*See* **CONTRACTS, Specifications, Deviations**)
***Di minimus* rule**
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Discarding all bids
Compelling reasons only
While fact that specifications are inadequate, ambiguous or otherwise deficient is not compelling reason to cancel invitation, absent showing of prejudice, where specification is restrictive of competition and record indicates that additional firms would bid on revised specifications included in a resolicitation, cancellation is proper course of action 464
Invitation defects
D.C.'s cancellation of invitation after bid opening was proper upon determination that specifications for one particular item being procured overstated user's actual needs and had detrimental effect of restricting competition 464
Omission of one line item, which may have substantial cost impact in relation to other 53 items in IFB for acoustical ceiling work, does not constitute compelling reason to reject all bids and readvertise since other items are valid repesentation of Govt.'s needs and alternate methods exist to satisfy need of omitted item 488
Workmanship requirements providing "all parts shall be free from defects or blemishes affecting their appearance" and "workmanship shall be first class throughout" are highly subjective and vague in that they fail to provide clear standard upon which bid samples will be evaluated. As such, although we agree with General Services Administration that rejection of bid samples would have been legally questionable, bids should have been rejected and procurement resolicited in terms indicating what specific characteristics, if any, bid samples would have to meet 1204
Not a mandatory requirement
Although IFB was patently defective in indicating bid opening time and contracting officer improperly failed to inform bidders of correct bid opening time when he was made aware of IFB discrepancy prior to bid opening, no compelling reason exists to cancel IFB after bid opening

BIDS—Continued
Discarding all bids—Continued
Not a mandatory requirement—Continued Page
and resolicit requirement since late bidder contributed to own lateness by failing to inquire regarding patent deficiency and there is adequate competition, a reasonable price and absence of any indication of prejudice to other bidders ---- 735
Price disclosure effect
Bidder, who submitted bid 30 minutes after 1:30 p.m. bid opening because it unreasonably interpreted IFB bid opening time designation of either ".30 PM" or "30 PM" as 3 p.m., and did not inquire as to correct bid opening time, may not have its late bid considered, despite substantial contribution to bid lateness of defective IFB and Government's improper failure to notify bidders of correct bid opening time, because bidder caused own lateness and integrity of competitive bid system may be jeopardized if late bid is considered since other bids had been publicly opened ---- 735
Reinstatement
General Accounting Office direction
Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future ---- 592
Low responsive bidder under canceled invitation
Solicitation provision requiring bid bond in amount of 20 percent of "bid," when read in context of entire bid package, may not reasonably be interpreted as applicable to monthly rather than annual bid total for 1-year contract, even though bid schedule called for monthly bid prices. Therefore, notwithstanding low bidder's erroneous interpretation of bid guarantee provision, agency's determination to resolicit bids under corrected specification is not justified and low bid is nonresponsive ---- 798
Resolicitation
Revised specifications
As general rule, mathematically unbalanced bid—bid based on enhanced prices for some work and nominal prices for other work—may be accepted if agency, upon examination, believes IFB's estimate of work requirements is reasonably accurate representation of actual anticipated needs. But where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel IFB and resolicit, based upon revised estimate. B-161208, Aug. 8, 1967, modified ---- 231
Solicitation should be canceled and requirement resolicited where (1) low bidder found to be responsible by agency is ineligible for award because bidder failed to comply with specific and objective responsibility criterion in IFB; and (2) only other bidder's price is almost $8 million higher than that of low bidder. Also, determination that low bidder was responsible shows that specific and objective criterion was unnecessary ---- 1043

BIDS—Continued
Discount provisions
Bid bond amount calculated on discount price Page
Since ASPR 2-407.3(b) provides that any prompt payment discount offered shall be deducted from bid price on assumption that discount will be taken and offered discount of successful bidder shall form part of award, where prompt payment discount is offered in bid where bid bond is required amount of bid bond may be properly calculated on discounted price 352
Errors. (*See* **BIDS, Mistakes**)
Evaluation
Aggregate *v.* separable items, prices, etc.
All or none bid
Where IFB permits multiple awards, "all or none" bid lower in aggregate than any combination of individual bids available may be accepted by Govt. even though partial award could have been made at lower unit cost 100
Base bid low
Where solicitation provided for insertion of bid price for entire work (basic bid) and insertion of bid prices for deductive items (alternates), and stated that evaluation of bids would be made on bases of basic bid and all alternates, it was proper to evaluate basic bid without deductive items since award was made for entire work. However, agency is advised to clarify its evaluation provision for future use 443
Total *v.* extension differences
While IFB clause, stating that aggregate total of lump-sum and unit price items, based on estimated quantities, shall be basis for comparison of bids, assumes that extended price for each item will equal product of unit price times estimated quantity, it does not indicate that where there is inconsistency one shall prevail over other 413
All or none bids
Qualified. (*See* **BIDS, Qualified, All or none**)
Alternate bases bidding
Propriety of evaluation
Where bid included alternate item price, bid deviated from amended bidding requirement that alternate work and price therefore be included in base bid price. However, bid may nevertheless be accepted if otherwise proper since deviation did not prejudice other bidders as bidder is obligated to perform all work and bid is low overall whether price under alternate item is included or is in addition to base bid price 168
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Descriptive literature on file
Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future 592

BIDS—Continued
Evaluation—Continued
Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Contrary to terms of solicitation
Presumption of unacceptability Page
Agency's presumption that bidders offering surplus material can meet QPL requirements only if bidder affirmatively volunteers and shows in its bid that it could meet acceptance test, QPL, and other Govt. requirements, is contrary to basic procurement policy---------- 1
Criteria
Federal aid, grants, etc.
Grantee's decision to give greater weight to long-range operating cost, rather than initial capital cost, in selecting successful bidder can be rationally supported so long as evaluation criteria for award makes clear basis upon which bids will be evaluated---------- 390
Propriety of evaluation. (*See* **BIDS, Evaluation, Propriety**)
Delivery provisions
After date of contract *v.* after receipt of contract
Where IFB required delivery within 280 days "after date of award," telegraphic bid offering delivery "280 days after receipt of award" was properly rejected as nonresponsive, where solicitation contained provision for evaluation of bids offering delivery based upon date of receipt of contract or notice of award (rather than contract date) by adding maximum number of days normally required for delivery of award through mails. Thus evaluated, protester's bid exceeded required delivery schedule---------- 605
Requirements contracts
Fact that prices of items under contract calling for definite quantity with fixed delivery might be lower than prices under requirements contract does not mean that the overall cost to Government is less since indirect costs associated with definite quantity contract must be considered such as cost of extra warehouse storage for additional inventory, generated excess inventory, and cost of transporting excess inventory to other locations---------- 1226
Labor costs
Old *v.* new wage rates
When contract is awarded on basis of old wage rates after new Service Contract Act wage determination has been received after bid opening, option should not be exercised since proper way to determine effect of new wages is to recompete rather than assume new rate would affect bidders equally. Recommendation is being referred to appropriate congressional committees pursuant to Legislative Reorganization Act of 1970, 31 U.S.C. 1172---------- 97
On basis other than invitation
Intended bid price
Mathematically converted
Bid responsive to reasonable interpretation of invitation for bids which is unclear as to basis for price computation may have price converted mathematically to intended basis and evaluated---------- 1406

BIDS—Continued
Evaluation—Continued
Propriety
Criteria of evaluation Page
Invitation specifications did not provide for evaluation of equipment on basis of operation and maintenance costs and thus those factors were not for consideration in selecting equipment 1272
Tax benefits
"Win" program
Protests against award of contracts because possible competitive advantages may accrue to competitors availing themselves of "WIN" program (providing for limited wage rate reimbursement and tax benefits for hiring and training of welfare recipients) are denied since matter is conjectural and any competitive advantages would not result from preferential or unfair treatment by Govt. While possible ramification of WIN program might be inconsistent with one purpose of Service Contract Act of 1965, program is not contrary to any provision of Act 656
Tax inclusion or exclusion
Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to requirement and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price 1159
Failure to furnish something required. (*See* **CONTRACTS, Specifications, Failure to furnish something required**)
Guarantee
Letter of credit. (*See* **LETTER OF CREDIT, Bid guarantee**)
Guarantees
Checks
Insufficient amount
Bid which contained $3,000 certified check, instead of 20-percent bid guaranty of $106,092 bid, was properly rejected, since failure to submit sufficient bid bond renders bid nonresponsive 439
Invitation requirement
Solicitation provision requiring bid bond in amount of 20 percent of "bid," when read in context of entire bid package, may not reasonably be interpreted as applicable to monthly rather than annual bid total for 1-year contract, even though bid schedule called for monthly bid prices. Therefore, notwithstanding low bidder's erroneous interpretation of bid guarantee provision, agency's determination to resolicit bids under corrected specification is not justified and low bid is nonresponsive 798
Hand carried
Delivery location
Provision in solicitation that bids be mailed to certain address or hand-carried to depositary located at mailing address does not prohibit hand delivery to official located in bid opening room who was authorized to receive bids 267

BIDS—Continued
Invitation for bids
Ambiguous
Minority hiring goals Page

Protester's assertion that solicitatation was confusing and ambiguous because it only provided space for insertion of goals for time periods which had expired is without merit, since solicitation specified that goals for the last period for which space was provided would be applicable to the contract to be awarded ---------- 1160

Bid opening time
Error

Contracting officer acted unreasonably and in contravention of ASPR 2–208 in failing to at least telephonically notify five firms on bidders' list of correct bid opening time when he was made aware of patent error in IFB, which designated bid opening time as either ".30PM" or "30 PM," even though DD Form 1707 included in solicitation package but not incorporated in IFB indicated correct bid opening time of 1:30 p.m. Contracting officer should not merely presume that reasonable bidders would inquire as to correct bid opening time under such circumstances-- 735

Cancellation
After bid opening

Although IFB was patently defective in indicating bid opening time and contracting officer improperly failed to inform bidders of correct bid opening time when he was made aware of IFB discrepancy prior to bid opening, no compelling reason exists to cancel IFB after bid opening and resolicit requirement since late bidder contributed to own lateness by failing to inquire regarding patent deficiency and there is adequate competition, a reasonable price and absence of any indication of prejudice to other bidders ---------- 735

Erroneous

Cancellation of a subsequet IFB on basis that services were no longer required was erroneous where there was in fact a continuing need for the services which was being met through a noncompetitive, informal agreement with a contractor to a Federal agency—an arrangement unauthorized by statute. Recommendation is made that D.C. discontinue present method of procurement and that services be procured through informal advertising or an intergovernmental agreement authorized by statute ---------- 464

Justification

Cancellation of IFB and negotiation of sole-source award to low bidder offering surplus material was not improper, even though contracting officer failed to ask QPL preparing activity for required waiver of those QPL requirements, which were not required of bidder, pursuant to ASPR 1–1108; however, recommendations is made that waiver be gotten to exercise of option under contract ---------- 1

As general rule, mathematically unbalanced bid—bid based on enhanced prices for some work and nominal prices for other work—may be accepted if agency, upon examination, believes IFB's estimate of work requirements is reasonably accurate representation of actual anticipated needs. But where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel IFB and resolicit, based upon revised estimate. B–161208, Aug. 8, 1967, modified ---------- 231

BIDS—Continued
Invitation for bids—Continued
Cancellation—Continued
Not prejudicial to other bidders Page
Although it would seem that contracting officer, who canceled IFB for supply of aircraft parts after determining that nonresponsive bid offering surplus material met Govt.'s actual minimum needs for much lower cost and who negotiated sole-source contract with surplus bidder on "public exigency" basis, acted improperly in failing to solicit other bidders on same basis, other bidders were not prejudiced since it is unlikely they would have offered surplus and low surplus bid was responsive to IFB 1
Clauses
Grandfather
Question regarding propriety of IFB's failure to reference applicable SBA "Grandfather" clause (used in determining small business size status) effective 7 days prior to bid opening, where IFB indicated different dollar threshold for small business standard, is significant issue under Bid Protest Procedures 617
Defective
Size standards
Where change to SBA's small business size standard was published in Fed. Reg. prior to bid opening, all parties are held to be on constructive notice, even procuring agency, especially where material should have caused it to take action to amend IFB's stated size standards. Agency's unintentional failure to bring its IFB size standard into line with SBA's could have had substantial adverse effect on competition and in this regard IFB was defective. However, even if contract awarded had not been substantially performed, harm to competitive system generated by agency's inadvertence may not have necessitated GAO recommendation for termination 617
Interpretation
Oral explanation
Oral explanation furnished bidder regarding manner of award has no legal effect where IFB requires bidders to request in writing any explanation desired regarding meaning or interpretation of IFB 100
Reasonable
Bid responsive to reasonable interpretation of invitation for bids which is unclear as to basis for price computation may have price converted mathematically to intended basis and evaluated 1406
Line item
Omission
Omission of one line item, which may have substantial cost impact in relation to other 53 items in IFB for acoustical ceiling work, does not constitute compelling reason to reject all bids and readvertise since other items are valid representation of Govt.'s needs and alternate methods exist to satisfy need of omitted item 488
Reasonable interpretation. (*See* **BIDS, Invitation for bids, Interpretation, Reasonable**)

BIDS—Continued
Invitation for bids—Continued
Requirements Page
Invitation specifications did not provide for evaluation of equipment on basis of operation and maintenance costs and thus those factors were not for consideration in selecting equipment---- 1272
Commitment to Washington, D.C. minority hiring plan
Invitation for bids (IFB) required bidders to commit themselves only to terms and conditions of Washington Plan as spelled out in IFB. Contention that IFB was improper because it required commitment to a revised Plan not yet issued is without merit---- 1160
Interpretation
Stock model requirements
Requirement that "All equipment furnished by Contractor shall be stock models for which parts are readily available" is more reasonably construed to mean that end products must be stock models rather than components or parts of equipment which are merely required to be "readily available."---- 1272
Responsive to
Bid which included signed appendix including percentage goals for two trades bidder contemplated utilizing in contract performance was responsive to requirements of IFB. Protester's assertion that bidders were required to submit estimates of manhours required for work in Washington area and of number of employees to be used is based on different appendix used in earlier case and has no applicability to instant matter---- 1160
Vague
Workmanship requirements providing "all parts shall be free from defects or blemishes affecting their appearance" and "workmanship shall be first class throughout" are highly subjective and vague in that they fail to provide clear standard upon which bid samples will be evaluated. As such, although we agree with General Services Administration that rejection of bid samples would have been legally questionable, bids should have been rejected and procurement resolicited in terms indicating what specific characteristics, if any, bid samples would have to meet---- 1204
Telegraphic amendment
Where agency issues telegraphic solicitation amendment one day before bid opening and telephonically notifies bidders of that fact who, without objecting, expressly acknowledge receipt of amendment, one bidder's assertion that agency did not issue written amendment and did not provide bidders with sufficient time to consider amendment is without merit---- 1160
Labor stipulations. (*See* **CONTRACTS, Labor stipulations**)
Late
Acceptance
Not prejudicial to other bidders
Hand-carried bid may be accepted even though received late since lateness is result of bid opening officer's erroneous rejection of initial tender which was timely made and consideration of bid does not compromise integrity of competitive bid system---- 267

BIDS—Continued
Late—Continued
Acceptance—Continued
Prejudicial to other bidders Page
Bidder, who submitted bid 30 minutes after 1:30 p.m. bid opening because it unreasonably interpreted IFB bid opening time designation of either ".30 PM" or "30 PM" as 3 p.m., and did not inquire as to correct bid opening time, may not have its late bid considered, despite substantial contribution to bid lateness of defective IFB and Government's improper failure to notify bidders of correct bid opening time, because bidder caused own lateness and integrity of competitive bid system may be jeopardized if late bid is considered since other bids had been publicly opened 735
Agency responsibility
Advertised procurement is open and public to protect interests of both Govt. and bidders. Agency's position that no regulation obliged it to notify apparently successful bidder of fact that undisclosed late bid was being considered for award is not persuasive justification for declining to provide information where apparently successful bidder makes several preaward inquiries attempting to ascertain procurement status. Record does not show whether there was actual failure to furnish advice, or merely poor communication. But procurement officials should be sensitive to position of bidder and make reasonable efforts to respond to inquiries 494
Conflicting statements
Factual statements made by attendee at bid opening who claimed to have observed occurrences from far corner of room are rejected in preference to contrary statements submitted by bid opening officer and alternate who directly participated in contested delivery of bid 267
Disposition
Although protest, insofar as it concerns IFB discrepancy in designating correct bid opening time, is untimely under Bid Protest Procedures, since it was not filed prior to bid opening, balance of protest, i.e., contention that protester's bid should not have been rejected as late, is timely because protester filed within 10 working days after it became aware of basis for protest 735
Hand-carried delay
Where bid opening officer states that hand-carried bid initially was tendered, according to clock in bid opening room, prior to scheduled bid opening time and prior to authorized public declaration that such time had arrived, rejection of bid as late is not required even though officer initially rejected tender of bid in accordance with time shown on unsynchronized clock outside bid opening room. Authorized public declaration, made in accordance with clock in bid opening room, that time for bid opening has arrived is *prima facie* evidence of that fact 267
Evidence
Despite allegation that clause included in invitation for bids as required by regulation (Armed Services Procurement Regulation 7-2002.2 (c)(ii)) provides that only acceptable evidence to establish time of bid receipt at Government installation is time/date stamp of installation, all evidence relevant to time of receipt of hand-carried bid is considered since regulation applies only for consideration of late mailed and telgraphic bids, and not late hand-carried bids 1103

BIDS—Continued
Late—Continued
Identification of bid erroneous
Negotiated procurement. (*See* **CONTRACTS, Negotiation, Late proposals and quotations, Identification erroneous**)
Locked office
Telegraphic modification delayed. (*See* **BIDS, Late, Telegraphic modifications, Delay due to Western Union, Unable to deliver, Locked building**)
Mishandling determination
Record *v.* time/date stamp Page
Totality of information of record more reasonably supports conclusion that hand-carried bid did not arrive at designated depositary room by time for bid opening, notwithstanding time/date stamp showing timely receipt. Time/date stamp was mechanical hand stamp, not automatic timepiece, and manually adjustable to show approximate time in 15-minute intervals 1103
Telegraphic bid. (*See* **BIDS, Late, Telegraphic modifications, Mishandling by Government**)
Modification
By telegram. (*See* **BIDS, Late, Telegraphic modifications**)
Negotiated procurement
Late proposals and quotations. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)
Public opening
Advertised procurement is open and public to protect interests of both Govt. and bidders. Agency's position that no regulation obliged it to notify apparently successful bidder of fact that undisclosed late bid was being considered for award is not persuasive justification for declining to provide information where apparently successful bidder makes several preaward inquiries attempting to ascertain procurement status. Record does not show whether there was actual failure to furnish advice, or merely poor communication. But procurement officials should be sensitive to position of bidder and make reasonable efforts to respond to inquiries 494
Recommendation to ASPR Committee and FPR Division
Revision of late bid provisions of procurement regulations
Recommendation is made to ASPR Committee and FPR Division that GAO comments on possibility that late bid provisions involving acceptable evidence to establish timely receipt of bids may be unnecessarily causing Govt. to lose benefits of low bids be considered with respect to possible revision of procurement regulations 220
Telegraphic modifications
Delay due to Western Union
Unable to deliver
Locked building
Telegraphic bid modification, Government time-stamped as received day after bid opening due to inability of Western Union to timely deliver since building designated in invitation for bids (IFB) for receipt of bids was locked (during noon hour while employees attended retirement luncheon) was properly accepted even though clause in IFB implementing Armed Services Procurement Regulation 7-2002 appears

BIDS—Continued
Late—Continued
Telegraphic modifications—Continued
Delay due to Western Union—Continued
Unable to deliver—Continued
Locked building—Continued Page
to indicate opposite result since to do so would contravene intent and spirit of late bid regulations, which do not appear to have contemplated instant situation 1340
Evidence of timely delivery
Telegraphic bid modification, Govt. time-stamped 3 minutes after time for bid opening in office designated in IFB, which, if for consideration, would make third low bidder low, was properly rejected as late, notwithstanding documentary evidence of Western Union indicating delivery at time for bid opening, since only acceptable evidence to establish timely receipt in IFB is time-date stamp of Govt. installation on bid wrapper or other documentary evidence of receipt maintained by installation 220
Time/date stamp inaccurate
Time/date stamp on bid modification may be disregarded in determining time of receipt at Government installation where independent evidence establishes that times marked by machine were inaccurate and were inconsistent with stipulated order of receipt 1146
Where time/date stamp is inaccurate, contracting officer may seek other documentary evidence maintained by installation, including telegrams, for purpose of establishing time of receipt of bid modification at Government installation 1146
Mishandling by Government
Decision to consider late bid modification was proper where documentary evidence maintained by Government installation established that bid would have been timely received in bid opening room but for Government mishandling following receipt in communications center 1146
Prices
Bid containing allegedly ambiguous price term may be accepted where no prejudice could result to other bidders because bid is low under all possible interpretations and bidder agrees to to be bound by interpretation yielding lowest bid 1146
Time ambiguity
Late bidder acted unreasonably in assuming that bid opening under IFB, which designated bid opening time as either ".30 PM" or "30 PM," would occur at 3 p.m. (actual bid opening was at 1:30 p.m.), and had duty to inquire of agency regarding patent discrepancy, even though agency improperly failed to notify bidder of bid opening time discrepancy when agency was made aware of it. Rule under which IFB's terms would be interpreted against Govt. as IFB drafter has no application where such a patent discrepancy exists 735
Time variances
Where bid opening officer states that hand-carried bid initially was tendered, according to clock in bid opening room, prior to scheduled bid opening time and prior to authorized public declaration that such time had arrived, rejection of bid as late is not required even though officer

BIDS—Continued
Late—Continued
Time variances—Continued Page
initially rejected tender of bid in accordance with time shown on unsynchronized clock outside bid opening room. Authorized public declaration, made in accordance with clock in bid opening room, that time for bid opening has arrived is *prima facie* evidence of that fact---------- 267
Letter accompanying bid
Ambiguous
Bid which omitted pages of IFB is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear------ 894
Letter containing conditions not in bid. (*See* **BIDS, Qualified, Letter, etc., Containing conditions not in invitation**)
Mistakes
Burden of proof
After error establishment
Where bidder seeks to withdraw its bid based upon alleged error and furnishes evidence to make *prima facie* case in support of error, i.e., substantially establishes error, for Govt. to make award it must virtually show that no error was made or that claim of error was not made in good faith. Therefore, upon ultimate determination that bona fide error was committed, withdrawal is permissible---------- 936
Correction
Base bid and alternative items
Where bidder stated separate prices for both base bid and alternate item, even though amendment (which was acknowledged) required inclusion of alternate work and price in base bid, bidder may correct base bid price by adding alternate price thereto as bidder has submitted clear and convincing evidence as to both the existence of mistake and price intended and bid is low both as corrected and uncorrected. However, agency is advised that in future bid schedules should be revised to conform with revisions in bidding instructions---------- 168
Contract awarded prior to correction
Low bidder claiming mistake in bid and seeking correction is not required as condition to proper award to apprise agency prior to decision on correction of willingness to accept award at original bid price in event correction is disallowed---------- 546
Denial
Low bidder's reservation of right to contest in appropriate forum contracting agency's denial of request for correction of bid did not render agency's award to bidder improper---------- 546
Discrepancy between actual and intended price
Unit price area
Bid responsive to reasonable interpretation of invitation for bids which is unclear as to basis for price computation may have price converted mathematically to intended basis and evaluated---------- 1406

BIDS—Continued
Mistakes—Continued
Correction—Continued
Discrepancy between words and figures Page
IFB provision stating, if discrepancy occurs between written and figure prices, price most favorable to municipality will be taken as bidder's intention applies where discrepancy exists between price stated in words and same price stated in figures and not where there is mistake between unit and extended price ---- 413
Rule
Departments are authorized under applicable procurement regulation to make administrative determinations prior to award to resolve suspected mistakes in bid ---- 267
Still lowest bid
Bid containing allegedly ambiguous price term may be accepted where no prejudice could result to other bidders because bid is low under all possible interpretations and bidder agrees to be bound by interpretation yielding lowest bid ---- 1146
Di minimus **rule**
Cases discussing withdrawal of bid due to mistake do not speak to materiality of mistake made but rather to whether mistake was honest one. Thus, where magnitude of mistake is not *de minimis* (between 1.6 percent and 3.2 percent of $11.8 million bid), withdrawal may be permitted ---- 936
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Mistakes**)
Recalculation of bid
Correction *v.* withdrawal
Contracting officer's determination that bidder alleging mistake should be permitted to withdraw but not to correct its bid was proper where correction would increase price on item of work from $97,079 to $223,440, thus bringing total bid to within $5,000 of second low bid in $670,000 procurement ---- 742
Unit price *v.* extension differences
Grants-in-aid procurement
While IFB clause, stating that aggregate total of lump-sum and unit price items, based on estimated quantities, shall be basis for comparison of bids, assumes that extended price for each item will equal product of unit price times estimated quantity, it does not indicate that where there is inconsistency one shall prevail over other ---- 413
Contract awarded under Iowa law pursuant to EPA grant to City of Davenport, Iowa, appears to be improper. City's construction of bid, which contained discrepancy between unit price and extended price for one item which resulted in displacement of another bid, was not proper because intended bid price for item was subject to more than one reasonable interpretation. Valid and binding contract comes into being under Iowa law only if essence of contract awarded is contained within four corners of bid submitted ---- 413
Verification
Acceptance of contract at initial bid price
Low bidder claiming mistake in bid and seeking correction is not required as condition to proper award to apprise agency prior to decision on correction of willingness to accept award at original bid price in event correction is disallowed ---- 546

BIDS—Continued
Mistakes—Continued
Withdrawal
Burden of proof Page
Where bidder seeks to withdraw its bid based upon alleged error and furnishes evidence to make *prima facie* case in support of error, i.e., substantially establishes error, for Govt. to make award it must virtually show that no error was made or that claim of error was not made in good faith. Therefore, upon ultimate determination that bona fide error was committed, withdrawal is permissible---- 936
Materiality *v.* honesty of mistake
Cases discussing withdrawal of bid due to mistake do not speak to materiality of mistake made but rather to whether mistake was honest one. Thus, where magnitude of mistake is not *de minimis* (between 1.6 percent and 3.2 percent of $11.8 million bid), withdrawal may be permitted---- 936
Modification
After bid opening
Evidence to substantiate allegation lacking
In absence of evidence affirmatively showing that low responsive bidder added "all or none" qualification to bid after opening, award is not questioned even though an appearance of impropriety was created when bid opening officer and preparer of bid abstracts, respectively, failed to read aloud or note qualification in violation of ASPR on bid opening procedures. GAO reviewed answers by Govt. employees to written interrogatories propounded by protester and received expert handwriting analysis from U.S. Secret Service---- 100
Ambiguous
Price term
Bid containing allegedly ambiguous price term may be accepted where no prejudice could result to other bidders because bid is low under all possible interpretations and bidder agrees to be bound by interpretation yielding lowest bid---- 1146
Telegraphic. (*See* **BIDS, Late, Telegraphic modifications**)
Negotiated procurement. (*See* **CONTRACTS, Negotiation**)
Nonresponsive to invitation
Bid guarantee
Deficiencies
Documentary letter of credit furnished as bid guarantee does not constitute "firm commitment" as required by solicitation and ASPR 7-2003.25, thereby rendering bid nonresponsive, since letter of credit was not accompanied by bidder's signed withdrawal application which would have to be presented to bank in order for letter of credit to be honored---- 587
Conformability of equipment. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Information after bid opening unauthorized
Low bidder, after bid opening, cannot "cure" its failure to acknowledge receipt of IFB amendment because to do so would be tantamount to permitting submission of second bid. Bidder's alleged nonreceipt of amendment does not appear to have been result of deliberate effort to exclude bidder from competition---- 599

BIDS—Continued
Nonresponsive to invitation—Continued
Large business bids
Small business set-asides Page
Large business bids on small business set-aside procurements are nonresponsive and contracting officer is not required to consider bids. Moreover, 15 U.S.C. 631, *et seq.*, has been interpreted to mean that Govt. may pay premium price to small business firms on restrictive procurements to implement policy of Congress 902
Partial compliance
Statement in cover letter accompanying bid that bidder would supply equipment specified in "Descriptive Schedules" "or equal" was reservation by bidder of right to substitute unidentified components of those described in bid, thereby rendering bid nonresponsive 999
Affirmative action requirements
Bidder who signed Part I certificate as member of Topeka Plan and inserted "Does not apply." under Part II which sets forth requirements for non-members of Topeka Plan is not responsive to affirmative action requirements of solicitation where bidder is not member of Topeka Plan at time of bid opening. Bidder's certification to Part I is not commitment to be bound to affirmative action requirements of solicitation where bid conditions require current membership in Topeka Plan as prerequisite to Government's acceptance of Part I certification 1259
Omissions
Information
Qualified products information
Test number identification
Bidder under QPL procurement, who fails to identify manufacturer or applicable QPL test number, but who identifies product's manufacturer's designation, is responsive to IFB, and omissions may be waived as minor informalities 1
Invitation attachments
Bid which omitted pages of IFB is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear 894
State sales tax
Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to require ment and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price 1159

BIDS—Continued
Opening
Public
Late bids Page

Advertised procurement is open and public to protect interests of both Govt. and bidders. Agency's position that no regulation obliged it to notify apparently successful bidder of fact that undisclosed late bid was being considered for award is not persuasive justification for declining to provide information where apparently successful bidder makes several preaward inquiries attempting to ascertain procurement status. Record does not show whether there was actual failure to furnish advice, or merely poor communication. But procurement officials should be sensitive to position of bidder and make reasonable efforts to respond to inquiries---- 494

Time for opening determination

Bid deadline for hand-carried bid may not be deemed to have arrived because of bid opening officer's removal of bids from depositary since public declaration that time set for bid opening had arrived subsequently was made by authorized official consistent with clock in bid opening room---- 267

Prices
Below cost

Because of GSA's widespread difficulties with deficient performance on formally advertised janitorial services contracts, GSA's possible misunderstanding of the decisions of GAO as applied to "below cost" bidding, and GAO opinion that GSA should be given time to study alternative solutions to difficulties, termination of protested award is not recommended. Distinguished by B–185966, Mar. 17, 1976---- 693

Mathematically converted to intended basis

Bid responsive to reasonable interpretation of invitation for bids which is unclear as to basis for price computation may have price converted mathematically to intended basis and evaluated---- 1406

Proposals and quotations. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)
Protests. (*See* **CONTRACTS, Protests**)
Qualified
All or none
Addition after bid opening
Evidence to substantiate allegation lacking

In absence of evidence affirmatively showing that low responsive bidder added "all or none" qualification to bid after opening, award is not questioned even though an appearance of impropriety was created when bid opening officer and preparer of bid abstracts, respectively, failed to read aloud or note qualification in violation of ASPR on bid opening procedures. GAO reviewed answers by Govt. employees to written interrogatories propounded by protester and received expert handwriting analysis from U.S. Secret Service---- 100

BIDS—Continued
Qualified—Continued
All or none—Continued Page
Evaluation. (*See* **BIDS, Evaluation, Aggregate *v.* separable items, prices, etc., All or none**)
Failure to read aloud and record qualification
Validity of award
Failure of procuring activity personnel to read aloud and properly record on abstracts "all or none" qualification is deviation of form from procurement regulations, not of substance, and does not affect validity of award. However, in view of failure of procuring activity personnel to follow ASPR bid opening procedures, GAO recommends that Secretary of Army take appropriate action to insure compliance with applicable ASPRs 100
Interpretation of qualification
Contention that "all or none" qualification on bidding schedule was change in bid requiring initialing by bidder is without merit because (1) qualification was not change; (2) assuming qualification was change, bidding schedule was initialed; and (3) lack of initialing of change could have been waived as minor informality 100
Bid nonresponsive
Stamped "confidential"
Low bid to provide computer services which is stamped "CONFIDENTIAL" is nonresponsive since stamp restricted public disclosure of information concerning essential nature of services and product offered, as well as price, quantity and delivery terms and affords that bidder opportunity, after bid opening, of accepting or refusing award, which is contrary to requirements of competitive bid system 445
Cover letter. (*See* **BIDS, Qualified, Letter, etc.**)
Descriptive literature
Notations
Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future 592
Letter, etc.
Containing conditions not in invitation
Statement in cover letter accompanying bid that bidder would supply equipment specified in "Descriptive Schedules" "or equal" was reservation by bidder of right to substitute unidentified components for those described in bid, thereby rendering bid nonresponsive 999
Receipt of city license
Fact that bidder alleges it was told by procuring agency personnel to include cover letter with bid which conditioned bid upon possession of local license, resulting in rejection of bid, does not alter nonresponsiveness of bid as Govt. is not responsible for negligence of employee absent specific statutory provision 597

BIDS—Continued
Qualified—Continued
Taxes
Bidder intent Page

Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to requirement and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price ---------- 1159

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Rejection
Contrary to basic procurement policy
Presumption of unacceptability

Agency's presumption that bidders offering surplus material can meet QPL requirements only if bidder affirmatively volunteers and shows in its bid that it could meet acceptance test, QPL, and other Govt. requirements, is contrary to basic procurement policy ---------- 1

Nonresponsive
Bidder's intent not indicated

Bidder, who intends to "refurbish" new unused parts by replacing elastomer components, but who does not indicate this intent in its bid, may be rejected as nonresponsive where bid indicates that parts bidder is offering would exceed allowable shelf life unless elastomers are replaced ---------- 1

Propriety
Conflict of interest

Where Govt. employee owns 39.95 percent of stock of corporation, it is concluded that he has substantial ownership in corporation. Conclusion is reached in view of significant history which has discouraged contracting between Govt. and its employees. Therefore, while agency restricted its view to employee's role in day-to-day management of corporation, since reasonable ground did exist, rejection of corporation low bid was not improper ---------- 295

Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)
Responsiveness
Concept

No basis exists for rejection of bid as nonresponsive under argument that generator offered would not meet specifications where bidder inserted acceptable information in "Descriptive Schedules" and furnished with bid letter from generator manufacturer certifying that generator would comply with specifications ---------- 999

Effect of confidential legend
Restrictive of competition

Low bid to provide computer services which is stamped "CONFIDENTIAL" is nonresponsive since stamp restricted public disclosure of information concerning essential nature of services and product offered, as well as price, quantity and delivery terms and affords that bidder opportunity, after bid opening, of accepting or refusing award, which is contrary to requirements of competitive bid system ---------- 445

BIDS—Continued
Responsiveness—Continued
Responsiveness *v.* bidder responsibility Page
Untimely protest is considered on merits because it reflects serious misunderstanding by agency of concepts of responsibility and responsiveness as applied in prior GAO decisions 999
Bidder's failure to complete blanks in "Descriptive Schedules" made bid nonresponsive and was not matter of bidder's responsibility as claimed by agency 999
Signatures
Status of bidder
Rational support is found for rejection by grantee and concurrence by grantor agency of low bid submitted by "Ethridge & Griffin Const. Co. * * * a corporation, organized and existing under the law of the State of Ga * * *" and signed by individual as secretary. Corporation was and is nonexistent. Award to Griffin Construction Company would be an improper substitution. Rationale for objecting to award to entity other than named in bid is that such action could serve to undermine sound competitive bidding procedures 1254
Small business concerns
Contract awards. (*See* **CONTRACTS, Awards, Small business concerns**)
Sole source procurement. (*See* **CONTRACTS, Negotiation, Sole source basis**)
Specifications. (*See* **CONTRACTS, Specifications**)
Subcontracts
Bid shopping. (*See* **CONTRACTS, Subcontracts, Bid shopping**)
Two-step procurement
Conformability of equipment offered to specifications. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Two-step procurement**)
Two-step procurement
First step
Protest timeliness
Notwithstanding that protester might have deduced identity of the precise model on which low bid was submitted from shipping weight and container size stated in bid on step two of two-step procurement, protest issue of model's acceptablity under first step of procurement is timely since it was filed promptly after agency revealed the precise model bid by low bidder 267
Technical approaches
While three units accepted under first step of two-step procurement were not equal in terms of weight, horsepower, or price, proposals frequently are based on different technical approaches. In the circumstances agency acted reasonably in determining that three proposals were acceptable and thus available for step two competition 267

BIDS—Continued
Two-step procurement—Continued
Mistakes. (*See* BIDS, Mistakes, Two-step procurement)
Specifications
Deviations
Acceptability
Page
Protester's extrapolation from low bidder's data that low bidder would not meet contract's compaction test requirement is rejected since all permissible variations in compaction test procedures were not covered in low bidder's data and therefore unacceptability of low bidder's product has not been established 267

Unbalanced
Estimates
Accuracy
As general rule, mathematically unbalanced bid—bid based on enhanced prices for some work and nominal prices for other work—may be accepted if agency, upon examination, believes IFB's estimate of work requirements is reasonably accurate representation of actual anticipated needs. But where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel IFB and resolicit, based upon revised estimate. B–161208, Aug. 8, 1967, modified 231

Evaluation
Proposed acceptance of apparent low mathematically unbalanced bid is not proper where (1) agency determines bid is low through reevaluations using substantially revised estimates of work requirements, which, in themselves, indicate that "material unbalancing" (existence of reasonable doubt that any award would result in lowest cost to Govt.) is present; (2) under reevaluation using one of revised estimates, bid is not low, confirming existence of material unbalancing; (3) reevaluation procedure has effect of introducing new evaluation factors into procurement and contravenes requirement that bidders compete equally based on objective factors in IFB. B–161208, Aug. 8, 1967, modified 231

Not automatically precluded
Where agency receives mathematically unbalanced bids and determines that quantity estimates in IFB are valid representation of actual needs, award may be made to low bidder notwithstanding its bid is unbalanced 488

BOARDS, COMMITTEES AND COMMISSIONS
Land Commission
Land condemnation cases
Court reporter fees
Whenever a Federal District Judge, pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure, appoints a Land Commission to hear suits for just compensation in land condemnation cases, and the order of reference indicates a desire for the proceeding to be recorded, attendance fees of the court reporter are chargeable to the appropriations of the Administrative Office of United States Courts since the Judiciary determines if reporter shall be in attendance and normally pays attendance fees in other cases 1172

BOARDS, COMMITTEES AND COMMISSIONS—Continued
Land Commission—Continued
Land condemnation cases—Continued
Court reporter fees—Continued Page

Court reporters are not entitled to payment in addition to their salaries for providing transcripts of land commission proceedings to judges or to land commissioners appointed by judges in land condemnation cases. Accordingly, neither the Department of Justice nor the Administrative Office of the United States Courts may pay for such transcripts from their appropriations. However, reporters whose services are obtained on a contract basis are entitled to payment, from the Administrative Office, in accordance with the provisions of their contracts 1172

BONDS
Bid
Amount of bond
Calculated on discounted price of bid

Since ASPR 2-407.3(b) provides that any prompt payment discount offered shall be deducted from bid price on assumption that discount will be taken and offered discount of successful bidder shall form part of award, where prompt payment discount is offered in bid where bid bond is required amount of bid bond may be properly calculated on discounted price 352

Deficiencies
Amount

Bid which contained $3,000 certified check, instead of 20-percent bid guaranty of $106,092 bid, was properly rejected, since failure to submit sufficient bid bond renders bid nonresponsive 439

Monthly percentage on 12-month contract

Solicitation provision requiring bid bond in amount of 20 percent of "bid," when read in context of entire bid package, may not reasonably be interpreted as applicable to monthly rather than annual bid total for 1-year contract, even though bid schedule called for monthly bid prices. Therefore, notwithstanding low bidder's erroneous interpretation of bid guarantee provision, agency's determination to resolicit bids under corrected specification is not justified and low bid is nonresponsive 798

Bid rejection

While ASPR 10-102.5(ii) gives discretionary authority to contracting officer to decide whether bid bond deficiencies should be waived, such discretion must have been intended for application within definite rules. Consequently, absent specific finding that waiver of requirement was not in best interest of Govt., which was not made in instant case, bid should not have been rejected since it fell into stated exception; protest is therefore sustained and ASPR Committee requested to revise provision to make exception mandatory 352

Waiver

To permit unbridled discretion under ASPR 10-102.5(ii) in determining when bid bond deficiency may be waived would totally defeat purpose of exception and allow its employment as substitute for rejecting bids for unrelated reasons such as nonresponsibility determinations 352

BONDS—Continued
Bid—Continued
Signatures
Corporate agent Page
Where bid bond, submitted with properly executed bid, is signed by corporate agent whose authority to sign bond on behalf of corporation is questioned, accompanying bid may be considered for award since surety's obligation to Govt. would not be affected by absence of authorized signature on bond---- 422
Sufficiency
Evidence required to establish authority of particular person to bind corporation is for determination of contracting officer, and record provides no basis for concluding that contracting officer incorrectly determined that agent was authorized to sign bid bond---- 422

BOOKS AND PERIODICALS
Appropriation availability
Expenses incident to specific purposes
Necessary expenses
Appropriated funds may be used to purchase subscription to periodical if subscription is justified as a "necessary" agency expense. Subscription need not be considered indispensable. 21 Comp. Gen. 339 is no longer applicable---- 1076

BUREAU OF LABOR STATISTICS (*See* **LABOR DEPARTMENT, Bureau of Labor Statistics**)

BUREAU OF STANDARDS (*See* **COMMERCE DEPARTMENT, National Bureau of Standards**)

BUY AMERICAN ACT
Applicability
Foreign component changes
Allegation that Mexican-assembled modules and other materials are directly incorporated into competitor's radio set, and that these foreign components make end product foreign under Buy American Act, is not supported by GAO decisions relied on by protester. While domestic-made parts are purchased in United States, shipped to Mexico for some manufacturing and returned to United States for additional manufacturing, there is no showing that separate "stages" of manufacturing are involved. GAO view is that domestic parts purchased in United States are components of end product---- 1479
Use outside United States
Buy American Act, 41 U.S.C. 10–d, is not applicable to proposed MAG58 machine gun purchase from foreign firm because Army has sufficient sole-source award justification and can therefore validly determine that MAG58's are not manufactured in United States "in sufficient and reasonably available commercial quantities and of a satisfactory quality." Also, Army discretionary determination that Act's application would not be in public interest cannot be questioned. In addition, Act does not apply to initial quantity of weapons to be purchased for foreign deployment and domestic training for foreign deployment---- 1362

BUY INDIAN ACT (*See* **BIDS, Competitive system, "Buy Indian Act"**)
CANAL ZONE
Employees
Temporary quarters
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters**)

CERTIFYING OFFICERS
Certification effect
Liable for improper payments
Based on fact, law or both Page
Certifying officer is liable moment an improper payment is made as a result of his erroneous certification. This is true whether certification involves question of fact, question of law, or mixed question of law and fact ---- 297
Liability
Failure to use statutory authority to obtain Comptroller General's decision
Where there is doubt as to legality of payment, certifying officer's only complete protection from liability for erroneous payment is to request and follow Comptroller General's advance decision under 31 U.S.C. 82d ---- 297
Relief
Erroneous payments
Statutory prohibition
The Comptroller General may not relieve a certifying officer from liability if Comptroller General finds payment was specifically prohibited by statute, even though payment was made in good faith and for value received. 31 U.S.C. 82c ---- 297
Lack of due care, etc.
Evidence
This Office has sought to apply the certifying officer's relief statute by considering practical conditions and procedures under which certifications are made. Consequently, diligence required of certifying officer before requests for relief can be granted is matter of degree dependent on practical conditions prevailing at time of certification, sufficiency of administrative procedures protecting interests of Govt., and apparency of the error ---- 297
Responsibility
Interagency services
GSA certifying officers who perform administrative functions relating to final processing of expenditure vouchers under interagency service and support agreement will not be regarded as certifying officers for purposes of 31 U.S.C. 82c liability to the extent that serviced Commission retains certification responsibility with respect to basic vouchers ---- 388
Submission to Comptroller General
Advance decisions
How requests should be addressed
Certifying officers should address requests for advance decisions under provisions of 31 U.S.C. 82d to the Comptroller General of the United States, Washington, D.C. 20548 ---- 645

CERTIFYING OFFICERS—Continued
Submission to Comptroller General—Continued
Advance decisions—Continued
Voucher accompaniment Page

Although, normally, the Comptroller General of the U.S. GAO would not render decision to question of law submitted by certifying officer unaccompanied by voucher as required by 31 U.S.C. 82d, statutory authority under which GAO renders decisions to certifying officers, since question submitted is general in nature and will be recurring one, reply to question raised is addressed to head of agency under broad authority contained in 31 U.S.C. 74, pursuant to which GAO may provide decisions to heads of departments on any question involved in payments which may be made by that department---------- 652

Doubtful payments

In view of certifying officer's statutory right to request and receive advance decision from the Comptroller General on matters of law, certifying officers are not "bound" by conclusion of law rendered by agency's general counsel. 31 U.S.C. 82d---------- 297

Test of good faith regarding legal questions concerning certified vouchers is whether or not certifying officer was "in doubt" regarding payment, and, if so, whether he exercised right to request and receive advance decision from Comptroller General. 31 U.S.C. 82c, 82d------ 297

CHECKS
Payees
Vietnam evacuees
Piaster checks
Conversion to American dollars

Section 492a of 31 U.S. Code and Treasury regulations issued pursuant thereto permit exchange transactions of U.S. and foreign currency or instruments for certain categories of people for accommodation purposes or for official purposes. Employees of Vietnamese-American Association (VAA), a binational organization receiving United States Information Agency grants, received piaster checks from VAA. Employees were evacuated from Vietnam to the United States before checks could be converted to American dollars. General Accounting Office agrees that Treasury acted in accordance with regulations in now refusing to convert checks to American dollars---------- 1308

Undelivered
Disposition

Incident to evacuation of U.S. personnel and local national employees from Vietnam, employees turning in Vietnamese piasters were given receipts on the bases of which Treasury checks were subsequently issued. Checks for payees still in Vietnam were placed in special deposit account pursuant to 31 U.S.C. 123–128 for benefit of payees and may not be paid out to relatives in U.S. who claim power of attorney to receive proceeds---------- 1234

CITIES, CORPORATE LIMITS
"Official duty station" status Page
Agency may issue regulations limiting the mileage allowable to an employee traveling to and from his residence where his residence is outside the limits of his headquarters to the distance between the origin or destination of his trip and a point not exceeding 25 miles from the corporate limits of his official duty station measured in the direction of his residence (25-mile point). However, where employee maintains residence at headquarters from which he commutes daily to work and another residence 103 miles away which he visits on weekends, when traveling from airport after official trip, he is entitled to mileage from airport to residence at headquarters 1323

CIVIL AERONAUTICS BOARD
Filed tariff provisions
Valid until rejected
Provisions of tariffs filed with Civil Aeronautics Board are valid unless and until rejected by the Board 958

CIVIL SERVICE COMMISSION
Adverse personnel actions
Appeals
Two Bureau of Mines employees were detailed to higher grade positions in excess of 120 days and no prior approval of extention beyond 120 days was sought from CSC. Employees are entitled to retroactive temporary promotions for period beyond 120 days until details were terminated because Board of Appeals and Review, CSC, has interpreted regulations to require temporary promotions in such circumstances. Amplified by 55 Comp. Gen. 785 539
Agency heads and authorized certifying officers have statutory rights to an advance decision from the Comptroller General on propriety of paying make-whole remedies ordered by appropriate authorities. Thus, Board of Appeals and Review, CSC, when ordering make-whole remedies should permit agencies opportunity to exercise their right to an advance decision from the Comptroller General prior to implementation of remedies. Amplified by 55 Comp. Gen. 785 539

CLAIMS
Allowance
Quasi-contract theory
Two State Department employees were named as defendants in grievance brought under Section 1820 of Volume 3, Foreign Affairs Manual, by employee they supervised. State Department refused to provide legal counsel to supervisors at grievance hearing due to personal nature of grievant's allegations and since purpose of hearing was fact finding for ultimate decision by Director of Personnel. Absent express statutory authority, the two supervisors may not be reimbursed fees of private counsel retained to represent them at the hearing 1418

CLAIMS—Continued
Assignments
Contracts
Set-off. (*See* **SET-OFF, Contract payments, Assignments**)
Validity of assignment *Page*
Bank claiming balance due under contract on basis of assignment from contractor does not have valid claim against Govt., since assignment was not made pursuant to Assignment of Claims Act, 31 U.S.C. 203 and 41 U.S.C. 15. Distribution of contract balance, withheld to cover Davis-Bacon underpayments, is authorized. But due to lapse of time since violations occurred and bankruptcy of contractor, debarment is not warranted 744
"Financing institutions" requirement
Govt. contractor's grant of security interest in accounts receivable to holding company alleged to be intermediary for bank's financing of contractor is not valid assignment under 31 U.S.C. 203, even if properly filed with Govt., since Govt. contract proceeds may be assigned only to financing institutions and holding company does not qualify as proper assignee 55
Set-off
Contract payments. (*See* **SET-OFF, Contract payments, Assignments**)
Validity
Assignee loan not for contract performance
Assignment to bank of Govt. contract proceeds where bank's alleged financing is through intermediary holding company may not be recognized as statutory assignment since there has been no showing that intermediary or bank actually provided funds to Govt. contractor or that intermediary expended funds for the performance of the contract .. 155
Check matters. (*See* **CHECKS**)
Damages
Contracts
Anticipated profits
Decision by U.S. Govt., acting in its sovereign capacity, to rehabilitate Suez Canal is not a taking of a valuable contractual right requiring compensation, as claimant had only anticipated contract for services, loss of which is not responsibility of U.S. Govt. Moreover, submission of unsolicited proposal makes claimant a pure volunteer, affording no basis upon which payment may be authorized 164
Evidence to support
Administrative determination acceptability
Foreign country
Where, due to unusual circumstances, presentation of best evidence to support claim will be impossible, impracticable, or will place undue burden on agency or individual concerned, this Office in exercise of its discretion will accept such other pertinent data from which the necessary information may be reconstructed, and on this basis, authorize payment .. 402
General Accounting Office discretionary authority
31 U.S.C. 71, which provides that all claims by and against the Govt. shall be settled by the GAO, leaves to the discretion of this Office what evidence is required in support of such claims 402

CLAIMS—Continued
Mobile home insurance
Set-off
Past due *v.* future premiums Page

Timely payment by insured lender of premiums for mobile home loan insurance under sec. 2, title I, of National Housing Act, as amended, 12 U.S.C.A. 1703—which requires payment of premiums "in advance"—is prerequisite to continued insurance coverage. There is no basis for implication, underlying HUD proposal to set off against insurance claims past due and future premiums of delinquent lending institution, that insurance coverage is unaffected by nonpayment of premiums. Modified by 56 Comp. Gen. —— (B–183784, Jan. 24, 1977)..... 658

Claims under mobile home loan insurance pursuant to 12 U.S.C.A. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default on loan occurred while premium payments were current, but cannot be allowed if default occurred or was imminent after premium payments became delinquent. Past due premium charges may be set off against allowable claims, if lender agrees to such setoff. Alternatively, remaining insurance coverage may be canceled. In no event is set-off of future premium charges appropriate. GAO recommends, pursuant to 31 U.S.C.A. 1176, that HUD regulations be amended in terms of foregoing issues and conclusions. Modified by 56 Comp. Gen. —— (B–183784, Jan. 24, 1977)..... 658

Set-off. (*See* **SET-OFF**)
Statutes of limitation. (*See* **STATUTES OF LIMITATION**)
Transportation
Contractor liability
Air carriers
Loss or damage to Government shipment

Claim against air carrier for damage to shipment moved on Govt. bill of lading is not subject to notice requirements of governing air tariff because use of Govt. bill of lading—which in Condition 7 contains waiver of usual notice requirements—is required by air tariff and creates ambiguity over applicability of notice requirements which is resolved in favor of shipper..... 958

Evidence requirement

Arrival of shipping documents in advance of actual unloading is irrelevant to issue whether U.S. is liable for vehicle detention charges for unloading performed in excess of 2 hours where motor carrier, with knowledge of fact that vehicles are scheduled for unloading at ocean terminal by Military Traffic Management Command, offers to perform transportation services which include use of its vehicles at no extra charge for 2 hours for unloading..... 301

Loss and damage claims
Minimum of $25

This Office concurs in establishment of any reasonable minimum amount for filing claims involving loss and damage to Government shipments where cost studies indicate such action is warranted..... 1438

Property damage, etc.
Reclaim of set-off. (*See* **SET-OFF, Transportation, Property damage, etc., Reclaim of set-off**)
Waiver
Debt collections. (*See* **DEBT COLLECTIONS, Waiver**)

CLASSIFICATION
Reclassification
Effective date
Date of action by administrative officer Page
Employee's GS–12 position was reclassified administratively to GS–13, effective June 2, 1975, incident to employee's grievance related to co-workers' promotions which had become effective October 11, 1974. Reclassification of position with concomitant pay increase may not be made retroactive other than as provided in 5 CFR 511.703 ---------- 515
Promotions
Federal Labor Relations Council requested decision on legality of arbitrator's award of retroactive promotion and backpay. Arbitrator' found grievant was assigned higher duties but was not given temporary promotion as provided in negotiated agreement. Award may not be implemented since new position had not yet been classified and grievant cannot be promoted to a position which did not exist ---------- 1062

COLLECTIONS (*See* **DEBT COLLECTIONS**)

COLLEGES, SCHOOLS, ETC.
Grants-in-aid
Educational programs. (*See* **STATES, Federal aid, grants, etc., Educational institutions**)

COMMERCE DEPARTMENT
National Bureau of Standards
Employees
Car rentals
Long-term basis
Overseas
The General Accounting Office will not object to reimbursement of Government employee for costs of vehicle leased by employee on long-term basis for a period of temporary duty in Germany, in light of apparent official determination that long-term use of vehicles was necessary due to extensive travel required and that long-term lease of vehicles was more advantageous to Government than rental arrangement, cost and other factors considered ---------- 1397

COMMISSIONS (*See* **BOARDS, COMMITTEES AND COMMISSIONS**)

COMMUNITY SERVICES ADMINISTRATION
Office of Economic Opportunity grant programs
Grantee tax indebtedness
Delinquencies
Section 115 of Economic Opportunity Amendments of 1969, 42 U.S.C. 2705, requires that upon notification from Treasury Secretary of grantee tax delinquency, Director, Community Services Administration, must suspend grant payments to "any person otherwise entitled to receive a payment pursuant to a grant" in amount sufficient to satisfy delinquency. Statute does not distinguish between delinquencies incurred before and those incurred after awarding of grant but legislative history indicates all outstanding delinquencies were intended to be included. Hence, all grant payments, up to amount of total delinquency, must be suspended until satisfactory provision for payment of delinquency is made ---------- 1329

COMPENSATION
Additional
Supervision of wage board employees
Retroactive pay adjustments Page

Pay adjustment for General Schedule supervisor of wage board employee under 5 U.S.C. 5333(b) is conditioned on continued supervision of the wage board employee and is limited to nearest rate of supervisor's grade which exceeds the highest rate of basic pay paid to supervised employee. When these conditions are no longer met, as when wage board employee is separated or reduced in pay, the adjustment previously granted to the supervisor must be eliminated or reduced, as required by the circumstances 1443

Aggregate limitation
Alaska Railroad employees

Amount in lieu of the cost-of-living allowance may be paid to employees in Alaska of Federal Railroad Administration, Dept. of Transportation, whose pay is fixed administratively, since statutory provisions limiting such salaries to amounts not in excess of salaries of specified grades under General Schedule refer to basic compensation rates in subch. I, Ch. 53, Title 5, U.S. Code, not to allowances in Ch. 59, Title 5, U.S. Code 196

Alaska Railroad employees. (*See* **ALASKA RAILROAD, Employees**)
Back pay. (*See* **COMPENSATION, Removals, suspensions, etc., Back pay**)
Ceiling. (*See* **COMPENSATION, Aggregate limitation**)
Double
Concurrent military retired and civilian service pay
Consultants
Reduction in retired pay
Exemption period

A renewed 30-day exemption from reduction in retired pay in the fiscal year in which a retired Regular military officer's previous excepted appointment as a consultant to a Federal agency is converted would be in violation of the Dual Compensation Act (5 U.S.C. 5532). Where an appointment conversion is merely in the nature of a continuation and an extension of a previous excepted appointment, it is not a "new appointment" for purposes of applying the multiple appointment rule of 5 U.S.C. 5532(c)(2)(ii), but is, instead, a routine personnel action ... 1305

Where a retired military member consultant receives a second intermittant appointment, and an entire fiscal year has intervened since the expiration of the consultant's previous intermittent appointment, he is not entitled to an additional 30-day exemption from reduction in military retired pay if the second appointment appears to be only a renewal of the initial appointment 1305

Exemptions
Disability incurred in line of duty

For purposes of establishing employment retention preference (5 U.S.C. 3501(a)(3), and 3502), exemption from reduction in retired pay under Dual Compensation Act (5 U.S.C. 5532(c)), and full credit for years of military service for annual leave accrual (5 U.S.C. 6303(a)) as civilian employee of Federal Govt., determinations as to whether service member's disability retirement from uniformed service resulted from

COMPENSATION—Continued
Double—Continued
Concurrent military retired and civilian service pay—Continued Page
Exemptions—Continued
Disability incurred in line of duty—Continued
injury or disease incurred as direct result of armed conflict or caused by instrumentality of war during period of war can only be made by uniformed service from which he is retired and neither employing agency nor this Office has authority to change that determination---------- 961
Veterans benefits in lieu of waived retired pay
Dual Compensation Act reduction formula
A retired Regular commissioned officer who accepts Federal civilian employment, and who immediately executes a waiver of retired pay pursuant to 38 U.S.C. 3105 in order to receive veterans' disability compensation, which award is administratively delayed but when granted by VA is made effective retroactively to date of waiver, has in effect reduced the legally authorized retired pay by the amount of the veterans' compensation; therefore, retired pay payments received by the member during the retroactive period must be adjusted under the dual compensation formula of 5 U.S.C. 5532 from the effective date of the waiver. 1402
Dual Compensation Act
Concurrent military retired and civilian service pay. (*See* **COMPENSATION, Double, Concurrent military retired and civilian service pay**)
Dual. (*See* **COMPENSATION, Double**)
Experts and consultants. (*See* **EXPERTS AND CONSULTANTS, Compensation**)
First-40-hour employees. (*See* **OFFICERS AND EMPLOYEES, Hours of work, Forty-hour week, First forty-hour basis**)
Increases. (*See* **COMPENSATION, Promotions**)
Cost-of-living adjustments
Maximum limitation
Cost-of-living provisions of 28 U.S.C. 461 do not apply to compensation of part-time United States magistrates and citizen jury commissioners. Inasmuch as section 461 lists the specific classes of judicial officers covered by its provisions, all not mentioned are deemed to have been intentionally excluded. However, 5 U.S.C. 5307 authorizes administrative adjustment of the statutory maximum compensation for part-time United States magistrates and citizen jury commissioners---- 1077
Retroactive
Customs Service inspectional employees
Parties receiving services not liable
In 1972 and 1973 flying club arranged aircraft flights and paid for required overtime services of Customs Service inspectional employees pursuant to 19 U.S.C. 267. In 1974 Customs Service billed club for additional overtime salary payments resulting from retroactive pay increases from Oct. 1, 1972, to Jan. 6, 1973. Parties in interest are not liable for charges stemming from retroactive pay increase since generally accounts billed and paid for at prevailing rates may not be subsequently reopened and statute does not explicitly require retroactive salary increases to be paid for by parties in interest. 31 Comp. Gen. 417 and B–107243, Nov. 3, 1958, shall no longer be followed---------- 226

COMPENSATION—Contiuned
Increases—Continued
Wage board employees. (*See* **COMPENSATION, Wage board employees, Increases**)
Jury duty
Fees. (*See* **COURTS, Jurors, Fees**)
Limitation. (*See* **COMPENSATION, Aggregate limitation**)
Military pay. (*See* **PAY**)
Missing, interned, captured, etc., employees
Entitlement
Page

Civilian employee is entitled to overtime compensation based on amount received prior to missing status if such compensation was part of his regularly scheduled pay and allowances and such overtime compensation continues throughout missing status period even though office to which employee was assigned is disestablished. However, where overtime compensation is not part of regularly scheduled pay and allowances, employee does not receive same unless he "may become entitled thereafter" and such entitlement would be based on overtime performed by his replacement or average irregularly scheduled overtime of employees in his unit. 54 Comp. Gen. 934, modified 147

Names
Married women. (*See* **NAMES, Married women**)
Night work
Basic compensation determinations

Judgment, entered on Feb. 4, 1976, stating in part that plaintiff Federal employees "shall receive for the period subsequent to September 14, 1974" sums representing increased salary increments originally denied under challenged agency action, is treated, for purposes of satisfying judgment, as money judgment for back pay up to date of judgment plus a mandate that agency place employees in higher salary rate as of date of judgment. Therefore, sums due plaintiffs up to date of judgment are payable, upon settlement by General Accounting Office, from permanent indefinite appropriation under 31 U.S.C. 724a, but sums due after judgment date are payable from agency appropriations for salaries and expenses 1447

Denial of assignment to night shift
Violation of collective bargaining agreement
Back pay entitlement

Labor union appealed General Accounting Office decision holding abritrator's award of backpay for night shift work improperly denied to employees in violation of collective bargaining agreement could not be implemented since agency's action was not unjustified or unwarranted personnel action under Back Pay Act and no night work was actually performed. Subsequent decisions have held that omission such as failure to afford opportunity for overtime work in violation of agreement may constitute unjustified or unwarranted personnel action although overtime work was not performed. Therefore, upon reconsideration, arbitrator's award may be implemented where employees were improperly denied assignment to night shift. B–181972, August 28, 1974, reversed 1311

COMPENSATION—Continued
Overpayments
Waiver. (*See* **DEBT COLLECTIONS, Waiver**)
Overtime
Actual work requirement
Exception
Back pay arbitration award Page

Federal Labor Relations Council questions the propriety of sustaining an arbitration award that orders backpay for employees deprived of overtime work in violation of a negotiated agreement. Agency violations of negotiated agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as comtemplated by the Back Pay Act, 5 U.S.C. 5596. Improper agency action may be either affirmative action or failure to act where agreement requires action. Thus, award of backpay to employees deprived of overtime work in violation of agreement is proper and may be paid 171

Fed. Labor Relations Council questions propriety of sustaining arbitration award of 1 hour backpay to employee deprived of overtime work in violation of negotiated labor-management agreement. Agency violations of such agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by Back Pay Act, 5 U.S.C. 5596. Therefore, where agency obligated itself in a labor-management agreement to provide 2 hours of productive work when employee is held on duty beyond his regular shift and, in violation of such agreement, provided him only 1 hour, arbitration award providing backpay to employee for the additional hour may be sustained 405

Federal Labor Relations Council requests decision on legality of arbitration award of backpay to 54 shipyard employees for overtime and time not worked. The arbitrator found that Shipyard changed basic workweek of employees without complying with consultation requirements of negotiated agreement. However, because arbitrator did not find that but for failure of Shipyard to consult with union, change in basic workweek would not have occurred, award does not satisfy criteria of Back Pay Act, 5 U.S.C. 5596 and, therefore, it may not be implemented 629

Administrative approval requirement

Employee alleged she was compelled to perform substantial amounts of overtime because superiors assigned her abnormal workload. Claim is denied since she failed to show work was ordered or induced by official who had authority to order or approve overtime and failed or refused to do so 55

Defense Attaché Office personnel in Saigon
Evacuation of South Vietnam

Overtime performed by Defense Attaché Office (DAO) personnel in Saigon during the period of Mar. 30, 1975, through Apr. 30, 1975, immediately prior to the evacuation of American personnel from South Vietnam, was approved by the Defense Attaché on June 6, 1975, after the normal procedures for approval and payment of overtime had been modified. The compensation for overtime is mandatory where the work actually performed is officially ordered or approved 402

COMPENSATION—Continued
Overtime—Continued
Defense Attaché Office personnel in Saigon—Continued
Evacuation of South Vietnam—Continued Page
The retroactive modification of a regulation requiring that overtime performed by DAO civilian personnel be specifically approved by DAO division chiefs or their designated representatives is permissible since the regulation modified was primarily designed to govern internal agency procedures rather than designed to benefit party by entitling him to either substantive benefit or procedural safeguard. Accordingly, if Major General Smith is authorized official to approve payment of overtime, his approval of June 6, 1975, is sufficient to allow payment of overtime as reported on time and attendance reports of DAO civilian personnel.... 402
Fair Labor Standards Amendments of 1974, Pub. L. 93-259
Professional employees exempted from overtime provisions
Although Fair Labor Standards Act of 1938 has been amended to apply to Federal employees, professional employees are exempted from application of the overtime provisions of the Act. 29 U.S.C. 213(a)(1).... 55
Traveltime
Commuting time
Govt. vehicle in which employee commuted carried essential equipment and supplies for his employer. Commuting time is generally not compensable under FLSA; however, where commuting employee also transports equipment and supplies for employer, traveltime is compensable overtime even though commuting in Govt. vehicle is of benefit to employee, since activity is employment under FLSA as it is done in part for benefit of employer.... 1009
Firefighting
Fair Labor Standards Amendments
Computation
Federal firefighters with 72-hour tour of duty are entitled to 12 hours overtime compensation under FLSA in 1975. Their regular rate of pay for computing overtime is determined by dividing their total compensation by number of hours in their tour of duty, 72, there being no basis for the divisor to be limited to number of hours beyond which overtime must be paid, 60. Therefore, since FLSA requires overtime pay at rate of one and one-half times regular rate of pay and firefighters have already been paid regular rate for 12 hours of overtime, extra compensation for overtime is limited to one-half their regular rate of pay.... 908
Standby, etc., time
Home as duty station
Based upon the determination of the Court of Claims in *Hugh J. Hyde* v. *United States*, Ct. Cl. No. 322-73, decided April 16, 1976, 52 Comp. Gen. 587, which denied petitioner Hyde overtime compensation for time spent in a standby status, is overruled. Where petitioner's performance of the Duty Security Officer function required him to remain at his residence located within the limits of his duty station, the Court found that, under the particular circumstances, his whereabouts were narrowly limited and his activities substantially restricted so as to entitle his to overtime compensation.... 1314

COMPENSATION—Continued
Overtime—Continued
Training courses Page
Mine inspectors' travel, which due to nature of mine inspection work is found to be inherent part of and inseparable from their work, is compensable as regular or overtime work. However, mine inspectors are prohibited from receiving overtime compensation for any time they spend in training under Government Employees Training Act. 5 U.S.C. 4109. B-179186, October 24, 1973, modified 994
Traveltime
Commuting time
Employee was allowed to commute in Govt. vehicle from Fort Sam Houston to Camp Bullis, his duty station. Employee's workday started at 7:30 a.m., at which time he picked up the vehicle at Fort Sam Houston. He returned from Camp Bullis after 4 p.m., end of his regular workday. His claim for overtime compensation for return travel is denied since such traveltime was part of his normal travel from work to home and commuting time is noncompensable under 5 U.S.C. 5544(a) 1009
Fair Labor Standards Amendments of 1974, Pub. L. 93-259. (*See* **COMPENSATION, Overtime, Fair Labor Standards Amendments of 1974, Pub. L. 93-259, Traveltime**)
Vacation leave travel
Fair Labor Standards Act inapplicable
Claim for compensation and premium (overtime) pay for period of time during which employee is traveling on vacation leave may not be paid because such time is not compensable official duty time. Further, since Fair Labor Standards Act (FLSA) applies only where employee has in fact worked during period for which compensation and premium pay is claimed, FLSA is inapplicable to vacation leave travel 1035
Wage board employees. (*See* **COMPENSATION, Wage board employees, Overtime, Traveltime**)
Promotions
Effective date
Retroactive
Federal Labor Relations Council questions propriety of implementing arbitration award that sustains grievance of two Community Services Admin. employees for retroactive promotions and backpay. Because record contains susbstantial evidence that grievants would probably have been demoted shortly after they should have been promoted—evidence which arbitrator apparently did not consider—award is indefinite. Matter should be remanded to arbitrator for additional proceedings with instructions that he hear evidence on whether demotions would have occurred and, if so, on what date 427
Failure to promote employee to reclassified position
Employee's GS-12 position was reclassified administratively to GS-13, effective June 2, 1975, incident to employee's grievance related to coworkers' promotions which had become effective October 11, 1974. Reclassification of position with concomitant pay increase may not be made retroactive other than as provided in 5 CFR 511.703 515

COMPENSATION—Continued
Promotions—Continued
Failure to promote employee to reclassified position—Continued
Administrative error
Collective bargaining agreement Page

Collective-bargaining agreement provides that certain Internal Revenue Service career-ladder employees will be promoted effective the first pay period after 1 year in grade, but promotions of seven employees covered by agreement were erroneously delayed for periods up to several weeks. Since provision relating to effective dates of promotions becomes nondiscretionary agency requirement, if properly includable in bargaining agreement, General Accounting Office will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotions in accordance with the agreement.. 42

Rule
Exceptions to rule

While employees, who are determined to be entitled to retroactive temporary promotions on basis of mandatory requirement of regulations, must satisfy eligibility criteria for promotions, including 1 year service in grade required by "Whitten Amendment," 5 U.S.C. 3101 note, may waive service requirement in individual cases of a meritorious nature involving undue hardship or inequity. However, decision of Board of Appeals and Review, CSC, awarding retroactive temporary promotion to employees did not indicate whether waiver was granted and is, therefore, remanded for a determination of this issue. Amplified by 55 Comp. Gen. 785 539

Interpretations of regulations by agency charged with their administration are entitled to be given great weight by reviewing authority. Board of Appeals and Review, CSC, has interpreted Commission's regulations to require temporary promotion of employees detailed to higher grade positions for over 120 days where prior Commission approval has not been sought. We have concurred in the Board's interpretation and therefore 52 Comp. Gen. 920 is overruled. Amplified by 55 Comp. Gen. 785 539

Temporary
Detailed employees

Two Bureau of Mines employees were detailed to higher grade positions in excess of 120 days and no prior approval of extension beyond 120 days was sought from CSC. Employees are entitled to retroactive temporary promotions for period beyond 120 days until details were terminated because Board of Appeals and Review, CSC, has interpreted regulations to require temporary promotions in such circumstances. Amplified by 55 Comp. Gen. 785 539

Retroactive

Decision of Dec. 5, 1975, 55 Comp. Gen. 539, entitling otherwise qualified employee to temporary promotion on 121st day of detail to higher grade position when prior approval of extension of detail beyond 120 days has not been obtained from Civil Service Commission will be applied retrospectively to extent permitted by 6-year statute of limitations applicable to GAO 785

COMPENSATION—Continued
Promotions—Continued
Temporary—Continued
Retroactive—Continued Page

Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made 836

Rates
Limitations
Experts and consultants, etc.

Maximum pay rate for experts and consultants employed under Pub. L. 88–633, as amended, may not exceed $100 per day, despite AID's administrative determination to the contrary. Pub. L. 91–231 does not make the specific dollar limitation obsolete, and AID may not rely on 5 U.S.C. 3109 as authority to pay those employees at higher rates. Also, legislative histories of acts increasing the maximum amounts payable to experts and consultants of other agencies with similar dollar limitations indicate necessity of legislation to increase $100 ceiling 567

Decision 55 Comp. Gen. 567, applicable to experts and consultants hired by Department of Agriculture pursuant to delegated authority under section 626(a) of Public Law 87–195, as amended, limits pay rates for such personnel to $100 per diem since that is maximum amount authorized by section 626(a). As no applicable law similarly limits pay rates of experts and consultants hired as authorized in 5 U.S.C. 3109 (1970) by virtue of section 702 of Public Law 94–212, general rule of section 3109 governs pay rates for such personnel and they may be compensated at rates not in excess of $145.36, currently the per diem equivalent of the top step of GS–15 1237

Removals, suspensions, etc.
Back pay
Administrative errors
Failure to carry out agency policy

Supervisor, whose salary was less than that of wage board employee whom he supervised, was not identified as eligible for pay adjustment. Since prompt identification was required by nondiscretionary agency regulation, noncompliance constitutes administrative error which may be rectified by the granting of backpay under 5 U.S.C. 5596 1443

Arbitration award

Federal Labor Relations Council questions propriety of implementing arbitration award that sustains grievance of two Community Services Admin. employees for retroactive promotions and backpay. Because record contains substantial evidence that grievants would probably have been demoted shortly after they should have been promoted—evidence which arbitrator apparently did not consider—award is indefinite. Matter should be remanded to arbitrator for additional proceedings with instructions that he hear evidence on whether demotions would have occurred and, if so, on what date 427

COMPENSATION—Continued
Removals, suspensions, etc—Continued
Back pay—Continued
Compromise offer Page

Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made 836

Unfair labor practices

Federal Labor Relations Council questions the propriety of sustaining an arbitration award that orders backpay for employees deprived of overtime work in violation of a negotiated agreement. Agency violations of negotiated agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act, 5 U.S.C. 5596. Improper agency action may be either affirmative action or failure to act where agreement requires action. Thus, award of backpay to employees deprived of overtime work in violation of agreement is proper and may be paid 171

Fed. Labor Relations Council questions propriety of sustaining arbitration award of 1 hour backpay to employee deprived of overtime work in violation of negotiated labor-management agreement. Agency violations of such agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by Back Pay Act, 5 U.S.C. 5596. Therefore, where agency obligated itself in a labor-management agreement to provide 2 hours of productive work when employee is held on duty beyond his regular shift and, in violation of such agreement, provided him only 1 hour, arbitration award providing backpay to employee for the additional hour may be sustained 405

Labor union appealed General Accounting Office decision holding arbitrator's award of backpay for night shift work improperly denied to employees in violation of collective bargaining agreement could not be implemented since agency's action was not unjustified or unwarranted personnel action under Back Pay Act and no night work was actually performed. Subsequent decisions have held that omission such as failure to afford opportunity for overtime work in violation of agreement may constitute unjustified or unwarranted personnel action although overtime work was not performed. Therefore, upon reconsideration, arbitrator's award may be implemented where employees were improperly denied assignment to night shift. B–181972, August 28, 1974, reversed 1311

COMPENSATION—Continued
Removals, suspensions, etc—Continued
Deductions from backpay
Outside earnings
In excess of "back pay" due Page

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Total interim earnings from private enterprise are for offset against total Federal backpay otherwise due, even though this results in no backpay payment. Interim earnings may not be computed and set off on a pay period by pay period basis to reduce the effect of interim earnings---------- 48

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Lump-sum pay for annual leave may not be considered for waiver under 5 U.S.C. 5584, since payment was proper when made. Also, there is no authority to waive payment of retirement deductions on the amount of Federal pay that would have been earned during the period of separation, notwithstanding interim earnings exceeded amount of Federal pay---------- 48

Supervision of wage board employees
Additional compensation. (*See* **COMPENSATION, Additional, Supervision of wage board employees**)
Traveltime
Entitlement

Mine inspectors who work first-40-hour workweeks may be compensated for time spent in travel on official business during their first 40 hours. Any time spent in nontravel work after first 40 hours is compensable overtime. B–179186, October 24, 1973, modified---------- 994

Mine inspectors' travel, which due to nature of mine inspection work is found to be inherent part of and inseparable from their work is compensable as regular or overtime work. However, mine inspectors are prohibited from receiving overtime compensation for any time they spend in training under Government Employees Training Act. 5 U.S.C. 4109. B–179186, October 24, 1973, modified---------- 994

Overtime compensation status. (*See* **COMPENSATION, Overtime, Traveltime**)
Wage board employees
Conversion to classified positions
Judgments
Appropriation availability

Judgment, entered on Feb. 4, 1976, stating in part that plaintiff Federal employees "shall receive for the period subsequent to September 14, 1974" sums representing increased salary increments originally denied under challenged agency action, is treated, for purposes of satisfying judgment, as money judgment for back pay up to date of judgment plus a mandate that agency place employees in higher salary rate as of date of judgment. Therefore, sums due plaintiffs up to date of judgment are payable, upon settlement by General Accounting Office, from permanent indefinite appropriation under 31 U.S.C. 724a, but sums due after judgment date are payable from agency appropriations for salaries and expenses---------- 1447

COMPENSATION—Continued
Wage board employees—Continued
Increases
Effective date
Page

Arbitrator's award setting effective date for increase in wage rates at Yakima Project Office, Bureau of Reclamation, may be fully implemented where governing collective-bargaining agreement calls for arbitration of unresolved negotiation issues involving wage rates, and record is clear that impasse existed on date collective-bargaining agreement became effective, and that, on same date, it was clear that there would be substantial increase in wage rates. Agencies and unions may negotiate preliminary agreement setting effective date for wage increases before exact amount of increase is known; therefore, arbitrator may resolve same issue 1006

Retroactive

Wage survey at Interior installation, commenced in time to be effective Feb. 4, 1973, was not effected until May 7, 1973, because wage board rates were set by labor-management negotiated agreement and there was question of union representation. Wage adjustment may not be effective retroactively since the provisions in 5 U.S.C. 5344 regarding the effective date of wage board pay adjustments are not applicable to labor-management agreements and no tentative agreement as to the effective date of the wage adjustment was made prior to May 7, 1973 162

Union agreements

U.S. Information Agency and union negotiate wage rates for Radio Technicians at Voice of America. Agency and union agreed to conduct wage survey and implement wage schedule, but action was delayed while agency sought approval from Civil Service Commission. Agency and union may agree in advance to effective date of new schedule before amount of increase is determined. Thus, new wage rate may be implemented retroactively to date agreed upon 1428

Overtime
Traveltime

Employee was allowed to commute in Govt. vehicle from Fort Sam Houston to Camp Bullis, his duty station. Employee's workday started at 7:30 a.m., at which time he picked up the vehicle at Fort Sam Houston. He returned from Camp Bullis after 4 p.m., end of his regular workday. His claim for overtime compensation for return travel is denied since such traveltime was part of his normal travel from work to home and commuting time is noncompensable under 5 U.S.C. 5544(a) 1009

Supervision by classified employees. (*See* **COMPENSATION, Additional, Supervision of wage board employees**)
Withholding
Debt liquidation
Alimony and child support

State of Washington sought to garnish pay of Air Force civilian employee to collect child support under authority of sec. 459 of P.L. 93-647 by means of administrative garnishment order served on Air Force Finance Officer. Air Force refused to effect garnishment on ground that administrative order was not "legal process" within meaning of statute. In light of purpose of statute and lack of any limiting language, we believe

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Architect, engineering, etc., services
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Combination of schedules
Lowest cost to Government
Where award on combination of schedules is contemplated, award must result in lowest cost to Govt. Accordingly, where bidder, whose bid when combined with protester's bid provided lowest cost to Govt., withdraws bid, it is then incumbent on agency to make award based on combination of bidders whose bids were still available for acceptance which represented lowest cost 936
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Although ASPR 1–706.3(a), which permits withdrawal of small business set-aside prior to award if found detrimental to public interest, is largely discretionary with contracting officer and SBA, contracting officer must withdraw total set-aside on procurement for "planned" item under DOD emergency preparedness mobilization planning program where solicitation containing set-aside was issued in violation of ASPR 1–706.1(e)(ii), which prohibits total set-aside where large business "planned producer" of item desires to participate in procurement, and bid opening has not occurred when contracting officer became aware of error 703
Time of preparing justification that set-aside is necessary to assure that fair proportion of Govt. procurement is placed with small business does not affect validity of award if proper basis for award exists 902
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Although original determination to set aside procurements for shirts and trousers for small business was not in accordance with ASPR 1–706.5 (a)(1) (1974 ed.) in that it was based upon expediency rather than required reasons, since there was small business competition for procurements and prices were determined to be reasonable, there is no basis to conclude that there was not proper basis for ultimate awards 902

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GAO will not review determination of responsibility when SBA issues COC in view of SBA's statutory authority, absent *prima facie* showing that action was taken fraudulently or with such willful disregard of facts as to necessarily imply bad faith. Under this standard, GAO reviewed COC file and found no evidence of fraud or bad faith---- 97

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Where firm purchases assets of concern previously found by SBA to be large business, suggestion is made that SBA consider adopting rule requiring such firm to request small business certificate prior to self-certifying status as small---- 469

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Being small business under existing SBA size standard is legal status which although entered into either through bidder's self-certification/representation or administrative decision is not just matter of existing fact. While self-certification/representation is initial step by which bidder obtains small business status, if and when SBA issues ruling that bidder is other than small business, until decision is reversed or overruled, bidder no longer enjoys status of being small under existing size standard. Modified by 55 Comp. Gen. 1412---- 1188

Disadvantage test

Examination of "social disadvantage" determination made of owner of firm proposed for 8(a) award shows that SBA did consider factors regarding disadvantage other than racial identity of owner or owner's alleged inability to obtain bonding. Determination is considered rationally supported, given broad guidelines conveyed in SBA policy and regulation concerning what constitutes "disadvantage."---- 397

Erroneous award

Ab initio v. voidable

Where small business size status protest was timely filed with contracting officer within 5 days after notification of successful offeror, but after award, SBA determination that protested offeror was not small at time of award does not result in contract awarded being void *ab initio*, but merely void at option of Govt., thereby precluding effective size protest. To remedy this anomaly, it is recommended that FPR be revised to require that identity of successful offeror be revealed prior to award---- 502

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Bidder found large by Small Business Administration Size Appeals Board and which thereafter sought, but as of date of bid opening had not received, recertification as small business could not properly represent itself as small business at time of bid opening. Bidder was not therefore eligible for award of total small business set-aside. Modified by 55 Comp. Gen. 1412---- 1188

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Price reasonableness
Mere fact that lower bid price is submitted by big business does not *per se* make award to small business, at slightly higher price, against public interest pursuant to ASPR 1–706.3, since 15 U.S.C. 631 states policy of Congress to award fair proportion of Govt. procurements to small business firms, and therefore, Govt. may pay reasonable premium price to small business firms on restricted procurement to implement above-mentioned policy of Congress ---- 372
While provisions of Small Business Act authorize award of contracts to small business concerns at prices which may be higher than those obtainable by unrestricted competition, no basis exists upon which it may be concluded that Act was intended to *require* award of contracts to small business concerns at prices considered unreasonable by contracting agency, or that contracting agency would be prohibited from withdrawing set-aside determination where bids submitted by small business concerns were considered unreasonable ---- 475
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Although original determination to set aside procurements for shirts and trousers for small business was not in accordance with ASPR 1–706.5(a)(1) (1974 ed.) in that it was based upon expediency rather than required reasons, since there was small business competition for procurements and prices were determined to be reasonable, there is no basis to conclude that there was not proper basis for ultimate awards ---- 902

CONTRACTS—Continued
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Small business concerns—Continued
Procurement under 8(a) program Page

Non-8(a), non-small business concern is considered interested party so long as it contends that concern proposed for 8(a) award does not belong in 8(a) category whose application prevents protester from competing; test of interested party for 8(a) protests clarifies prior discussion in *Kleen-Rite Janitorial Services, Inc.*, B-178752, March 21, 1974, 74-1 CPD 139; *City Moving and Storage Company, Inc.*, B-181167, August 16, 1974, 74-2 CPD 104; and *Kings Point Manufacturing Company, Inc.*, 54 Comp. Gen. 913, 75-1 CPD 264 397

Because other issues raised by non-small business, non-8(a) concern in protest against 8(a) award are indirectly related to basic eligibility determination of firm proposed for 8(a) award, it is considered that concern is interested party as to other issues 397

Excess costs

Because Dept. of Army states it is aware of requirement that SBA must fund any costs of 8(a) services in excess of what Dept. considers current fair market price for services, it appears that Dept. will charge SBA any excess costs involved in subject 8(a) procurement contrary to protester's suggestion that Dept. will not 397

Propriety

Timeliness of appeal

Where small business size protest is received 1½ hours after award made on bid opening date, last day of fiscal year, termination of contract is recommended, since SBA subsequently sustained protest; contracting officer has indicated that procurement would have been referred to SBA under standard operating procedure if received before award; and contracting officer exceeded authority in that ASPR 1-703(b)(5) precludes small business set-aside award prior to expiration of 5 working days after bid opening in absence of urgency determination 439

Qualifications. (*See* **BIDDERS, Qualifications, Small business concerns**)

Regulations

Examination of "social disadvantage" determination made of owner of firm proposed for 8(a) award shows that SBA did consider factors regarding disadvantage other than racial identity of owner or owner's alleged inability to obtain bonding. Determination is considered rationally supported, given broad guidelines conveyed in SBA policy and regulation concerning what constitutes "disadvantage." 397

Self-certification

Acceptance

In accordance with Armed Services Procurement Regulation 1-703(b) contracting officer cannot accept bidder's bid opening representation of itself as being small business if he knows that bidder has not subsequently been recertified by SBA as being small. Modified by 55 Comp. Gen. 1412 .. 1188

CONTRACTS—Continued
Awards—Continued
Small business concerns—Continued
Self-certification—Continued
"Good faith" certification Page

Where record indicates that contractor was or should have been aware of its affiliation with large business firm, GAO agrees with protester's contention that firm awarded total small business set-aside contract failed to self-certify its small business status in good faith pursuant to ASPR 1–703(b), and award was therefore improper. However, since contract has been fully performed no remedial action is possible 469

Purpose

Being small business under existing SBA size standard is legal status which although entered into either through bidder's self-certification/representation or administrative decision is not just matter of existing fact. While self-certification/representation is initial step by which bidder obtains small business status, if and when SBA issues ruling that bidder is other than small business, until decision is reversed or overruled, bidder no longer enjoys status of being small under existing size standard. Modified by 55 Comp. Gen. 1412 1188

Set-asides

Competition sufficiency

Where four responsive bids were received from small businesses under totally set-aside IFB, and where low small business bid was less than 5 percent above low, big business bid submitted, adequate competition has been achieved 372

Although original determination to set aside procurements for shirts and trousers for small business was not in accordance with ASPR 1–706.5(a)(1) (1974 ed.) in that it was based upon expediency rather than required reasons, since there was small business competition for procurements and prices were determined to be reasonable, there is no basis to conclude that there was not proper basis for ultimate awards 902

Department of Defense procurements

Emergency preparedness planning program

Although withdrawal of total small business set-aside pursuant to ASPR 1–706.1(e)(ii) prior to bid opening, where large business "planned producer" achieved status on same date solicitation containing set-aside was issued, is not required, contracting officer, exercising reasonable discretion, can find sufficient detriment to public interest to justify withdrawing set-aside solely for reason that "planned producer" wants to bid, in view of specificity of ASPR 1–706.1(e)(ii) proscription and criticalness of DOD emergency preparedness planning program. Therefore, recommendation is made that contracting officer consider exercising discretion in view of various special factors 703

Justification

Time of preparing justification that set-aside is necessary to assure that fair proportion of Govt. procurement is placed with small business does not affect validity of award if proper basis for award exists 902

CONTRACTS—Continued
Awards—Continued
Small business concerns—Continued
Set-asides—Continued
Large business bids nonresponsive Page

Large business bids on small business set-aside procurements are nonresponsive and contracting officer is not required to consider bids. Moreover, 15 U.S.C. 631, *et seq.*, has been interpreted to mean that Govt. may pay premium price to small business firms on restrictive procurements to implement policy of Congress 902

Limitation
Planned producer

ASPR 1–706.1(e)(ii), which prohibits total small business set-asides where large business "planned producer" of "planned" item under DOD emergency preparedness mobilization planning program desires to participate in procurement, is valid limitation on making total set-asides necessary to protect legitimate DOD concern, and is not in contravention of Small Business Act and implementing regulations 703

Planned item procurements

Total small business set-aside on procurement of "planned" item under DOD emergency preparedness mobilization planning program becomes so established as to preclude applicability of ASPR 1–706.1(e)(ii), which prohibits total set-asides where large business "planned producer" desires to participate in procurement of item, on date that invitation is issued. 42 Comp. Gen. 108, modified 703

Price differential computation

Mere fact that lower bid price is submitted by big business does not *per se* make award to small business, at slightly higher price, against public interest pursuant to ASPR 1–706.3, since 15 U.S.C. 631 states policy of Congress to award fair proportion of Govt. procurements to small business firms, and therefore, Govt. may pay reasonable premium price to small business firms on restricted procurement to implement above-mentioned policy of Congress 372

Procedures

Total small business set-aside is not required to be withdrawn, pursuant to ASPR 1–706.1(e)(ii), prior to bid opening, where "planned producer" firm of "planned" item under DOD emergency preparedness planning program only achieved that status on same date that solicitation for item was issued, since firm was not "planned producer" prior to issuance date, notwithstanding that firm had expressed interest in procurement prior to becoming "planned producer" and procuring activity solicited firm to be "planned producer" after making total set-aside determination 703

Sole bid submitted by big business

Award may not be made under Navy total small business set-aside to firm found to be other than small business concern by Small Business Administration (SBA), even though firm's bid was the only one received. Retrospective determination by Navy that there was not sufficient competition to justify set-aside and suggestion that invitation for bids (IFB) size classification may be erroneous do not allow direct award to sole bidder. Requirement must be resolicited so that all potential bidders, including other large business firms, may have opportunity to compete .. 1351

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Fiscal year funds to be used for June 30, 1975, award under small business set-aside, conditioned on SBA determination that awardee is small business concern, can be used in subsequent fiscal year to fund replacement contract where award is withdrawn because of negative SBA size determination since conditional contract (1) was binding agreement obligating 1975 funds; (2) was sufficiently definite; (3) represented *bona fide* 1975 need; and (4) replacement contract to be awarded after resolicitation will cover same continuing need encompassed by conditional contract. 24 Comp. Gen. 555, overruled 1351

Bid price excessive

While provisions of Small Business Act authorize award of contracts to small business concerns at prices which may be higher than those obtainable by unrestricted competition, no basis exists upon which it may be concluded that Act was intended to *require* award of contracts to small business concerns at prices considered unreasonable by contracting agency, or that contracting agency would be prohibited from withdrawing set-aside determination where bids submitted by small business concerns were considered unreasonable 475

Determination of unreasonableness of price of small business bid, based upon comparison with prior procurement and with Govt. estimates, involves no impropriety on part of contracting officer and, therefore, no legal basis exists to object to cancellation and resolicitation of procurement on unrestricted basis 475

Planned emergency producer

Although ASPR 1–706.3(a), which permits withdrawal of small business set-aside prior to award if found detrimental to public interest, is largely discretionary with contracting officer and SBA, contracting officer must withdraw total set-aside on procurement for "planned" item under DOD emergency preparedness mobilization planning program where solicitation containing set-aside was issued in violation of ASPR 1–706.1(e)(ii), which prohibits total set-aside where large business "planned producer" of item desires to participate in procurement, and bid opening has not occurred when contracting officer became aware of error 703

Size

Affiliates of large business concerns

Where record indicates that contractor was or should have been aware of its affiliation with large business firm, GAO agrees with protester's contention that firm awarded total small business set-aside contract failed to self-certify its small business status in good faith pursuant to ASPR 1–703(b), and award was therefore improper. However, since contract has been fully performed no remedial action is possible 469

Where firm purchases assets of concern previously found by SBA to be large business, suggestion is made that SBA consider adopting rule requiring such firm to request small business certificate prior to self-certifying status as small 469

CONTRACTS—Continued
Awards—Continued
Small business concerns—Continued
Size—Continued
Change in standards Page

Any situation which could reasonably be construed as being one in which procuring agency advocates use of size standard differing from that then applicable under SBA regulation would amount to encroachment whether intentional or unintentional on SBA's exclusive jurisdiction. Thus, where, as here, applicable SBA regulations were changed 7 days prior to bid opening and IFB can reasonably be construed as setting forth size standard differing from SBA's, encroachment has occurred and impact of encroachment on competition must be analyzed... 617

Eligibility determination date

Bidder found large by Small Business Administration Size Appeals Board and which thereafter sought, but as of date of bid opening had not received, recertification as small business could not properly represent itself as small business at time of bid opening. Bidder was not therefore eligible for award of total small business set-aside. Modified by 55 Comp. Gen. 1412..... 1188

Being small business under existing SBA size standard is legal status which although entered into either through bidder's self-certification/representation or administrative decision is not just a matter of existing fact. While self-certification/representation is initial step by which bidder obtains small business status, if and when SBA issues ruling that bidder is other than small business, until decision is reversed or overruled, bidder no longer enjoys status of being small under existing size standard. Modified by 55 Comp. Gen. 1412..... 1188

Eligibility to protest size

Where small business size status protest was timely filed with contracting officer within 5 days after notification of successful offeror, but after award, SBA determination that protested offeror was not small at time of award does not result in contract awarded being void *ad initio*, but merely void at option of Govt., thereby precluding effective size protest. To remedy this anomaly, it is recommended that FPR be revised to require that identity of successful offeror be revealed prior to award... 502

Obvious error

Contracting officer's duty to question

Contract awarded on basis of offeror's good faith certification that it is small, which status is determined erroneous by SBA, is voidable and may be terminated for convenience in discretion of agency where, as here, it is determined contracting officer should have questioned size status prior to award..... 502

Sole bidder

Award may not be made under Navy total small business set-aside to firm found to be other than small business concern by Small Business Administration (SBA), even though firm's bid was the only one received. Retrospective determination by Navy that there was not sufficient competition to justify set-aside and suggestion that invitation for bids (IFB) size classification may be erroneous do not allow direct award to sole bidder. Requirement must be resolicited so that all potential bidders, including other large business firms, may have opportunity to compete... 1351

CONTRACTS—Continued Page

Awards—Continued

Small business concerns—Continued

Size—Continued

Standards used in invitation erroneous

Where change to SBA's small business size standard was published in Fed. Reg. prior to bid opening, all parties are held to be on constructive notice, even procuring agency, especially where material should have caused it to take action to amend IFB's stated size standards. Agency's unintentional failure to bring its IFB size standard into line with SBA's could have had substantial adverse effect on competition and in this regard IFB was defective. However, even if contract awarded had not been substantially performed, harm to competitive system generated by agency's inadvertence may not have necessitated GAO recommendation for termination 617

Status protest by unsuccessful bidder, etc.

Where small business size protest is received 1-1/2 hours after award made on bid opening date, last day of fiscal year, termination of contract is recommended, since SBA subsequently sustained protest; contracting officer has indicated that procurement would have been referred to SBA under standard operating procedure if received before award; and contracting officer exceeded authority in that ASPR 1-703(b)(5) precludes small business set-aside award prior to expiration of 5 working days after bid opening in absence of urgency determination 439

Splitting

Advantageous to Government

Combination by procuring activity of two items in one solicitation (formerly two solicitations had been utilized) is proper exercise of procurement discretion since preparation and establishment of specifications to reflect needs of Govt. are matters primarily within jurisdiction of procurement agency and record substantiates fact that combination of items results in lower overall cost. Moreover, award can still be on item basis if doing so is in best interests of DC 366

Sum certain

Requirement

Where it would have been near impossibility to ascertain intended bid price of bidder alleging mistake, and while bidder would still have been low even adding entire amount of claimed mistake, still it would not have been possible to make award to bidder for sum certain which is required by regulations 936

Sustained by GAO

Protest not for consideration

Protester's allegation that agency had no need to award contract prior to GAO decision on protest need not be considered since award has been sustained 1160

To other than lowest bidder

Small business set-asides

Mere fact that lower bid is submitted by large business on small business set-aside solicitation does not *per se* make award to small business, at slightly higher percentage differential, against public interest under ASPR 1-706.3 since 15 U.S.C. 631 has been interpreted to mean that Govt. may pay premium price to small business firms on restricted procurements to implement intent of Congress 475

CONTRACTS—Continued
Bid procedures. (*See* **BIDS**)
Bid shopping. (*See* **CONTRACTS, Subcontracts, Bid shopping**)
Bids
Generally. (*See* **BIDS**)
Buy American Act
Foreign products
Component *v.* end product Page

Allegation that Mexican-assembled modules and other materials are directly incorporated into competitor's radio set, and that these foreign components make end product foreign under Buy American Act, is not supported by GAO decisions relied on by protester. While domestic-made parts are purchased in United States, shipped to Mexico for some manufacturing and returned to United States for additional manufacturing, there is no showing that separate "stages" of manufacturing are involved. GAO view is that domestic parts purchased in United States are components of end product 1479

A 1975 GAO audit report expressed reservations whether contractor's 85 to 90 percent manufacturing of radio sets in Mexico satisfies Buy American Act requirement that materials must be "manufactured in the United States" in order to qualify as domestic end product, and recommended ASPR Committee consideration of issue. Recent protest decision in different factual context repeated recommendation. Considering Mexican manufacturing issue in present protest is therefore viewed as inappropriate 1479

Nonavailability determination

Buy American Act, 41 U.S.C. 10a-d, is not applicable to proposed MAG58 machine gun purchase from foreign firm because Army has sufficient sole-source award justification and can therefore validly determine that MAG58's are not manufactured in United States "in sufficient and reasonably available commercial quantities and of a satisfactory quality." Also, Army discretionary determination that Act's application would not be in public interest cannot be questioned. In addition, Act does not apply to initial quantity of weapons to be purchased for foreign deployment and domestic training for foreign deployment 1362

Cancellation
Contractor misrepresentations
Status
Detective agencies

Contract for guard services was awarded based on contractor's representations that it was not a detective agency for purposes of 5 U.S.C. 3108. Upon subsequent determination that contractor is a detective agency and thus subject to statutory prohibition, contract should be canceled. Modified by 56 Comp. Gen. —— (B–180257, Jan. 6, 1977) 1472

Negotiation procedures propriety

Finding that janitorial services contract was improperly negotiated does not lead to conclusion that contract must be canceled, since cancellation is reserved for contracts illegally awarded, and under rationale of Court of Claims decisions illegal award results only if it was made contrary to statutory or regulatory requirements because of some action or

CONTRACTS—Continued
Cancellation—Continued
Negotiation procedures propriety—Continued Page
statement by contractor or if contractor was on direct notice that procedures being followed were violative of requirements. Distinguished by B–185966, Mar. 17, 1976 693
Competitive system
Federal aid, grants, etc.
Compliance
Where grantor agency issues regulation requiring grantees to make contract awards under grants through maximum competition to low responsive, responsible bidder, unless grantor takes action necessary to assure grantee compliance, there will be no guarantee that conditions which agency requires to carry out congressional purposes will be met 1254
Conflicts of interest prohibitions
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Conflicts of interest prohibitions**)
Construction
Conflicting provisions
Conflict between two contract provisions concerning who pays prime contractor's fee, subcontractor or Govt., is resolved in favor of Govt. payment since that interpretation upholds validity of contract in accord with presumption of legality. Contrary interpretation might lead to conclusion contract violated Anti-Kickback Act 554
Cost accounting
Cost Accounting Standards Act application
Catalog or market price exemption from requirement of Cost Accounting Standards Act is mandatory exemption rather than discretionary with contracting agency. Therefore CAS requirements should not be imposed on contractor whenever catalog or market price exemption is determined to exist 881
Cost-type
Negotiation. (*See* **CONTRACTS, Negotiation, Cost-type**)
Court reporters. (*See* **COURTS, Reporters, Contract services**)
Custodial services
Personnel recruitment
Agency points out that hiring of incumbent contractor personnel is common business practice in custodial services industry; and that such practice is not contrary to law or business ethics. Accordingly, protest based on allegation that competing offeror has attempted to recruit members of protester's work force is without merit 1295
Damages
Claims. (*See* **CLAIMS, Damages, Contracts**)
Government liability
Sovereign acts
Decision by U.S. Govt., acting in its sovereign capacity, to rehabilitate Suez Canal is not a taking of a valuable contractual right requiring compensation, as claimant had only anticipated contract for services, loss of which is not responsibility of U.S. Govt. Moreover, submission of unsolicited proposal makes claimant a pure volunteer, affording no basis upon which payment may be authorized 164

CONTRACTS—Continued
Data, rights, etc.
Disclosure
Protest procedures
Page
Because of policy not to hear post-award proprietary data protests and since relief being sought by post-award protester is injunctive in nature—relief not available through GAO—aspect of protest will not be considered 1040
Relief procedure
Allegation that Government disclosed proprietary information to private party is matter for courts as contract has been substantially performed 1272
Solicitation
GAO has provided some protection against unauthorized disclosure of proprietary data in solicitation which includes data without owner's consent. If protest against solicitation disclosing data is lodged after award, policy has been not to hear protest 1040
Status of information furnished
Since question whether protester's data is proprietary will not be considered, capability of prime contractor to successfully complete contract without data will not be questioned 1040
Use by Government
Internal use
Agency may use data supplied with restrictive legend to evaluate drawings submitted by other offerors so long as such data is not released outside the Government. Moreover, where it appears that drawings were furnished to agency without restriction, General Accounting Office is precluded from concluding that Government does not have unrestricted rights in such drawings 1289
Default
Performance deficiencies
Determination
Function of contracting agency
Whether guard services contractor is, as protester claims, in default of contract is matter of contract administration, which is function of contracting agency, not GAO. In any event, contracting officer states that contractor beginning performance using personnel with Confidential security clearances adequately meets initial needs under contract; that necessary administrative processing to transfer Secret clearances from old to new contractor is being accomplished; and that in event Secret tests or equipment are utilized at site, contractor has capability to furnish Secret-cleared personnel 494
GAO will not consider protester's request that termination for default of turnkey housing contract be recommended as appropriate remedy in connection with prior decision upholding protest. Questions involved in protest as to adequacy of contract performance are matters of contract administration—which is function of contracting agency, not GAO. Also, performance defects alleged by protester do not necessarily establish grounds for termination for default, and contracting agency states it has no cause to take such action 972

CONTRACTS—Continued

Discounts

Interpretation of discount clause Page

Since ASPR 2–407.3(b) provides that any prompt payment discount offered shall be deducted from bid price on assumption that discount will be taken and offered discount of successful bidder shall form part of award, where prompt payment discount is offered in bid where bid bond is required amount of bid bond may be properly calculated on discounted price 352

Equal employment opportunity requirements. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

Evaluation of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)

Federal Supply Schedule

Requirements contracts

Administrative discretion

Determination to issue requirements solicitation to satisfy needs of Government for cleaning compounds, solicitation containing minimum and maximum order limitation, is valid determination within ambit of sound administrative discretion where solicitation is issued pursuant to requirements of section 1–3.409 of Federal Procurement Regulations and section 5A–72.105–3(c) of General Services Procurement Regulations and results in overall economy to Government 1226

Incorporation of terms by reference

Bid which omitted pages of IFB is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear 894

Contractor has constructive notice of LEAA organizational conflict of interest guideline where it was contained in document incorporated by reference in contract requiring the preparation of specifications. In any case, since guideline is attached as condition to LEAA grant, it is self-executing, and grantee is bound to reject contractor's proposal if contractor fell under guideline, notwithstanding grantee's inadequate notice and contrary advice to contractor 911

Indian Self-Determination Act

Bureau of Indian Affairs. (*See* **INDIAN AFFAIRS, Contracts, Bureau of Indian Affairs, Indian Self-Determination Act**)

Janitorial services

Advertising *v.* negotiation

Since question of whether negotiated award method is proper for GSA's awards of janitorial services is of widespread interest, given number of janitorial services' awards made by GSA and number of protests pending involving negotiated janitorial services' awards, protest will be considered even though untimely raised under Bid Protest Procedures 693

CONTRACTS—Continued
Janitorial services—Continued
Advertising *v.* negotiation—Continued Page
None of the exceptions to formal advertising (as set forth in 41 U.S.C. 252(c)(1)-(15)) expressly authorizes use of negotiations only to secure desired level of quality of janitorial services or to obtain incentive-type contract. Moreover, analysis of legislative history of Federal Property and Administrative Services Act (40 U.S.C. 471), under which questioned negotiated award of services was made, shows that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of supplies or services 693
Since negotiating rationale employed by GSA is same as was cited in *Nationwide Building Maintenance, Inc.*, 55 Comp. Gen. 693, where it was found that GSA had no legal basis to negotiate janitorial services procurements, and since award has been made, option should not be exercised and any future requirement for services should be formally advertised 864
Labor stipulations
Affirmative action programs. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)
Davis-Bacon Act
Correction of wage schedules
Even if offeror's score for mission suitability should have been adjusted downward for its improper escalation of Davis-Bacon Act wage rates, impact on scoring would not be sufficient to make situation one where given point spread between competing proposals indicates significant superiority of one proposal over another 715
Minimum wage determinations
Addenda not acknowledged
Bid which failed to acknowledge IFB amendment increasing Davis-Bacon wage rate was properly rejected as nonresponsive, since failure to acknowledge amendment was material deviation. Fact that work to be performed by craft listed in amendment (bricklayer) was not specifically required under specifications is immaterial as agency determined that, in course of contract performance, craft could be employed. However, recommendation is made that procedures be instituted to assure that wage determination modifications are reviewed to ascertain applicability to contract prior to inclusion in amendment 615
Award to bidder failing to acknowledge presumptively applicable solicitation amendment increasing Davis-Bacon wage rate may be made only if agency demonstrates (a) that increased rate does not relate to work to be performed under contract and (b) that it either was not reasonable for bidders to consider increased rates in bid preparation or that reliance upon amended rates was not prejudicial to protesting bidder in circumstances 1501

CONTRACTS—Continued
Labor stipulations—Continued
Davis-Bacon Act—Continued
Wage underpayments
Claim priority
Underpaid workers *v.* IRS levy Page

Where it was determined that contractor had underpaid three employees in violation of Davis-Bacon Act, 40 U.S.C. 276a, and funds were administratively withheld from balance due on contract to cover underpayments, claims of underpaid workers have priority over later IRS levy. 46 Comp. Gen. 178, which held that IRS levy had priority over claims of underpaid employees, is modified to extent that it is inconsistent ---- 744

Debarment not required

Bank claiming balance due under contract on basis of assignment from contractor does not have valid claim against Govt., since assignment was not made pursuant to Assignment of Claims Act, 31 U.S.C. 203 and 41 U.S.C. 15. Distribution of contract balance, withheld to cover Davis-Bacon underpayments, is authorized. But due to lapse of time since violations occurred and bankruptcy of contractor, debarment is not warranted ---- 744

Minimum wage determinations
Effect of new determination

When contract is awarded on basis of old wage rates after new Service Contract Act wage determination has been received after bid opening, option should not be exercised since proper way to determine effect of new wages is to recompete rather than assume new rate would affect bidders equally. Recommendation is being referred to appropriate congressional committees pursuant to Legislative Reorganization Act of 1970, 31 U.S.C. 1172 ---- 97

Where GSA improperly incorporated in contract old Service Contract Act DOL Wage Determination, which was revised with GSA's knowledge prior to award selection and over a month prior to award, and contract was soon modified to reflect revised wage determination, GSA's actions were tantamount to awarding contract different from that called for in RFP. Moreover, GSA failed to comply with DOL regulations in not submitting SF-98 to DOL both when it extended incumbent's contract and not less than 30 days prior to proposed award, despite extended period between closing date for proposals and award ---- 864

Nondiscrimination
"Affirmative action programs"
Commitment requirement

There is no basis to conclude that bidders were unreasonably misled as to affirmative action requirements clearly set forth which were included in IFB containing bidders' schedules, provisions, conditions, drawings and specifications, rather than with separate bid packet. Requirements clearly advised that, unless proper documentation was submitted, bid would be considered nonresponsive ---- 262

CONTRACTS—Continued
Labor stipulations—Continued
Nondiscrimination—Continued
"Affirmative action programs"—Continued
Commitment requirement—Continued Page

That bidder has affirmative action plan filed elsewhere or has agreed to accept standard equal opportunity clause of invitation does not create required binding obligation to affirmative action requirements of present invitation 262

Requirement in solicitation that bidders commit themselves to affirmative action provisions of Washington Plan, even though Plan had expired by bid opening date, was proper since contracting officer had been informed that Plan would be extended and solicitations may provide for specific future needs and contingencies 1160

Bidder who signed Part I certificate as member of Topeka Plan and inserted "Does not apply." under Part II which sets forth requirements for non-members of Topeka Plan is not responsive to affirmative action requirements of solicitation where bidder is not member of Topeka Plan at time of bid opeining. Bidder's certification to Part I is not commitment to be bound to affirmative action requirements of solicitation where bid conditions require current membership in Topeka Plan as prerequisite to Government's acceptance of Part I certification 1259

Grants-in-aid

Where applicable regulations of Federal Govt. agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsivemess to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated 139

Bidder who fails to submit, prior to bid opening, affirmative action plan under Part II of Bid Conditions, but who has properly executed and submitted Part I certification wherein bidder "will be bound by the provisions of Part II" for listed appropriate trades to be used in the work, has submitted responsive bid; that pages of Part II were not submitted with bid is of no consequence. Bids containing no part I or Part II documentation were nonresponsive. Recommendation is made that grantor agency, which concluded that all bids were nonresponsive, advise grantee to award contract to bidder who submitted Part I certification 262

Washington, D.C. plan

Allegation that DC's policy of affirmatively promoting minority-owned business is thwarted by award under instant IFB is unsubstantiated in record presented 366

Commitment requirement

Invitation for bids (IFB) required bidders to commit themselves only to terms and conditions of Washington Plan as spelled out in IFB. Contention that IFB was improper because it required commitment to a revised Plan not yet issued is without merit 1160

CONTRACTS—Continued
Labor stipulations—Continued
Nondiscrimination—Continued
"Affirmative action programs"—Continued
Washington, D.C. plan—Continued
Effective date Page

Question of whether Department of Labor order extending Washington Plan (for fostering equal employment opportunity through Federal contractor affirmative action plans) is subject to rule making requirements of 5 U.S.C. 553 is not appropriate for decision by GAO since (1) it involves legal issue of first impression; (2) courts are not in agreement on effect of noncompliance with such requirements; (3) Washington Plan extension has been regarded as effective; and (4) matter is pending before U.S. District Court. GAO will consider Plan effective as of date of publication in Federal Register 1160

Service Contract Act of 1965
Amendments
Minimum wages, etc., determinations

Selected offeror would be successor contractor under Service Contract Act and proposes to hire substantial number of incumbent union workers but also to replace percentage of senior union workers with apprentices. In view of indication of labor unrest resulting therefrom, source selection official should ascertain if risk of possible labor unrest was properly assessed by evaluation board 715

Applicability of act
Data processing services

GAO will not object to inclusion by contracting agency of Service Contract Act provisions in solicitations for data processing services, even though U.S. District Court has ruled that Act is not applicable to such services, since Dept. of Labor (DOL), which has responsibility for administering Act, has declined to follow the decision in all other jurisdictions and has been supported in its position by cognizant congressional committee, and since there is conflict within same judicial circuit as to whether decisions by DOL regarding coverage of the Act are judicially reviewable 675

Contract modifications

Where GSA improperly incorporated in contract old Service Contract Act DOL Wage Determination, which was revised with GSA's knowledge prior to award selection and over a month prior to award, and contract was soon modified to reflect revised wage determination, GSA's actions were tantamount to awarding contract different from that called for in RFP. Moreover, GSA failed to comply with DOL regulations in not submitting SF–98 to DOL both when it extended incumbent's contract and not less than 30 days prior to proposed award, despite extended period between closing date for proposals and award 864

Wage underpayments
Davis-Bacon Act. (*See* **CONTRACTS, Labor stipulations, Davis-Bacon Act, Wage underpayments**)
Walsh-Healey Public Contracts Act
Manufacturer or dealer determination. (*See* **BIDDERS, Qualifications, Manufacturer or dealer**)

CONTRACTS—Continued
Labor stipulations—Continued
Withholding unpaid wages, overtime, etc.
Trust funds
Concept
Page

Where it was determined that contractor had underpaid three employees in violation of Davis-Bacon Act, 40 U.S.C. 276a, and funds were administratively withheld from balance due on contract to cover underpayments, claims of underpaid workers have priority over later IRS levy. 46 Comp. Gen. 178, which held that IRS levy had priority over claims of underpaid employees, is modified to extent that it is inconsistent---- 744

Mistakes
Allegations before award. (*See* BIDS, Mistakes)
Correction
Intended bid price
Uncertain

Where it would have been near impossibility to ascertain intended bid price of bidder alleging mistake, and while bidder would still have been low even adding entire amount of claimed mistake, still it would not have been possible to make award to bidder for sum certain which is required by regulations---- 936

Errors
Of omission
Evidence to support

In mistake in bid cases involving errors of omission, bidder's sworn affidavit outlining nature of error, its approximate magnitude and manner in which error occurred can constitute substantial evidence thereof. This fact does not, however, detract from agency's obligation to weigh all evidence so as to determine that bona fide mistake was committed.... 936

For errors prior to award. (*See* BIDS, Mistakes)
Modification
No cost stop work order
Effect

Army proposal to enter into contract modification providing for no cost stop work order, for partially performed contracts executed in violation of Antideficiency Act, would freeze Government liability at amount already due, unless supplemental appropriation is enacted. We perceive no legal objection to proposal since it would maintain status quo and reserve to Congress maximum flexibility in deciding whether to make deficiency appropriation in amount necessary to liquidate actual obligations already incurred or to permit Army to realize full contract benefits by making appropriation greater than actual existing deficiency---- 768

Obligation to pay *v.* future availability of funds

Army proposal to modify contracts executed in violation of Antideficiency Act, to make Govt.'s obligation to pay subject to future availability of funds, but under which Govt. would continue to accept benefits, is of dubious validity as means of mitigating effects of Anti-

CONTRACTS—Continued
Modification—Continued
Obligation to pay *v.* future availability of funds—Continued Page
deficiency Act violation, since contractors might recover under contracts or on *quantum meruit* theory even if appropriation was not subsequently made available by Congress. Moreover, proposal may prejudice congressional options by requiring Congress to fully appropriate for continued performance or allow Army to receive benefits at expense of contractors 768
Relief through courts
Prior to exhaustion of remedy in GAO
Nothing requires contractor seeking contract reformation to exhaust remedy in GAO before bringing action in court for relief 546
Multi-year procurements
Third program year funding
Option prices *v.* offered prices under RFP
Contention that Army is required to fund third program year of multi-year contract before procuring similar supplies under request for proposals (RFP) is without merit, because there is no showing that award under RFP would eliminate any requirements covered by third program year 1479
Negotiated. (*See* **CONTRACTS, Negotiation**)
Negotiation
Administrative determination
Advertising *v.* negotiation
Although procurement assigned priority designation 02 is sufficient authority for contracting officer to negotiate under public exigency exception rather than formally advertise, such authority does not give contracting officer authority to negotiate with only one source where other sources can meet agency's needs as applicable statute and regulations require solicitation of proposals, including price, from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and time limitations involved 358
Advertising *v.* negotiation. (*See* **ADVERTISING, Advertising *v.* negotiation**)
Anti-Kickback Act violations
Contract for computer time/timesharing services to prime contractor who has commercial arrangements with potential subcontractors to pay standard percentage of invoice fee for finding buyer of computer time and/or services does not violate Anti-Kickback Act (41 U.S.C. 51) because commercial arrangement does not apply and prime contractor receives fee according to sliding matrix from Govt. only 554
Auction technique prohibition
Disclosure of price, etc.
If information in initial proposal(s) is improperly disclosed, giving one or more offerors competitive advantage, it is desirable to make award on basis of initial proposals, if possible, because conduct of negotiations and submission of best and final offers may constitute use of prohibited auction technique 1066

CONTRACTS—Continued
Negotiation—Continued
Auction technique prohibition—Continued
Disclosure of price, etc—Continued Page
Fact that contractor's prices under prior contract are public information does not establish that issuing new solicitation for similar items subjects contractor, as offeror under new procurement, to auction..... 1479
Protest
Various changes made to specification requirements and evaluation scheme after submission of initial best and final offers, resulting in additional calls from new best and final offers, does not indicate presence of "auction bidding" since record shows changes were based on legitimate Govt. needs which warranted reopening negotiations. Neither is auction indicated by fact that reduced price offered in revised best and final offers was not related to change, since offerors are free to revise proposals in any manner they deem appropriate once negotiations are reopened... 244
Audit requirements
Agency's failure to audit revised proposal is not objectionable, since contracting officer need not request audit when sufficient information is available to determine price reasonableness and determination that such information is available is not subject to question unless clearly erroneous..... 244
Award under initial proposals. (*See* **CONTRACTS, Negotiation, Competition, Award under initial proposals**)
Awards
Advantageous to Government
Requirement
Source selection authority's conclusion that protester's lower target and ceiling prices for fixed price incentive contract offered little in way of advantages to Government and were not sufficiently significant to overcome selected firm's superiority in technical and operations area is supported by record and is consistent with evaluation criteria which gave more weight to technical and operations area. Protester's contention that negotiations were not conducted in compliance with 10 U.S.C. 2304(g) is denied..... 1450
Contrary to public policy
No basis for allegation
While protester argues contract award by Navy should be regarded as void since it is not in accordance with public policy as expressed in congressional Conference Report, award is not contrary to statute, contract does not require any actions contrary to law, and does not represent a violation of moral or ethical standards. Therefore no basis exists to conclude that award is contrary to public policy..... 307
Erroneous
Improper *v.* illegal awards
Finding that janitorial services contract was improperly negotiated does not lead to conclusion that contract must be canceled, since cancellation is reserved for contracts illegally awarded, and under rationale of Court of Claims decisions illegal award results only if it was made contrary to statutory or regulatory requirements because of some action or statement by contractor or if contractor was on direct notice that procedures being followed were violative of requirements. Distinguished by B-185966, Mar. 17, 1976..... 693

CONTRACTS—Continued
Negotiation—Continued
Awards—Continued
Initial proposal basis
Competition sufficiency Page
Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from RFP, Navy's failure was not unjustified or illegal in particular procurement, since offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price, and since awardee's price could be considered "fair and reasonable." 839
Legality
Provision in appropriation act which prohibits use of funds for presenting certain reprogramming requests cannot operate to invalidate contract awards even if awards resulted from reprogramming action since violation of such provision cannot serve to invalidate an otherwise legal contract award 307
Multiple
Since determinations of technical acceptability are within discretion of procuring agency, in absence of clear evidence that agency acted arbitrarily, and record in this case is devoid of any evidence which would justify our Office concluding that technical evaluations were without reasonable basis, there is no basis to take exception to awards 432
Number
Where under terms of RFP Govt. reserved right to make any number of awards, such reservation can only be regarded as also reserving to Govt. its right to make more than three awards even though it later indicated that its contemplation was to make maximum of three awards. While offerors were led to believe, because of confusing and misleading language in RFP, that three awards would be made, harm to competitive system generated by agency's action does not necessitate recommending that corrective action be taken 529
Multi-year basis
Award of negotiated contract on multi-year basis when technical considerations rather than cost were primary factors for award was inappropriate since multi-year contracting method envisions award on basis of lowest evaluated unit price 244
Not prejudicial to other offerors
Although RFP, which only stated that "cost is an important factor in selection of the offeror for contract award," was defective for failing to apprise offerors of *relative* importance of estimated costs vis-a-vis other specified evaluation factors, there was no prejudice because successful offeror's proposal received highest score on technical evaluation and offered lowest evaluated estimated costs, and proposals of other offeror in competitive range completely responded to all factors considered in award selection 607

CONTRACTS—Continued
Negotiation—Continued
Awards—Continued
Not prejudicial to other offerors—Continued Page

Where agency makes some errors in conducting cost evaluation of proposals but record indicates errors were not prejudicial in view of overall evaluation, award based on overall evaluation is not subject to objection 1111

Offerors noncompliance with RFP requirements
Countervailing factors

Although successful offeror for computer services in facilities dedicated exclusively to FEA did not comply with RFP "internal" security requirement of protection from ready access by FEA users to other FEA users' programs and codes and operating system located in computer's main memory, countervailing factors mandate against disturbing award because of agency's improper relaxation of mandatory requirement without informing other offerors, e.g., lack of certainty of deficiency's effect on award selection or of whether offerors would have changed offers if specification was relaxed, agency's short life, and large excess costs and adverse effect on agency's performance of basic functions 60

Prejudice alleged

Offeror's claim that agency showed favoritism toward other offeror by waiving certain specification requirements is not supported by record, which shows only that one specification requirement was relaxed and such relaxation accommodated both offerors 244

Award on basis of evaluators' preference

Protest that conflict of interest existed because two evaluators of proposals were students at university whose museum was awarded contract is denied since relationship between evaluators and museum was so remote as to be practically nonexistent. Record shows that only one evaluator was part-time student at distant campus involving separate administrative entities and that museum was not involved in teaching. In fact, protester fared better overall in evaluation by this individual than with other evaluators 787

Insider information

Contrary to protester's assertions, Navy denies that contractor received "insider information" substantially prior to closing date for receipt of proposals relating to precise evaluation criteria and numerical breakdown. Also, GAO records do not indicate that awardee was supplied this information during bid protest involving prior procurement having identical evaluation scheme 839

Speculative

Where Navy RFP for "turnkey" family housing failed to disclose manner in which price would be compared to technical evaluation criteria even though price was considered, i.e., award was made to offeror having lowest price per quality point ratio, disclosure of precise evaluation formula shortly before closing date for receipt of proposals was not meaningful disclosure. However, in view of advanced state of contract and since prejudice to unsuccessful offerors was speculative, protest is denied 839

CONTRACTS—Continued
Negotiation—Continued
Awards—Continued
Price one factor in determination Page
Although cost was listed as least important of four evaluation factors used in evaluation of proposals leading to award of fixed price contracts, protester's claim that cost was ignored by agency is incorrect, since cost was considered both in computation of numerical scoring and again in source selection process. Since negotiated procurement was involved, award may be made to technically superior offeror, notwithstanding that offeror's higher price ---- 244
Propriety
Failure to negotiate with all offerors
Where substantial technical uncertainties exist in initial proposals, award on basis of initial proposals is precluded though proposals may be considered technically acceptable. 10 U.S.C. 2304(g) requires written or oral discussions to be conducted with offerors in competitive range to extent necessary to resolve technical uncertainties, so that Govt. can be assured of obtaining most advantageous contract. Modified in part by 55 Comp. Gen. 972 ---- 201
Where substantial technical uncertainties exist in initial proposals, discussions should be conducted with offerors in competitive range and award should not be made on initial proposal basis because "adequate price competition" cannot be found to exist under such circumstances. However, proposal of awardee in present Navy "turnkey" family housing procurement, who received award on initial proposal basis, substantially complied with RFP requirements. Therefore, Navy's failure to conduct discussions was not unjustified or illegal ---- 839
Small business concerns
Erroneous award
***Ab initio* v. voidable**
Where small business size status protest was timely filed with contracting officer within 5 days after notification of successful offeror, but after award, SBA determination that protested offeror was not small at time of award does not result in contract awarded being void *ab initio*, but merely void at option of Govt., thereby precluding effective size protest. To remedy this anomaly, it is recommended that FPR be revised to require that identity of successful offeror be revealed prior to award ---- 502
Validity
Validity of award by FEA for dedicated automatic data processing services through facilities management contract was not affected by Brooks Act, 40 U.S.C. 759, and implementing regulations and policies, because FEA was entitled to rely on authorizations to proceed with procurement given by OMB and GSA after reviews of solicitation and FEA's cost and other justifications. Also, provisions of OMB Cir. No. A–54 and FMC 74–5 concerning ADPE acquisitions are ordinarily executive branch policy matters not for resolution by GAO ---- 60
Where procurement is conducted by field purchasing office but contract award is signed by Deputy Chief of higher echelon organization within agency of which purchasing office is a part, award is valid since Deputy Chief's contracting officer authority extends throughout organization ---- 1111

CONTRACTS—Continued
Negotiation—Continued
Best advantage of Government Page
Although cost was listed as least important of four evaluation factors used in evaluation of proposals leading to award of fixed price contracts, protester's claim that cost was ignored by agency is incorrect, since cost was considered both in computation of numerical scoring and again in source selection process. Since negotiated procurement was involved, award may be made to technically superior offeror, notwithstanding that offeror's higher price---- 244
Cancellation
Generally. (*See* CONTRACTS, Cancellation)
Changes during negotiation
Notification
Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited---- 859
Protester outside competitive range
Where contract, as negotiated, changed performance periods of solicitation, agency's failure to provide protester opportunity to submit revised proposal on basis of changed requirements was not necessary since protester was not considered to be in competitive range and changes are not directly related to reasons for rejecting protester's proposal. In absence of directly applicable FPR provision, ASPR 3-805.4(b) is followed for guidance---- 787
Submission of additional data
Where contracting officer determines it to be in the Government's interest to allow all offerors within competitive range opportunity to provide data which was omitted in some initial proposals, notwithstanding presence of clause in request for proposals allowing contracting officer to find proposal submitted without such data to be nonresponsive, contracting officer's action was proper---- 1295
Changes, etc.
Price revision after close of negotiations
Attempted late price reductions submitted by unsuccessful offeror after receipt of initial proposals were properly rejected, because RFP late proposal clause (see ASPR 7-2002.4) provided generally for rejection of late proposals and modifications, and none of specified exceptions to general rule were satisfied. But Navy then erred in accepting late price increase from successful offeror, as this action constituted discussions with that offeror and discussions were not held with other offerors in competitive range. Modified in part by 55 Comp. Gen. 972-- 201
Procurement no longer needed
Govt. need not make award initially contemplated under solicitation where it is determined reduction in available funds requires commensurate reduction in scope of work---- 432

CONTRACTS—Continued
Negotiation—Continued
Changes, etc.—Continued
Reopening negotiations
Wage determination change Page

GSA's failure to reopen negotiations to incorporate in RFP Service Contract Act DOL Wage Determination was not justified on basis of GSA's assumption that revision would have equal effect on all offerors, would not affect relative standing of offerors, and would be impractical since successful offeror had been announced, as such assumptions are speculative and award under circumstances on basis of superseded wage determination is contrary to principles of competitive procurement system ---------- 864

Specifications

Series of specification changes and requests for new best and final offers did not cause technical "leveling" of proposals, which refers to unfair practice of helping offeror bring unacceptable proposal up to level of other adequate proposals through successive rounds of negotiations, since only two proposals under consideration were both regarded as acceptable throughout testing and evaluation period and proposal which protester regards as having been brought up to level of its proposal was regarded by agency as superior proposal ---------- 244

Competition
Adequacy
Application of cost accounting standards requirements

A negotiated price may be based on adequate price competition and at the same time be qualified for exemption from CAS requirements as catalog or market price ---------- 881

Award under initial proposals

Where substantial technical uncertainties exist in initial proposals, award on basis of initial proposals is precluded though proposals may be considered technically acceptable. 10 U.S.C. 2304(g) requires written or oral discussions to be conducted with offerors in competitive range to extent necessary to resolve technical uncertainties, so that Govt. can be assured of obtaining most advantageous contract. Modified in part by 55 Comp. Gen. 972 ---------- 201

Appropriateness of Navy's failure to conduct discussions with offerors within competitive range in fixed price "turnkey" family housing procurements and its award on initial proposal basis is questionable, in view of many varied acceptable approaches of meeting "turnkey" projects' performance-type specifications, since fact that offeror is highest rated does not mean it is offering such "fair and reasonable" price that oral or written discussions would not be required, even if there are several competitive offerors ---------- 839

Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from RFP, Navy's failure was not unjustified or illegal in particular procurement, since

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Award under initial proposals—Continued Page
offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price, and since awardee's price could be considered "fair and reasonable" 839
Award may be made on initial proposal basis without discussions with offerors in competitive range to offeror, who proposed higher fixed price than other presumably acceptable offeror under Navy "turnkey" family housing procurement, since winning offeror, who received lowest dollar per quality point ratio, had "lowest evaluated price" under ASPR 3-807.1(b)(1) (1974 ed.). Language "lowest evaluated price" should be defined to include all factors involved in award selection. B-170750(2), February 22, 1971, modified 839
If information in initial proposal(s) is improperly disclosed, giving one or more offerors competitive advantage, it is desirable to make award on basis of initial proposals, if possible, because conduct of negotiations and submission of best and final offers may constitute use of prohibited auction technique 1066
Since lowest-priced initial proposal is 47 percent in excess of Government estimate (28 percent in excess of revised upward estimate), General Accounting Office does not object to contracting officer's determination that fair and reasonable price under Armed Services Procurement Regulation 3-805.1(a)(v) is lacking, and that award should not be made on basis of initial proposals, notwithstanding desirability of such action where proposal information has been improperly disclosed 1066
Status of undisclosed competitor
Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protestor may be excluded from portion of procurement involving possible advantage 280
Changes in price, specifications, etc.
Relative price position not affected
Although offerors selected for award were afforded opportunity to revise total price to receive award for reduced scope of work, failure of agency to conduct discussions with other offerors within competitive range does not provide basis for GAO to take exception to awards as unit prices for reduced work were not revised and, therefore, relative price position of offerors would not have been affected by revision of total price. 49 Comp. Gen. 402, overruled 432

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Competitive range formula
Basis of evaluation Page

Incumbent protests against request for proposals (RFP) for aircraft maintenance services requiring offerors to insert hourly rate multiplied by estimated 600 man-hours for over and above work (11 percent of contract) because it does not provide for recognition of incumbent's experience and award to any other firm will not result in lowest cost. Protest is denied because no wide discrepancies in performance are expected as RFP contains stringent experience responsibility requirements, Government has significant control over man-hours to be expended, and man-hours estimate is reasonable. Moreover, recognition of experience is speculative and incumbent's suggested evaluation formulas would have no effect on competitive standing of offerors ---------- 1214

Incumbent contractor eliminated

Agency's elimination of incumbent contractor from competitive range had reasonable basis. Totality of many allegedly "informational" deficiencies made proposal so materially deficient that it could not be made acceptable except by major revisions and additions. Incumbent's low proposed estimated costs did not have to be considered since proposal was found to be totally technically unacceptable. There is no basis for favoring incumbent in competitive range determination with presumptions based merely on prior satisfactory service, since proposal must demonstrate compliance with essential RFP requirements ---------- 60

Predetermined cut-off score
Not prejudicial

Although use of predetermined cut-off score to establish competitive range is not in accord with sound procurement practice, it is not prejudicial to offeror eliminated from competitive range in view of offeror's low technical score of 44.8 points on 100-point scale in relation to scores of proposals included in competitive range (96.3, 92.1 and 88.2) ---------- 60

Selection basis

Determination of competitive range on basis of three highest technically evaluated proposals without consideration of price and relative weight *vis-a-vis* technical is improper since competitive range should be determined from array of scores of all proposals submitted and with regard to price. Although award will not be disturbed, agency is advised to preclude recurrence of such deficiency in future procurements. 49 Comp. Gen. 402, overruled ---------- 432

Technical acceptability

Proposal may be found outside of competitive range on basis of technical unacceptability without consideration of cost ---------- 787

Where Govt's statement of work is broad and general, proposal was nevertheless properly considered outside competitive range since, consistent with evaluation factors listed in solicitation, protester's technical proposal was considered to be so deficient as to be wholly unacceptable. Question whether Govt. unfairly construed its work statement too narrowly may not be judged solely from work statement but must be determined in light of solicitation's evaluation factors ---------- 787

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Competitive range formula—Continued
Technical acceptability—Continued Page

Where contract, as negotiated, changed performance periods of solicitation, agency's failure to provide protester opportunity to submit revised proposal on basis of changed requirements was not necessary since protester was not considered to be in competitive range and changes are not directly related to reasons for rejecting protester's proposal. In absence of directly applicable FPR provision, ASPR 3-805.4(b) is followed for guidance 787

Contracting officer's duty to secure

Although procurement assigned priority designation 02 is sufficient authority for contracting officer to negotiate under public exigency exception rather than formally advertise, such authority does not give contracting officer authority to negotiate with only one source where other sources can meet agency's needs as applicable statute and regulations require solicitation of proposals, including price, from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and time limitations involved 358

On reconsideration, GAO decision 55 Comp. Gen. 201—which sustained protest against award of negotiated turnkey housing procurement and recommended remedy involving renewal of competition among offerors and possible termination for convenience of existing contract—is modified in part. After considering points raised in requests for reconsideration by contracting agency, contractor and protester, recommendation in prior decision is withdrawn, and in all other respects decision is affirmed 972

Discussion with all offerors requirement
Actions not requiring

Although offerors selected for award were afforded opportunity to revise total price to receive award for reduced scope of work, failure of agency to conduct discussions with other offerors within competitive range does not provide basis for GAO to take exception to awards as unit prices for reduced work were not revised and, therefore, relative price position of offerors would not have been affected by revision of total price. 49 Comp. Gen. 402, overruled 432

Equal opportunity to compete

Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage 280

Protester's claim that Navy did not treat offerors on equal basis is not supported by record, which indicates that overall evaluation was conducted in accordance with established criteria and that both offerors were treated fairly 307

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Equal opportunity to compete—Continued Page

GSA's failure to reopen negotiations to incorporate in RFP Service Contract Act DOL Wage Determination was not justified on basis of GSA's assumption that revision would have equal effect on all offerors, would not affect relative standing of offerors, and would be impractical since successful offeror had been announced, as such assumptions are speculative and award under circumstances on basis of superseded wage determination is contrary to principles of competitive procurement system ---- 864

Failure to discuss
Not unjustified or illegal

Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from RFP, Navy's failure was not unjustified or illegal in particular procurement, since offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price, and since awardee's price could be considered "fair and reasonable." ---- 839

Where substantial technical uncertainties exist in initial proposals, discussions should be conducted with offerors in competitive range and award should not be made on initial proposal basis because "adequate price competition" cannot be found to exist under such circumstances. However, proposal of awardee in present Navy "turnkey" family housing procurement, who received award on initial proposal basis, substantially complied with RFP requirements. Therefore, Navy's failure to conduct discussions was not unjustified or illegal ---- 839

"Meaningful" discussions

Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited ---- 859

Agency's failure to give opportunity to offerors, who had been informed during discussions that cost proposals were not realistic, to revise proposals to respond to this criticism was improper and in violation of FPR 1-3.805-1(b). Under such circumstances, discussions cannot be regarded as meaningful under applicable regulations ---- 1315

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Proposed revisions Page
By accepting offeror's initial turnkey housing proposal—regarded as most favorable to Govt.—which nonetheless substantially varied from specific RFP requirements, Navy waived those requirements for purposes of competition among seven offerors in competitive range. This change in specifications, without complying with provisions of ASPR 3-805.4, deprived other offerors of equal opportunity to compete and Govt. of benefits of maximum competition. Modified in part by 55 Comp. Gen. 972 201
Technical transfusion or leveling
Although technical "transfusion" of one offeror's unique or innovative idea to other offerors is prohibited, offeror's request for direct reimbursement by Govt. of its interest expense is not such a unique or innovative idea, but is suggestion for departure from procurement "ground rules" which, if accepted by agency, must be communicated to all competing offerors 802
What constitutes discussion
GSA did not conduct meaningful negotiation with unsuccessful, albeit competitive-range, offeror, since it did not explore purported deficiency in phase-in costs 693
Written or oral negotiations
Where award on basis of initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. GAO recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminted for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal. Modified in part by 55 Comp. Gen. 972 201
Appropriateness of Navy's failure to conduct discussions with offerors within competitive range in fixed price "turnkey" family housing procurements and its award on initial proposal basis is questionable, in view of many varied acceptable approaches of meeting "turnkey" projects' performance-type specifications, since fact that offeror is highest rated does not mean it is offering such "fair and reasonable" price that oral or written discussions would not be required, even if there are several competitive offerors 839
Effect of negotiation procedures
Where GAO decision after lengthy protest proceeding recommended continuing competition under RFP, Environmental Protection Agency's (EPA) position that RFP is defective and should be canceled—formally documented for first time 3 months after decision and 10 months after protest was filed—raises serious questions concerning Agency's understanding of and adherence to fundamental procurements policies and procedures, since inaction by Agency in failing to ascertain and promptly

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Effect of negotiation procedures—Continued Page
disclose RFP deficiencies has created delay and confusion in procurement process 1281
Equal bidding basis for all offerors
If information in initial proposal(s) is improperly disclosed, giving one or more offerors competitive advantage, it is desirable to make award on basis of initial proposals, if possible, because conduct of negotiations and submission of best and final offers may constitute use of prohibited auction technique 1066
Where information in initial proposal has been improperly disclosed and award cannot be made on basis of initial proposals, conduct of negotiations and submission of best and final offers should be undertaken in such manner as to place offerors in relatively equal competitive positions and to eliminate, insofar as possible, unfair competitive advantage which any offeror may have obtained through improper disclosure of proposal information 1066
Where Navy improperly disclosed first offeror's initial proposal prices and attempted to eliminate unfair advantage by disclosing both offerors' prices before best and final offers, first offeror was disadvantaged because it was not advised that second offeror had alleged mistake in its proposal, requesting substantial downward price correction. GAO recommends that unless second offeror agrees to release of its mistake in proposal claim to first offeror, it be eliminated from competition. If second offeror agrees to disclosure, Navy should obtain one additional round of best and final offers before proceeding with award 1066
Where offerors within competitive range are advised in morning of reopening of negotiations and requested to submit best and final offers by that same afternoon, reasonableness of action will not be questioned where all offerors are in fact able to respond within time limit 1295
Denied
Failure of procuring activity to inform competing offeror in negotiated procurement for fixed-price contract that Govt. would directly reimburse contractor for interest on borrowings to finance plant expansion when reimbursement is prohibited by agency procurement regulation denied such offeror opportunity to compete on equal basis 802
Exclusion of other firms
Protester's claim that agency unduly restricted competition by seeking production proposals only from development contractors instead of conducting new competition is untimely, since under 4 C.F.R. 20.2(a) issue should have been raised prior to date set for receipt of proposals 244
No exclusion on basis of potential or theoretical conflict of interest
In absence of condition in solicitation which clearly limited proposals only to those firms (including officers of firms) which have no connection with oil or gas industry, together with clearly supportable reason for so limiting competition, and since there is no relevant legal prohibition, award of automatic data processing services contract by FEA to firm whose Chairman of Board of Directors has some interest in oil or gas industry was not improper. Firm should not be excluded from competition simply on basis of theoretical or potential conflict of interest 60

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Financing benefits Page
Failure of procuring activity to inform competing offeror in negotiated procurement for fixed-price contract that Govt. would directly reimburse contractor for interest on borrowings to finance plant expansion when reimbursement is prohibited by agency procurement regulation denied such offeror opportunity to compete on equal basis 802
Key component breakout
Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs 1019
Limitation on negotiation
Propriety
Restriction of competition in Navy procurement for Air Combat Fighter (ACF) to offerors furnishing designs derived from Air Force ACF program was proper even though Navy selected derivative of design different from that chosen by Air Force, since solicitation was intended to maximize commonality of both technology and hardware between Air Force and Navy designs and Navy selection was in accordance with solicitation criteria regarding commonality 307
Maximum possible extent
Although procurement assigned priority designation 02 is sufficient authority for contracting officer to negotiate under public exigency exception rather than formally advertise, such authority does not give contracting officer authority to negotiate with only one source where other sources can meet agency's needs as applicable statute and regulations require solicitation of proposals, including price, from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and time limitations involved 358
Preservation of system's integrity
GSA's failure to reopen negotiations to incorporate in RFP Service Contract Act DOL Wage Determination was not justified on basis of GSA's assumption that revision would have equal effect on all offerors, would not affect relative standing of offerors, and would be impractical since successful offeror had been announced, as such assumptions are speculative and award under circumstances on basis of superseded wage determination is contrary to principles of competitive procurement system 864
Status of undisclosed competitor
Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage 280

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Propriety
Method of conducting negotiations Page

In negotiated procurement accomplished under NASA Procurement Directive 70–15 which limits agency in discussing deficiencies in offerors' proposals during written or oral discussions, no harm to protester's competitive position is found even though other offeror was advised of deficiency during multiple "final negotiations," since NASA could properly have made necessary Davis-Bacon Act wage cost adjustments to offeror's proposal. Comment is made that this practice seems inconsistent with limitations imposed by procurement directive..... 715

Request for proposals defective

Where GAO decision after lengthy protest proceeding recommended continuing competition under RFP, Environmental Protection Agency's (EPA) position that RFP is defective and should be canceled—formally documented for first time 3 months after decision and 10 months after protest was filed—raises serious questions concerning Agency's understanding of and adherence to fundamental procurements policies and procedures, since inaction by Agency in failing to ascertain and promptly disclose RFP deficiencies has created delay and confusion in procurement process..... 1281

Sole source of supply. (*See* **CONTRACTS, Negotiation, Sole source basis**)

Subcontractors

Fact that prime contractor of computer time/timesharing contract may have developed commercial clientele whose abilities it knows does not unduly restrict competition since no potential subcontractor is prohibited from submitting proposal which prime contractor must consider.. 554

Conflicts of interest prohibitions
Organizational

No organizational conflict of interest is shown where contractor who performed both contract definition, including development of specifications, and actual system development is awarded contract for initial production that only it can provide..... 1019

Status of offeror

In absence of condition in solicitation which clearly limited proposals only to those firms (including officers of firms) which have no connection with oil or gas industry, together with clearly supportable reason for so limiting competition, and since there is no relevant legal prohibition, award of automatic data processing services contract by FEA to firm whose Chairman of Board of Directors has some interest in oil or gas industry was not improper. Firm should not be excluded from competition simply on basis of theoretical or potential conflict of interest..... 60

Cost accounting standards requirements
Catalog or market price exemption
Effect of adequate price competition

A negotiated price may be based on adequate price competition and at same time be qualified for exemption from CAS requirements as catalog or market price..... 881

CONTRACTS—Continued
Negotiation—Continued
Cost accounting standards requirements—Continued
Catalog or market price exemption—Continued
Effect of adequate price competition—Continued Page

Where low offeror claimed exemption from CAS on ground that its offered prices were based upon its established catalog or market prices, exemption should not have been denied solely because adequate price competition was obtained by agency. Recommendation is made that agency review claim and if basis for exemption existed then consideration be given to termination for convenience of contract awarded to second low offeror and award of terminated quantities to low offeror 881

Mandatory

Catalog or market price exemption from requirement of Cost Accounting Standards Act is mandatory exemption rather than discretionary with contracting agency. Therefore CAS requirements should not be imposed on contractor whenever catalog or market price exemption is determined to exist 881

Request and justification
Offeror's responsibility

It is the offeror's responsibility to request and to provide justification for catalog or market price exemption from CAS requirements. However, contracting agency must make determination whether exemption applies in the particular case 881

Cost, etc., data
Adequate competition effect

Protest against alleged action of contracting personnel in orally amending RFP so that only protester was required to use standard cost and pricing form different than all other competitors on day before closing date for receipt of proposals, submitted within 10 days of notification of reasons why agency would not consider proposal, is timely notwithstanding that action occurred before closing date for receipt of proposal since it was not impropriety apparent on face of solicitation. See 40 Fed. Reg. 17979, April 24, 1975 754

Escalation

No basis is seen to object to contracting officer's finding that radio sets available under existing contract option will fulfill existing need of Government. While comparison of option prices (including effect of possible price escalation) and prices of proposals submitted under RFP may be difficult, this does not establish that consideration of option as means of satisfying Government's requirements is precluded 1472

Estimated
Low

Agency's elimination of incumbent contractor from competitive range had reasonable basis. Totality of many allegedly "informational" deficiencies made proposal so materially deficient that it could not be made acceptable except by major revisions and additions. Incumbent's low proposed estimated costs did not have to be considered since proposal was found to be totally technically unacceptable. There is no basis for favoring incumbent in competitive range determination with presumptions based merely on prior satisfactory service, since proposal must demonstrate compliance with essential RFP requirements 60

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data—Continued
Evaluation factors changed Page
Where agency did not discuss certain areas in proposals simply because they were considered "weakensses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resoliticted---------- 859
Form for submission
Protester is not justified in relying on oral statements of contracting personnel prior to closing date for receipt of proposals, which would have changed standard cost and pricing data form specified in RFP. Oral representation one day prior to closing date for receipt of proposals without confirmation in writing does not constitute amendment of RFP_ 754
Price adjustment
Attempted late price reductions submitted by unsuccessful offeror after receipt of initial proposals were properly rejected, because RFP late proposal clause (see ASPR 7–2002.4) provided generally for rejection of late proposals and modifications, and none of specified exceptions to general rule were satisfied. But Navy then erred in accepting late price increase from successful offeror, as this action constituted discussions with that offeror and discussions were not held with other offerors in competitive range. Modified in part by 55 Comp. Gen. 972_____ 201
Proposed staffing
Incumbent protests against request for proposals (RFP) for aircraft maintenance services requiring offerors to insert hourly rate multiplied by estimated 600 man-hours for over and above work (11 percent of contract) because it does not provide for recognition of incumbent's experience and award to any other firm will not result in lowest cost. Protest is denied because no wide discrepancies in performance are expected as RFP contains stringent experience responsibility requirements, Government has significant control over man-hours to be expended, and man-hours estimate is reasonable. Moreover, recognition of experience is speculative and incumbent's suggested evaluation formulas would have no effect on competitive standing of offerors---------- 1214
"Realism" of cost
Where cost realism analysis of competing proposals was based, in part, on collective bargaining agreement in effect at time of evaluation escalated over proposed contract period, but thereafter new collective bargaining agreement is negotiated and becomes effective, more appropriate and precise analysis is now both possible and in order in light of definitization of new applicable wages---------- 715
Agency's selection of contractor on basis of lower evaluated costs is not improper, even though evaluation section of solicitation indicates cost realism as the least important evaluation factor, since solicitation, on Standard Form 33A, indicated that price (cost quantum) would also be considered and cost or price may become determinative factor in award selection when competing proposals are essentially equal, notwithstanding fact that other factors are of greater importance in overall evaluation scheme---------- 1111

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data—Continued
"Realism" of cost—Continued Page
Agency's cost evaluation of proposals is not subject to objection where agency's determination of realism of proposed costs is supported by reasonable basis, even though agency essentially relies on information contained in proposals rather than seeking independent verification of each item of proposed costs, since extent to which proposed costs will be examined is matter for agency 1111
Reasonableness of proposed cost
Although there were shortcomings and omissions in proposal of awardee under Navy negotiated fixed price "turnkey" family housing procurement and relatively minor inconsistencies and errors in technical evaluation of protester's and awardee's proposal, determination by Navy, in its broad discretion, that awardee had highest technically evaluated proposal had reasonable basis, and initial proposal award based upon lowest dollar per technical quality point ratio to awardee, who had higher priced, higher technically rated proposal, was reasonable despite protester's over $600,000 lower offered price 839
Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from RFP, Navy's failure was not unjustified or illegal in particular procurement, since offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price, and since awardee's price could be considered "fair and reasonable." 839
Since lowest-priced initial proposal is 47 percent in excess of Government estimate (28 percent in excess of revised upward estimate), General Accounting Office does not object to contracting officer's determination that fair and reasonable price under Armed Services Procurement Regulation 3-805.1(a)(v) is lacking, and that award should not be made on basis of initial proposals, notwithstanding desirability of such action where proposal information has been improperly disclosed 1066
Where agency cannot identify precise future requirements and therefore requests estimated costs on basis of hypothetical plan which includes the types of tasks and services actually required, estimated cost submitted by offerors provide adequate basis for cost comparison between competing proposals to determine probable relative cost to agency of accepting one proposal rather than another 1111
Agency's cost evaluation of proposals is not subject to objection where agency's determination of realism of proposed costs is supported by reasonable basis, even though agency essentially relies on information contained in proposals rather than seeking independent verification of each item of proposed costs, since extent to which proposed costs will be examined is matter for agency 1111

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data—Continued
Reasonableness of proposed cost—Continued Page
Where prices of proposed lease plan for automatic data processing equipment were effective through only 4 months of 96 months' systems life, plan should have been rejected. RFP required that fixed or determinable prices throughout systems life be offered. Fact that other lease plans included in contract cover remainder of systems life is immaterial, because RFP allowed only one plan to be considered in evaluation, and unacceptable plan was only plan actually evaluated. Therefore, awards were made without reasonable assurance of lowest overall cost to Government 1151
Agency improperly assigned maximum points for cost in evaluating offerors' cost proposals where costs were not considered to be realistic without making independent cost projection of offerors' estimated costs 1315
Reevaluation
Lowest overall cost to Government
Where awards were made based on partially unacceptable proposal and without reasonable assurance of lowest overall cost to Government, GAO recommends that Army reevaluate proposals (excluding unacceptable lease plan) and, if necessary, take appropriate termination for convenience and reaward action based upon reevaluation of proposals 1151
Verification
Since, contrary to protester's contention, quantity estimates in RFP were not substantially overstated, there is no evidence that other offeror knew protester's original price before it submitted best and final offer and determination not to obtain cost and pricing DD form 633 was in accordance with regulations, claim for proposal preparation costs will not be considered 875
Cost-plus-award-fee contracts
Estimated costs
Automatic data processing services
Recognizing that low cost estimates should not be accepted at face value and that agency should make independent cost projection of estimated costs, agency's determination, after cost analysis, that successful offeror's proposed low estimated costs for cost-plus-award-fee contract for automatic data processing services were realistic, was reasonable, notwithstanding lack of complete explanation of why proposed costs were substantially less than those of protester, who offered similar computer configuration 60
Cost-plus-incentive-fee contracts
Evaluation
Navy's cost evaluation of competing proposals was conducted in accordance with proper procedures and established criteria since Navy's development of its own estimates in determining cost credibility was consistent with sound procurement practices and award of contract to higher priced offeror was not improper 307

CONTRACTS—Continued
Negotiation—Continued
Cost-reimbursement basis
Indefinite delivery contract Page
Use of cost-reimbursement provisions in indefinite delivery contract is not prohibited by regulations and record suggests that regulations were not intended to foreclose agency from awarding this type of contract 1111
Cost-type
Award on basis other than price
Although cost was listed as least important of four evaluation factors used in evaluation of proposals leading to award of fixed price contracts, protester's claim that cost was ignored by agency is incorrect, since cost was considered both in computation of numerical scoring and again in source selection process. Since negotiated procurement was involved, award may be made to technically superior offeror, notwithstanding that offeror's higher price 244
Fee based on "estimated cost" of order
Provision in cost-type indefinite quantity contract specifying that fee to be paid on each delivery order will be based on "costs being paid" does not render contract contrary to statutory prohibition against cost-plus-percentage-of-cost contracts since contract itself does not confer entitlement to payment and fee for actual delivery order is being based on "estimated cost" of each order 1111
Technical/cost justification
Responding to prior GAO decision, agency furnishes rational support for bare conclusions reached by third evaluator (whose views prompted source selection) in conflict with technical evaluation committee's views. Committee evaluated and scored only original proposals but not additional information resulting from negotiations considered by third evaluator which reduced technical evaluation difference of technical committee in favor of protester. Additional information from lower cost awardee responded satisfactorily to technical problem raised by agency which, in large measure, accounted for technical evaluation difference between proposals. 54 Comp. Gen. 896, modified 499
Although there were shortcomings and omissions in proposal of awardee under Navy negotiated fixed price "turnkey" family housing procurement and relatively minor inconsistencies and errors in technical evaluation of protester's and awardee's proposal, determination by Navy, in its broad discretion, that awardee had highest technically evaluated proposal had reasonable basis, and initial proposal award based upon lowest dollar per technical quality point ratio to awardee, who had higher priced, higher technically rated proposal, was reasonable despite protester's over $600,000 lower offered price 839
Use of formula, which gave negligible weight to cost as evaluation factor, to evaluate cost proposals was improper because it was inconsistent with RFP statement that cost be given 20 percent of total evaluation weight. However, since protester was found in competitive range only because of clerical error in technical evaluation scoring and was improperly assigned maximum points for cost even though its cost proposal was determined to be unrealistic, and since RFP clearly indicated technical excellence was far more important (four times) than low cost, there was no prejudice justifying disturbing award 1315

CONTRACTS—Continued
Negotiation—Continued
Determination and findings
Not required
Process to determine minimum needs Page

Since Army machine gun selection program was not procurement but rather process to determine minimum meeds, no written Determinations and Findings (D&F) had to be prepared prior to selection of foreign machine gun as minimum need. In any case, agency's failure to prepare D&F prior to conducting negotiations preparatory to executing sole-source contract is deviation of form rather than substance---------- 1362

Disclosure of price, etc.
Allegation not substantiated

Since, contrary to protester's contention, quantity estimates in RFP were not substantially overstated, there is no evidence that other offeror knew protester's original price before it submitted best and final offer and determination not to obtain cost and pricing DD form 633 was in accordance with regulations, claim for proposal preparation costs will not be considered---------- 875

Auction technique prohibition

Contracting officer properly did not seek clarification of revised best and final offer which appeared to be inconsistent with offer previously submitted and with requirements of solicitation, since matter went to heart of promised performance and could only be resolved by reopening negotiations with all offerors in competitive range, and reopening of negotiations after submission of second best and final offers was deemed not to be in best interest of Govt.---------- 636

If information in initial proposal(s) is improperly disclosed, giving one or more offerors competitive advantage, it is desirable to make award on basis of initial proposals, if possible, because conduct of negotiations and submission of best and final offers may constitute use of prohibited auction technique---------- 1066

Fact that contractor's prices under prior contract are public information does not establish that issuing new solicitation for similar items subjects contractor, as offeror under new procurement, to auction---------- 1479

Inadvertent

Since lowest-priced initial proposal is 47 percent in excess of Government estimate (28 percent in excess of revised upward estimate), General Accounting Office does not object to contracting officer's determination that fair and reasonable price under Armed Services Procurement Regulation 3-805.1(a)(v) is lacking, and that award should not be made on basis of initial proposals, notwithstanding desirability of such action where proposal information has been improperly disclosed---------- 1066

Where information in initial proposal has been improperly disclosed and award cannot be made on basis of initial proposals, conduct of negotiations and submission of best and final offers should be undertaken in such manner as to place offerors in relatively equal competitive positions and to eliminate, insofar as possible, unfair competitive advantage which any offeror may have obtained through improper disclosure of proposal information---------- 1066

CONTRACTS—Continued
Negotiation—Continued
Disclosure of price, etc.—Continued
Inadvertent—Continued Page

Where Navy improperly disclosed first offeror's initial proposal prices and attempted to eliminate unfair advantage by disclosing both offerors' prices before best and final offers, first offeror was disadvantaged because it was not advised that second offeror had alleged mistake in its proposal, requesting substantial downward price correction. GAO recommends that unless second offeror agrees to release of its mistake in proposal claim to first offeror, it be eliminated from competition. If second offeror agrees to disclosure, Navy should obtain one additional round of best and final offers before proceeding with award 1066

Discussion requirement
Competition. (*See* **CONTRACTS, Negotiation, Competition, Discussion with all offerors requirement**)
Compliance

Source selection authority's conclusion that protester's lower target and ceiling prices for fixed price incentive contract offered little in way of advantages to Government and were not sufficiently significant to overcome selected firm's superiority in technical and operations area is supported by record and is consistent with evaluation criteria which gave more weight to technical and operations area. Protester's contention that negotiations were not conducted in compliance with 10 U.S.C. 2304(g) is denied 1450

Estimated basis
Propriety

Navy's cost evaluation of competing proposals was conducted in accordance with proper procedures and established criteria since Navy's development of its own estimates in determining cost credibility was consistent with sound procurement practices and award of contract to higher priced offeror was not improper 307

Evaluation factors
Additional factors
Not in request for proposals

Since disclosure of relative weights of evaluation factors is essential requirement of procurement, GSA erred in failing to communicate to offerors material changes in evaluation scheme from that designated in RFP so offerors would not be misled by RFP's provisions 864

Administrative determination

Agency's cost evaluation of proposals is not subject to objection where agency's determination of realism of proposed costs is supported by reasonable basis, even though agency essentially relies on information contained in proposals rather than seeking independent verification of each item of proposed costs, since extent to which proposed costs will be examined is matter for agency 1111

All offerors informed requirement

Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
All offerors informed requirement—Continued Page
Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from RFP, Navy's failure was not unjustified or illegal in particular procurement, since offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price, and since awardee's price could be considered "fair and reasonable." 839
Agency's failure to give opportunity to offerors, who had been informed during discussions that cost proposals were not realistic, to revise proposals to respond to this criticism was improper and in violation of FPR 1-3.805-1(b). Under such circumstances, discussions cannot be regarded as meaningful under applicable regulations 1315
Areas of evaluation
Allegations were filed after receipt of best and final offers that RFP was deficient for failure to disclose (1) numerical values assigned to mission suitability factors, and (2) relative importance of cost or "other factors" to mission suitability; and failure to include incumbent contractor closeout costs are untimely since they relate to deficiencies apparent before date set for receipt of initial proposals. Argument that protester did not read RFP as making cost independent evaluation factor is rejected since evaluation section clearly indicates three distinct major areas of evaluation—mission suitability, cost, and other factors 715
Commonality between Air Force and Navy designs
Restriction of competition in Navy procurement for Air Combat Fighter (ACF) to offerors furnishing designs derived from Air Force ACF program was proper even though Navy selected derivative of design different from that chosen by Air Force, since solicitation was intended to maximize commonality of both technology and hardware between Air Force and Navy designs and Navy selection was in accordance with solicitation criteria regarding commonality 307
Commonality features of prior contracts
Contrary to protester's assertions, Navy denies that contractor received "insider information" substantially prior to closing date for receipt of proposals relating to precise evaluation criteria and numerical breakdown. Also, GAO records do not indicate that awardee was supplied this information during bid protest involving prior procurement having identical evaluation scheme 839
Commonality of design
Protester's assertion that Navy properly could select only derivative of model selected by Air Force is incorrect, since reasonable interpretation of RFQ, read in context of applicable documents, indicates that Navy sought aircraft with optimum performance (within cost parameters) and with due consideration of design commonality with prior Air Force prototype program and with selected Air Force fighter 307

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Competitive advantage precluded Page

GSA's failure to reopen negotiations to incorporate in RFP Service Contract Act DOL Wage Determination was not justified on basis of GSA's assumption that revision would have equal effect on all offerors, would not affect relative standing of offerors, and would be impractical since successful offeror had been announced, as such assumptions are speculative and award under circumstances on basis of superseded wage determination is contrary to principles of competitive procurement system 864

Conformability of equipment, etc.
Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)
Cost
Changed

Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited 859

Cost analysis
Normalized treatment

"Normalization" methodology used to compute dollar value of technical point spread between proposals did not conform to established relative weights and produced misleading result which could have affected source selection decision. Therefore, Comptroller General recommends that source selection decision be reconsidered on basis of appropriate computation 244

Reevaluation

Recognizing that low cost estimates should not be accepted at face value and that agency should make independent cost projection of estimated costs, agency's determination, after cost analysis, that successful offeror's proposed low estimated costs for cost-plus-award-fee contract for automatic data processing services were realistic, was reasonable, notwithstanding lack of complete explanation of why proposed costs were substantially less than those of protester, who offered similar computer configuration 60

Where awards were made based on partially unacceptable proposal and without reasonable assurance of lowest overall cost to Government, GAO recommends that Army reevaluate proposals (excluding unacceptable lease plan) and, if necessary, take appropriate termination for convenience and reaward action based upon reevaluation of proposals 1151

Cost credibility

Navy's cost evaluation of competing proposals was conducted in accordance with proper procedures and established criteria since Navy's development of its own estimates in determining cost credibility was consistent with sound procurement practices and award of contract to higher priced offeror was not improper 307

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Cost realism Page

Recognizing that low cost estimates should not be accepted at face value and that agency should make independent cost projection of estimated costs, agency's determination, after cost analysis, that successful offeror's proposed low estimated costs for cost-plus-award-fee contract for automatic data processing services were realistic, was reasonable, notwithstanding lack of complete explanation of why proposed costs were substantially less than those of protester, who offered similar computer configuration 60

Agency's selection of contractor on basis of lower evaluated costs is not improper, even though evaluation section of solicitation indicates cost realism as the least important evaluation factor, since solicitation, on Standard Form 33A, indicated that price (cost quantum) would also be considered and cost or price may become determinative factor in award selection when competing proposals are essentially equal, notwithstanding fact that other factors are of greater importance in overall evaluation scheme 1111

Agency's cost evaluation of proposals is not subject to objection where agency's determination of realism of proposed costs is supported by reasonable basis, even though agency essentially relies on information contained in proposals rather than seeking independent verification of each item of proposed costs, since extent to which proposed costs will be examined is matter for agency 1111

Criteria

Protester's claim that Navy did not treat offerors on equal basis is not supported by record, which indicates that overall evaluation was conducted in accordance with established criteria and that both offerors were treated fairly 307

Award may be made on initial proposal basis without discussions with offerors in competitive range to offeror, who proposed higher fixed price than other presumably acceptable offeror under Navy "turnkey" family housing procurement, since winning offeror, who received lowest dollar per quality point ratio, had "lowest evaluated price" under ASPR 3-807.1 (b)(1) (1974 ed.). Language "lowest evaluated price" should be defined to include all factors involved in award selection. B-170750(2), February 22, 1971, modified 839

Application of criteria

Allegation that part of successful proposal should have been rejected is not protest against request for proposals evaluation criteria, but against application of criteria by contracting agency in evaluating proposal. Protest filed within 10 working days after protester obtained and analyzed copy of contract, thereby learning of improper evaluation, is timely under General Accounting Office Bid Protest Procedures 1151

Divulged and generalized

Objection to Govt.'s failure to include detailed subordinate evaluation criteria in solicitation may not be sustained where sufficient correlation exists between divulged criteria and generalized criteria in solicitation. Even though subcriterion is applied under two evaluation criteria of solicitation and may penalize offeror twice, such action is proper since it is supported by rational basis 787

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Defective request for proposals provisions Page

Navy RFP for "turnkey" family housing, which listed major technical criteria in descending order of importance and listed and explained all subcriteria of major criteria, although subcriteria's relative weight was not disclosed, has satisfied requirement that prospective offerors be informed of broad scheme of scoring to be employed and given reasonably definite information as to degree of importance to be accorded to particular factors in relation to each other. Disclosure of precise numerical weights is not required. However, RFP is defective for failing to disclose role of price in evaluation scheme..... 839

Escalation
Wage rates

Even if offeror's score for mission suitability should have been adjusted downward for its improper escalation of Davis-Bacon Act wage rates, impact on scoring would not be sufficient to make situation one where given point spread between competing proposals indicates significant superiority of one proposal over another..... 715

Where cost realism analysis of competing proposals was based, in part, on collective bargaining agreement in effect at time of evaluation escalated over proposed contract period, but thereafter new collective bargaining agreement is negotiated and becomes effective, more appropriate and precise analysis is now both possible and in order in light of definitization of new applicable wages..... 715

Evaluators
Conflict of interest alleged

Protest that conflict of interest existed because two evaluators of proposals were students at university whose museum was awarded contract is denied since relationship between evaluators and museum was so remote as to be practically nonexistent. Record shows that only one evaluator was part-time student at distant campus involving separate administrative entities and that museum was not involved in teaching. In fact, protester fared better overall in evaluation by this individual than with other evaluators..... 787

Factors other than price
Relative importance of price

Although RFP, which only stated that "cost is an important factor in selection of the offeror for contract award," was defective for failing to apprise offerors of *relative* importance of estimated costs vis-a-vis other specified evaluation factors, there was no prejudice because successful offeror's proposal received highest score on technical evaluation and offered lowest evaluated estimated costs, and proposals of other offeror in competitive range completely responded to all factors considered in award selection..... 60

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Factors other than price—Continued
"Successor employer doctrine" Page

Selected offeror would be successor contractor under Service Contract Act and proposes to hire substantial number of incumbent union workers but also to replace percentage of senior union workers with apprentices. In view of indication of labor unrest resulting therefrom, source selection official should ascertain if risk of possible labor unrest was properly assessed by evaluation board 715

Technical acceptability

Although cost was listed as least important of four evaluation factors used in evaluation of proposals leading to award of fixed price contracts, protester's claim that cost was ignored by agency is incorrect, since cost was considered both in computation of numerical scoring and again in source selection process. Since negotiated procurement was involved, award may be made to technically superior offeror, notwithstanding that offeror's higher price 244

Offerors are entitled to know whether procurement is intended to achieve minimum standard at lowest cost or whether cost is secondary to quality and mere statement that "cost and other factors" will be considered in award determination does not fully satisfy this requirement. However, basic technical deficiencies in proposal may not be attributed to agency's failure to fully emphasize importance of technical evaluation considerations 787

Proposal may be found outside of competitive range on basis of technical unacceptability without consideration of cost 787

Use of formula, which gave negligible weight to cost as evaluation factor, to evaluate cost proposals was improper because it was inconsistent with RFP statement that cost be given 20 percent of total evaluation weight. However, since protester was found in competitive range only because of clerical error in technical evaluation scoring and was improperly assigned maximum points for cost even though its cost proposal was determined to be unrealistic, and since RFP clearly indicated technical excellence was far more important (four times) than low cost, there was no prejudice justifying disturbing award 1315

If agency, in determining minimum needs, does not treat potential suppliers fairly or inform them as fully as possible of what is needed, it may reflect on reasonableness of minimum needs determination. Army machine gun selection process, by which MAG58 was found to be minimum need, was fair and although Army did not specifically set forth bases on which weapons would be evaluated prior to side-by-side tests, all parties realized weapon operational reliability was paramount performance characteristic, and that cost was secondary in importance .. 1362

Source selection authority's conclusion that protester's lower target and ceiling prices for fixed price incentive contract offered little in way

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Factors other than price—Continued
Technical acceptability—Continued Page
of advantages to Government and were not sufficiently significant to overcome selected firm's superiority in technical and operations area is supported by record and is consistent with evaluation criteria which gave more weight to technical and operations area. Protester's contention that negotiations were not conducted in compliance with 10 U.S.C. 2304(g) is denied 1450
Information
Failure to furnish
Offerors are entitled to know whether procurement is intended to achieve minimum standard at lowest cost or whether cost is secondary to quality and mere statement that "cost and other factors" will be considered in award determination does not fully satisfy this requirement. However, basic technical deficiencies in proposal may not be attributed to agency's failure to fully emphasize importance of technical evaluation considerations 787
Labor costs
In negotiated procurement accomplished under NASA Procurement Directive 70-15 which limits agency in discussing deficiencies in offerors' proposals during written or oral discussions, no harm to protester's competitive position is found even though other offeror was advised of deficiency during multiple "final negotiations," since NASA could properly have made necessary Davis-Bacon Act wage cost adjustments to offeror's proposal. Comment is made that this practice seems inconsistent with limitations imposed by procurement directive 715
Downward adjustment
Even if offeror's score for mission suitability should have been adjusted downward for its improper escalation of Davis-Bacon Act wage rates, impact on scoring would not be sufficient to make situation one where given point spread between competing proposals indicates significant superiority of one proposal over another 715
Method of evaluation
Defective
Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited 859
Formula
Incumbent protests against request for proposals (RFP) for aircraft maintenance services requiring offerors to insert hourly rate multiplied by estimated 600 man-hours for over and above work (11 percent of

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Method of evaluation—Continued
Formula—Continued Page

contract) because it does not provide for recognition of incumbent's experience and award to any other firm will not result in lowest cost. Protest is denied because no wide discrepancies in performance are expected as RFP contains stringent experience responsibility requirements, Government has significant control over man-hours to be expended, and man-hours estimate is reasonable. Moreover, recognition of experience is speculative and incumbent's suggested evaluation formulas would have no effect on competitive standing of offerors 1214

Use of formula, which gave negligible weight to cost as evaluation factor, to evaluate cost proposals was improper because it was inconsistent with RFP statement that cost be given 20 percent of total evaluation weight. However, since protester was found in competitive range only because of clerical error in technical evaluation scoring and was improperly assigned maximum points for cost even though its cost proposal was determined to be unrealistic, and since RFP clearly indicated technical excellence was far more important (four times) than low cost, there was no prejudice justifying disturbing award 1315

Improper

Allegation that part of successful proposal should have been rejected is not protest against request for proposals evaluation criteria, but against application of criteria by contracting agency in evaluating proposal. Protest filed within 10 working days after protester obtained and analyzed copy of contract, thereby learning of improper evaluation, is timely under General Accounting Office Bid Protest Procedures 1151

Technical proposals

Responding to prior GAO decision, agency furnishes rational support for bare conclusions reached by third evaluator (whose views prompted source selection) in conflict with technical evaluation committee's views. Committee evaluated and scored only original proposals but not additional information resulting from negotiations considered by third evaluator which reduced technical evaluation difference of technical committee in favor of protester. Additional information from lower cost awardee responded satisfactorily to technical problem raised by agency which, in large measure, accounted for technical evaluation difference between proposals. 54 Comp. Gen. 896, modified 499

Where Navy RFP for "turnkey" family housing failed to disclose manner in which price would be compared to technical evaluation criteria even though price was considered, i.e., award was made to offeror having lowest price per quality point ratio, disclosure of precise evaluation formula shortly before closing date for receipt of proposals was not meaningful disclosure. However, in view of advanced state of contract and since prejudice to unsuccessful offerors was speculative, protest is denied 839

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Performance-type specifications Page

Appropriateness of Navy's failure to conduct discussions with offerors within competitive range in fixed price "turnkey" family housing procurements and its award on initial proposal basis is questionable, in view of many varied acceptable approaches of meeting "turnkey" projects' performance-type specifications, since fact that offeror is highest rated does not mean it is offering such "fair and reasonable" price that oral or written discussions would not be required, even if there are several competitive offerors 839

Point rating
Advantage to Government award basis

Whether difference in point scores assigned to competing technical proposals is significant is for determination on basis of what difference might mean in performance and what it would cost Government to take advantage of it. Therefore, agency decision to award contract to less costly offeror despite competing offeror's higher technical point rating is proper exercise of discretion by selection officials 1111

Competitive range formula

Although use of predetermined cut-off score to establish competitive range is not in accord with sound procurement practice, it is not prejudicial to offeror eliminated from competitive range in view of offeror's low technical score of 44.8 points on 100-point scale in relation to scores of proposals included in competitive range (96.3, 82.1 and 88.2) 60

Determination of competitive range on basis of three highest technically evaluated proposals without consideration of price and relative weight *vis-a-vis* technical is improper since competitive range should be determined from array of scores of all proposals submitted and with regard to price. Although award will not be disturbed, agency is advised to preclude recurrence of such deficiency in future procurements. 49 Comp. Gen. 402, overruled 432

Incumbent protests against request for proposals (RFP) for aircraft maintenance services requiring offerors to insert hourly rate multiplied by estimated 600 man-hours for over and above work (11 percent of contract) because it does not provide for recognition of incumbent's experience and award to any other firm will not result in lowest cost. Protest is denied because no wide discrepancies in performance are expected as RFP contains stringent experience responsibility requirements, Government has significant control over man-hours to be expended, and man-hours estimate is reasonable. Moreover, recognition of experience is speculative and incumbent's suggested evaluation formulas would have no effect on competitive standing of offerors 1214

Differences significance

Since question of whether given point spread between two competing proposals as result of technical evaluation indicates significant superiority of one proposal over another is primarily within discretion of procuring agency and where point spread is 18 points out of 1,000, no basis exists to object to agency's determination that proposals were essentially equal 715

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Point rating—Continued
Evaluation guidelines Page

"Normalization" methodology used to compute dollar value of technical point spread between proposals did not conform to established relative weights and produced misleading result which could have affected source selection decision. Therefore, Comptroller General recommends that source selection decision be reconsidered on basis of appropriate computation 244

Even if offeror's score for mission suitability should have been adjusted downward for its improper escalation of Davis-Bacon Act wage rates, impact on scoring would not be sufficient to make situation one where given point spread between competing proposals indicates significant superiority of one proposal over another 715

Source selection officials' determination that competing proposals are technically equal, despite point spread of 47 out of 1000 and lower echelon requiring activity's conclusion that higher rated proposal is superior, is not subject to objection since point scores are only guides for decision-making 1111

Price consideration

Whether difference in point scores assigned to competing technical proposals is significant is for determination on basis of what difference might mean in performance and what it would cost Government to take advantage of it. Therefore, agency decision to award contract to less costly offeror despite competing offeror's higher technical point rating is proper exercise of discretion by selection officials 1111

Agency improperly assigned maximum points for cost in evaluating offerors' cost proposals where costs were not considered to be realistic without making independent cost projection of offerors' estimated costs 1315

Price consideration not mandatory

If agency, in determining minimum needs, does not treat potential suppliers fairly or inform them as fully as possible of what is needed, it may reflect on reasonableness of minimum needs determination. Army machine gun selection process, by which MAG58 was found to be minimum need, was fair and although Army did not specifically set forth bases on which weapons would be evaluated prior to side-by-side tests, all parties realized weapon operational reliability was paramount performance characteristic, and that cost was secondary in importance 1362

Price elements for consideration

Where award on basis of initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. GAO recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminated for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal. Modified in part by 55 Comp. Gen 972 201

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Price elements for consideration—Continued Page

Although cost was listed as least important of four evaluation factors used in evaluation of proposals leading to award of fixed price contracts, protester's claim that cost was ignored by agency is incorrect, since cost was considered both in computation of numerical scoring and again in source selection process. Since negotiated procurement was involved, award may be made to technically superior offeror, notwithstanding that offeror's higher price 244

Contention that price was given undue weight is not supported where evaluation provision stated that award would be made on basis of lowest price of three highest technically acceptable proposals 432

Although there were shortcomings and omissions in proposal of awardee under Navy negotiated fixed price "turnkey" family housing procurement and relatively minor inconsistencies and errors in technical evaluation of protester's and awardee's proposal, determination by Navy, in its broad discretion, that awardee had highest technically evaluated proposal had reasonable basis, and initial proposal award based upon lowest dollar per technical quality point ratio to awardee, who had higher priced, higher technically rated proposal, was reasonable despite protester's over $600,000 lower offered price 839

Where prices of proposed lease plan for automatic data processing equipment were effective through only 4 months of 96 months' systems life, plan should have been rejected. RFP required that fixed or determinable prices throughout systems life be offered. Fact that other lease plans included in contract cover remainder of systems life is immaterial, because RFP allowed only one plan to be considered in evaluation, and unacceptable plan was only plan actually evaluated. Therefore, awards were made without reasonable assurance of lowest overall cost to Government 1151

Anticipated costs

Fact that protester would have to absorb all direct costs exceeding its ceiling price in fixed price incentive contract does not negate evaluator's legitimate concern for anticipated costs over ceiling considering performance and administration problems which reasonably can be expected to result from contractor's loss position 1450

Proposals *v.* firm commitments

Agency erred in merely accepting, without more, offeror's proposed use of specific minority subcontractor, then using this fact as significant basis for award decision. Evaluation of resources which offeror merely proposes without contractual control or commitment is "patently irrational." Agency must be reasonably assured that resources are firmly committed to offeror, especially where consideration of factor in evaluation may be determinative of award 715

Propriety of evaluation

Since determinations of technical acceptability are within discretion of procuring agency, in absence of clear evidence that agency acted arbitrarily, and record in this case is devoid of any evidence which would justify our Office concluding that technical evaluations were without reasonable basis, there is no basis to take exception to awards 432

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Superior product offered Page
Where procuring activity believes one proposal is superior to another, determination made by higher echelon within agency that proposals are technically equal is not subject to objection since higher level personnel were acting within the scope of their authority for procurement involved 1111
Failure to discuss all areas
Weaknesses *v.* deficiencies
Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited 859
Fixed-price
Adjustment
Reimbursement
Failure of procuring activity to inform competing offeror in negotiated procurement for fixed-price contract that Govt. would directly reimburse contractor for interest on borrowings to finance plant expansion when reimbursement is prohibited by agency procurement regulation denied such offeror opportunity to compete on equal basis 802
Cost data, etc. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Government-furnished property
Use denied
Allegation that Govt. permitted successful offeror to use public research vessel in performance of contract but did not make vessel available to others is denied since record shows that assistance in obtaining vessels was not provided to any offeror and successful offeror acquired vessel in question 10 years ago under grant from entity which is unrelated to procuring agency 787
Justification
Conduct of negotiations with only firm considered to be in competitive range does not require additional D&F to support sole source award where procurement was negotiated pursuant to D&F justifying use of negotiation authority under FPR 1-3.210(a)(8) relating to procurement of studies and surveys 787
Requirement
Notwithstanding desired use of negotiated award method for given procurement or range of procurements, negotiation must be objectively justified in view of statutory preference (41 U.S.C. 252(c)) for formal advertising 693
Late proposals and quotations
Court interest
Although protest issues going to solicitation defects were filed after closing date for receipt of proposals and are therefore untimely raised, General Accounting Office will consider them because of interest of U.S. District Court in GAO decision 1111

CONTRACTS—Continued
Negotiation—Continued
Late proposals and quotations—Continued
Hand carried Page

Protester's proposal, hand-delivered after time specified as closing date for receipt of proposals, was properly not considered since it did not fall within one of exceptions in applicable late proposal clause in RFP which would permit its consideration. Protester's delay in obtaining documents until before closing date for receipt of proposals, which allegedly caused lateness of proposal, is deemed significant intervening cause of lateness 754

Identification erroneous

Where proposal package was received in proper office by required time, and such receipt was verified by procurement personnel in response to offeror's telephone call, but without reference to offeror's mislabeling of package with non-existent RFP number, proposal may be considered timely received, notwithstanding return of package to offeror unopened as result of incorrect labeling, and subsequent resubmission after closing date for submission of proposals but before award 36

Modification of proposal
Price increase

Contracting agency's position that late price increase submitted by successful offeror upon extending its proposal did not involve late modification to proposal or any unequal treatment to other offerors is without merit. Decision is affirmed that late price increase was late modification within meaning of RFP late proposals clause, and that agency's acceptance amounted to conduct of irregular discussions with successful offeror, since no discussions were held with other offerors within competitive range 972

Level of quality

None of the exceptions to formal advertising (as set forth in 41 U.S.C. 252(c)(1)-(15)) expressly authorizes use of negotiations only to secure desired level of quality of janitorial services or to obtain incentive-type contract. Moreover, analysis of legislative history of Federal Property and Administrative Services Act (40 U.S.C. 471), under which questioned negotiated award of services was made, shows that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of supplies or services 693

Minimum needs
Potential suppliers
Fair treatment

If agency, in determining minimum needs, does not treat potential suppliers fairly or inform them as fully as possible of what is needed, it may reflect on reasonableness of minimum needs determination. Army machine gun selection process, by which MAG58 was found to be minimum need, was fair and although Army did not specifically set forth bases on which weapons woud be evaluated prior to side-by-side tests, all parties realized weapon operational reliability was paramount performance characteristic, and that cost was secondary in importance 1362

CONTRACTS—Continued
Negotiation—Continued
Preprocurement tests Page
Agency may legitimately conduct preprocurement tests and discussions with potential suppliers as well as consider cost when formulating minimum needs ---- 1362
Minimum needs—Continued
Selection process
Not prejudicial
After side-by-side testing, technical and cost evaluation, and discussions with two sources in preprocurement context, Army selected foreign MAG58 machine gun instead of American-made M60E2. Although protester now complains that selection process was procurement and Army did not comply with applicable laws and regulations, protester entered into process with "eyes wide open" and was not prejudiced. Army's selection process was necessary to determine minimum machine gun needs, since there was insufficient data for Army to make such determination prior to completion of process ---- 1362
Mistakes
Erroneous identification on proposal
Where proposal package was received in proper office by required time, and such receipt was verified by procurement personnel in response to offeror's telephone call, but without reference to offeror's mislabeling of package with non-existent RFP number, proposal may be considered timely received, notwithstanding return of package to offeror unopened as result of incorrect labeling, and subsequent resubmission after closing date for submission of proposals but before award ---- 36
Multi-year procurements
Cost *v.* technical considerations
Award of negotiated contract on multi-year basis when technical considerations rather than cost were primary factors for award was inappropriate since multi-year contracting method envisions award on basis of lowest evaluated unit price ---- 244
Off-the-shelf items
While public exigency justification for negotiation imbues contracting officer with considerable range of discretion in determining extent of negotiation consistent with exigency of situation, and D & F reasonably supported sole-source negotiation, RFP should nevertheless be canceled and resolicited on unrestricted basis where protests prior to award indicate multimeter being procured is off-the-shelf item which other manufacturers can furnish within time required ---- 358
Replacement of "off the shelf" coaxial machine gun program involving limited testing and evaluation does not fall under Department of Defense (DOD) Design to Cost Policy Directive 5000.28. In any case, Directive is matter of DOD policy, and does not establish legal rights and responsibilities ---- 1362

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals
Best and final Page

Various changes made to specification requirements and evaluation scheme after submission of initial best and final offers, resulting in additional calls from new best and final offers, does not indicate presence of "auction bidding" since record shows changes were based on legitimate Govt. needs which warranted reopening negotiations. Neither is auction indicated by fact that reduced price offered in revised best and final offers was not related to change, since offerors are free to revise proposals in any manner they deem appropriate once negotiations are reopened..... 244

Authority in FPR 1–3.805–1(a)(5) to make award on "initial proposal" basis operates only to permit acceptance of proposal exactly as initially received. Consequently, award, incorporating revised cost proposal submitted by successful offeror in response to call for "best and final" offers (which constituted negotiation), was not made under initial proposal authority..... 693

Allegations were filed after receipt of best and final offers that RFP was deficient for failure to disclose (1) numerical values assigned to mission suitability factors, and (2) relative importance of cost or "other factors" to mission suitability; and failure to include incumbent contractor closeout costs are untimely since they relate to deficiencies apparent before date set for receipt of initial proposals. Argument that protester did not read RFP as making cost independent evaluation factor is rejected since evaluation section clearly indicates three distinct major areas of evaluation—mission suitability, cost, and other factors.... 715

Although doubt exists as to general appropriateness of Navy's failure to conduct discussions and making award on initial proposal basis in Navy "turnkey" family housing procurements and even though Navy's only justification of record for failing to conduct discussions was that awardee's proposal contained no major variances from RFP, Navy's failure was not unjustified or illegal in particular procurement, since offerors apparently submitted best possible offers at lowest prices, which allows inference that adequate competition existed to insure "fair and reasonable" price, and since awardee's price could be considered "fair and reasonable."..... 839

Where information in initial proposal has been improperly disclosed and award cannot be made on basis of initial proposals, conduct of negotiations and submission of best and final offers should be undertaken in such manner as to place offerors in relatively equal competitive positions and to eliminate, insofar as possible, unfair competitive advantage which any offeror may have obtained through improper disclosure of proposal information..... 1066

Additional rounds

Where Navy improperly disclosed first offeror's initial proposal prices and attempted to eliminate unfair advantage by disclosing both offerors' prices before best and final offers, first offeror was disadvantaged because it was not advised that second offeror had alleged mistake in its proposal, requesting substantial downward price correction. GAO recommends

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Best and final—Continued
Additional rounds—Continued Page
that unless second offeror agrees to release of its mistake in proposal claim to first offeror, it be eliminated from competition. If second offeror agrees to disclosure, Navy should obtain one additional round of best and final offers before proceeding with award 1066
Leveling alleged
Series of specification changes and requests for new best and final offers did not cause technical "leveling" of proposals, which refers to unfair practice of helping offeror bring unacceptable proposal up to level of other adequate proposals through successive rounds of negotiations, since only two proposals under consideration were both regarded as acceptable throughout testing and evaluation period and proposal which protester regards as having been brought up to level of its proposal was regarded by agency as superior proposal 244
Second offer technically unacceptable
Contracting officer's rejection of protester's second best and final offer as technically unacceptable was proper where cost data submitted with proposal appeared to materially change previously acceptable technical proposal and protester did not furnish adequate detailed explanation of apparent revisions 636
Contracting officer properly did not seek clarification of revised best and final offer which appeared to be inconsistent with offer previously submitted and with requirements of solicitation, since matter went to heart of promised performance and could only be resolved by reopening negotiaions with all offerors in competitive range, and reopening of negotiations after submission of second best and final offers was deemed not to be in best interests of Govt 636
Revised proposal submitted
Reopening of negotiations not required
Agency was not required to seek further clarification in negotiated procurement where protester substantially revised building design in best and final offer and failed to support such change with adequate documentation. In such circumstances contracting officer need not reopen negotiations but may lower his rating of final proposal submitted 1450
Time limit
Reasonable
Where offerors within competitive range are advised in morning of reopening of negotiations and requested to submit best and final offers by that same afternoon, reasonableness of action will not be questioned where all offerors are in fact able to respond within time limit 1295
Cost analysis
Fact that protester would have to absorb all direct costs exceeding its ceiling price in fixed price incentive contract does not negate evaluator's legitimate concern for anticipated costs over ceiling considering performance and administration problems which reasonably can be expected to result from contractor's loss position 1450

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Deviations Page

Authority in FPR 1-3.805-1(a)(5) to make award on "initial proposal" basis operates only to permit acceptance of proposal exactly as initially received. Consequently, award, incorporating revised cost proposal submitted by successful offeror in response to call for "best and final" offers (which constituted negotiation), was not made under initial proposal authority 693

Discussions
Not prejudicial

In negotiated procurement accomplished under NASA Procurement Directive 70-15 which limits agency in discussing deficiencies in offerors' proposals during written or oral discussions, no harm to protester's competitive position is found even though other offeror was advised of deficiency during multiple "final negotiations," since NASA could properly have made necessary Davis-Bacon Act wage cost adjustments to offeror's proposal. Comment is made that this practice seems inconsistent with limitations imposed by procurement directive 715

Relate to responsibility

Agency's improper release to one offeror of transfer agreement between protester, another offeror, and its predecessor, which contained basis of transfer but did not contain financial or business data so as to give insight into protester's proposal, was not prejudicial since, unlike situation where either unique technical approach or price is improperly disclosed to other offerors during negotiations, matter relates to protester's responsibility 715

Evaluation
Conflict between evaluators

Where procuring activity believes one proposal is superior to another, determination made by higher echelon within agency that proposals are technically equal is not subject to objection since higher level personnel were acting within the scope of their authority for procurement involved 1111

Errors
Not prejudicial

Where agency makes some errors in conducting cost evaluation of proposals but record indicates errors were not prejudicial in view of overall evaluation, award based on overall evaluation is not subject to objection 1111

Late. (*See* CONTRACTS, Negotiation, Late proposals and quotations)
Mistakes
Identification of proposal

Where proposal package was received in proper office by required time, and such receipt was verified by procurement personnel in response to offeror's telephone call, but without reference to offeror's mislabeling of package with non-existent RFP number, proposal may be considered timely received, notwithstanding return of package to offeror unopened as result of incorrect labeling, and subsequent resubmission after closing date for submission of proposals but before award 36

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Offeror
Developer and drafter of specifications Page

Estoppel has not been established against LEAA application of organizational conflict of interest guideline for grantee procurements to prevent grantee award to offeror, who developed and drafted specifications, notwithstanding assurances given to offeror by grantee that it could compete, since grantee's assurances cannot bind LEAA and LEAA apparently was not aware of all facts showing offeror came under guideline prior to communicating this fact to grantee 911

Oral
Offer and acceptance

Parties intended to be bound by agency's oral acceptance of offer to purchase rubber where past course of dealing and language of solicitation indicated that execution of written contracts was for purpose of confirming pre-existing agreement 833

In absence of statute or regulation requiring that Govt. sales contracts be in writing, telephonic offer to purchase stockpile rubber followed by timely telephonic acceptance creates valid and enforceable contract 833

Preparation
Costs

Since, contrary to protester's contention, quantity estimates in RFP were not substantially overstated, there is no evidence that other offeror knew protester's original price before it submitted best and final offer and determination not to obtain cost and pricing DD form 633 was in accordance with regulations, claim for proposal preparation costs will not be considered 875

Proposal preparation costs claim by offeror, whose award selection was not approved by LEAA because it came under LEAA organizational conflict of interest guideline imposed as limitation on grantee procurements, is denied since rejection of proposal was not arbitrary or capricious. Allocated overhead directly related to offeror's efforts to obtain waiver of LEAA guideline is not recoverable in any case 911

GAO recommendation made to Navy in prior decision sustaining protest—which contemplated renewal of competition among offerors, with possible result that existing turnkey housing contract be terminated for convenience—is withdrawn upon reconsideration. Information presented by agency and contractor concerning value of work in place at time of decision, plus extent of subcontracting for materials, indicates implementation of such recommendation is not feasible. Protester's only possible remedy rests with its claim for proposal preparation costs, which will be considered in future GAO decision if protester wishes to pursue claim 972

Qualifications of offerors

In any negotiated procurement, burden is on offerors to affirmatively demonstrate merits of their proposals. Where RFP contemplated fixed-price contract for supply of calibration system, not developmental effort, and instructed offerors to make such demonstration on paragraph-by-

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Qualifications of offerors—Continued Page
paragraph basis, offeror which proposed alternative approach to meeting requirements arguably bore even heavier burden of showing how its system would satisfy Army's needs 374
Foreign business authority
Question of offeror's authority to do business in foreign country cannot be determined conclusively by contracting agency. Contracting officer acted reasonably in awarding contract to offeror where information indicated that awardee was authorized by local authorities to do business. However, contracting officer should have determined whether in attempting to qualify itself to do business offeror has retained original identity so as to be eligible to receive award 1295
Responsiveness
Concept not applicable to negotiated procurements
While concept of responsiveness is not directly applicable to proposals submitted in negotiated procurement, RFP's repeated use of this term indicates that provisions so referenced were material requirements, and that proposal failing to conform to them would be considered unacceptable 1151
Revisions
Cost
Authority in FPR 1-3.805-1(a)(5) to make award on "initial proposal" basis operates only to permit acceptance of proposal exactly as initially received. Consequently, award, incorporating revised cost proposal submitted by successful offeror in response to call for "best and final" offers (which constituted negotiation), was not made under initial proposal authority 693
Equal opportunity to all offerors
Agency's failure to give opportunity to offerors, who had been informed during discussions that cost proposals were not realistic, to revise proposals to respond to this criticism was improper and in violation of FPR 1-3.805-1(b). Under such circumstances, discussions cannot be regarded as meaningful under applicable regulations 1315
Options
Generally. (*See* CONTRACTS, Options)
Patented articles, etc.
Agency may use data supplied with restrictive legend to evaluate drawings submitted by other offerors so long as such data is not released outside the Government. Moreover, where it appears that drawings were furnished to agency without restriction, General Accounting Office is precluded from concluding that Government does not have unrestricted rights in such drawings 1289
Prices
Comparison
Option prices *v.* offered prices under RFP
Grant of extraordinary contractual relief under Public Law 85-804—which has effect of making exercise of contract option viable possibility

CONTRACTS—Continued
Negotiation—Continued
Prices—Continued
Comparison—Continued
Option prices *v.* offered prices under RFP—Continued Page
and leads agency to compare contract option price with prices of proposals received under RFP—does not constitute improper use of Public Law 85-804 authority to negotiate contract. Proscription in act is that extraordinary authority cannot be used to negotiate contracts for supplies or services which are required to be procured by formal advertising, which is not what occurred in this case ---- 1479
Cost and pricing data evaluation
Although there were shortcomings and omissions in proposal of awardee under Navy negotiated fixed price "turnkey" family housing procurement and relatively minor inconsistencies and errors in technical evaluation of protester's and awardee's proposal, determination by Navy, in its broad discretion, that awardee had highest technically evaluated proposal had reasonable basis, and initial proposal award based upon lowest dollar per technical quality point ratio to awardee, who had higher priced, higher technically rated proposal, was reasonable despite protester's over $600,000 lower offered price ---- 839
Agency's selection of contractor on basis of lower evaluated costs is not improper, even though evaluation section of solicitation indicates cost realism as the least important evaluation factor, since solicitation, on Standard Form 33A, indicated that price (cost quantum) would also be considered and cost or price may become determinative factor in award selection when competing proposals are essentially equal, notwithstanding fact that other factors are of greater importance in overall evaluation scheme ---- 1111
Increase
Where award on basis of initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. GAO recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminated for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal. Modified in part by 55 Comp. Gen. 972 ---- 201
Life cycle cost *v.* purchasing price
Where prices of proposed lease plan for automatic data processing equipment were effective through only 4 months of 96 months' systems life, plan should have been rejected. RFP required that fixed or determinable prices throughout systems life be offered. Fact that other lease plans included in contract cover remainder of systems life is immaterial, because RFP allowed only one plan to be considered in evaluation, and unacceptable plan was only plan actually evaluated. Therefore, awards were made without reasonable assurance of lowest overall cost to Government ---- 1151

CONTRACTS—Continued
Negotiation—Continued
Prices—Continued
Reasonableness Page

Agency's failure to audit revised proposal is not objectionable, since contracting officer need not request audit when sufficient information is available to determine price reasonableness and determination that such information is available is not subject to question unless clearly erroneous---- 244

Since lowest-priced initial proposal is 47 percent in excess of Government estimate (28 percent in excess of revised upward estimate), General Accounting Office does not object to contracting officer's determination that fair and reasonable price under Armed Services Procurement Regulation 3-805.1(a)(v) is lacking, and that award should not be made on basis of initial proposals, notwithstanding desirability of such action where proposal information has been improperly disclosed---- 1066

Technical status of low offeror

Whether difference in point scores assigned to competing technical proposals is significant is for determination on basis of what difference might mean in performance and what it would cost Government to take advantage of it. Therefore, agency decision to award contract to less costly offeror despite competing offeror's higher technical point rating is proper exercise of discretion by selection officials---- 1111

Pricing data. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Propriety
Procedures deficient

Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage---- 280

Protests
Generally. (*See* **CONTRACTS, Protests**)
Reopening
Not in best interests of Government

Contracting officer properly did not seek clarification of revised best and final offer which appeared to be inconsistent with offer previously submitted and with requirements of solicitation, since matter went to heart of promised performance and could only be resolved by reopening negotiations with all offerors in competitive range, and reopening of negotiations after submission of second best and final offers was deemed not to be in best interests of Govt---- 636

CONTRACTS—Continued
Negotiation—Continued
Reopening—Continued
Not required Page
Agency was not required to seek further clarification in negotiated procurement where protester substantially revised building design in best and final offer and failed to support such change with adequate documentation. In such circumstances contracting officer need not reopen negotiations but may lower his rating of final proposal submitted. 1450
Propriety
Auction bidding not indicated
Various changes made to specification requirements and evaluation scheme after submission of initial best and final offers, resulting in additional calls from new best and final offers, does not indicate presence of "auction bidding" since record shows changes were based on legitimate Govt. needs which warranted reopening negotiations. Neither is auction indicated by fact that reduced price offered in revised best and final offers was not related to change, since offerors are free to revise proposals in any manner they deem appropriate once negotiations are reopened... 244
Fact that contractor's prices under prior contract are public information does not establish that issuing new solicitation for similar items subjects contractor, as offeror under new procurement, to auction..... 1479
Submission of best and final offers
Time limit
Reasonable
Where offerors within competitive range are advised in morning of reopening of negotiations and requested to submit best and final offers by that same afternoon, reasonableness of action will not be questioned where all offerors are in fact able to respond within time limit..... 1295
Requests for proposals
Acceptance time limitation
Contracting officer may allow offeror to waive expiration of proposal acceptance period and make valid award thereunder..... 432
Additional
Pending protest
Contention that agency issued three RFP's to circumvent effect of protest pending under separate RFP involves subjective motives of agency officials which cannot be conclusively established on written record. No provision of procurement law specifically prohibits concurrent procurement of work similar to work being sought under protested solicitation. Moreover, three additional RFP's have not eliminated need for work involved in protested procurement, and protester has not been deprived of its opportunity to compete for award..... 1281
Allegations of unfairness not substantiated
Incumbent protests against request for proposals (RFP) for aircraft maintenance services requiring offerors to insert hourly rate multiplied by estimated 600 man-hours for over and above work (11 percent of

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Allegations of unfairness not substantiated—Continued Page
contract) because it does not provide for recognition of incumbent's experience and award to any other firm will not result in lowest cost. Protest is denied because no wide discrepancies in performance are expected as RFP contains stringent experience responsibility requirements, Government has significant control over man-hours to be expended, and man-hours estimate is reasonable. Moreover, recognition of experience is speculative and incumbent's suggested evaluation formulas would have no effect on competitive standing of offerors---------- 1214
Ambiguous
Where under terms of RFP Govt. reserved right to make any number of awards, such reservation can only be regarded as also reserving to Govt. its right to make more than three awards even though it later indicated that its contemplation was to make maximum of three awards. While offerors were led to believe, because of confusing and misleading language in RFP, that three awards would be made, harm to competitive system generated by agency's action does not necessitate recommending that corrective action be taken---------- 529
Amendment
Oral
Protest against alleged action of contracting personnel in orally amending RFP so that only protester was required to use standard cost and pricing form different than all other competitors on day before closing date for receipt of proposals, submitted within 10 days of notification of reasons why agency would not consider proposal, is timely notwithstanding that action occurred before closing date for receipt of proposals since it was not impropriety apparent on face of solicitation. See 40 Fed. Reg. 17979, April 24, 1975---------- 754
Required for changes in RFP
Some changes in request for proposals (RFP) can be made appropriately by amendment, but substantial changes may justify canceling RFP and issuing new, revised RFP. While several reasons offered by agency for canceling RFP are subject to question, others indicate that certain amendments to RFP are appropriate and necessary. Amendments may revise RFP's terms to extent that, as agency claims, it would become preferable to cancel and resolicit---------- 1281
What constitutes
Protester is not justified in relying on oral statements of contracting personnel prior to closing date for receipt of proposals, which would have changed standard cost and pricing data form specified in RFP. Oral representation one day prior to closing date for receipt of proposals without confirmation in writing does not constitute amendment of RFP---------- 754

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Cancellation Page
Where GAO decision after lengthy protest proceeding recommended continuing competition under RFP, Environmental Protection Agency's (EPA) position that RFP is defective and should be canceled—formally documented for first time 3 months after decision and 10 months after protest was filed—raises serious questions concerning Agency's understanding of and adherence to fundamental procurements policies and procedures, since inaction by Agency in failing to ascertain and promptly disclose RFP deficiencies has created delay and confusion in procurement process 1281
After considering all circumstances of procurement, GAO cannot conclude that EPA's justifications for canceling RFP are clearly without reasonable basis. However, since several of alleged justifications are subject to question, GAO recommends that EPA Administrator review and reconsider proposed cancellation in light of points addressed in decision 1281
Off-the-shelf items procurement
While public exigency justification for negotiation imbues contracting officer with considerable range of discretion in determining extent of negotiation consistent with exigency of situation, and D & F reasonably supported sole-source negotiation, RFP should nevertheless be canceled and resolicited on unrestricted basis where protests prior to award indicate multimeter being procured is off-the-shelf item which other manufacturers can furnish within time required 358
Construction
Inconsistent provisions
In interpreting seemingly inconsistent provisions of RFP it is incumbent upon GAO to attempt to read provisions together 529
Copy requested
Failure to furnish
Where sole-source RFP was listed in Commerce Business Daily and protester was unable to obtain copy of RFP after reasonable efforts to do so prior to closing date, failure by agency to comply with request was contrary to ASPR 1-1002.1 358
Expiration date
Contracting officer may allow offeror to waive expiration of proposal acceptance period and make valid award thereunder 432
Interpretation. (*See* **CONTRACTS, Negotiation, Requests for proposals, Construction**)
Late receipt of proposal. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)
Preparation costs
Claim for proposal preparation costs is without merit since lack of good faith, arbitrariness or capriciousness must be established and no indication is apparent that proposals were not solicited and evaluated in good faith 787

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Production plan data
Verification
Page

Protest based upon contention that incumbent contractor and awardee under subject procurement knowingly submitted production plan containing incorrect and misleading data, which was incorporated into RFP, to gain competitive advantage over other offerors is denied since two separate agency audits show that data used was substantially correct. However, agency advised that verification of such data should be made prior to inclusion in solicitation rather than after protest as in instant case 875

Protests under
Allegations of unfairness not substantiated

Allegations of Army officials' persistent unfairness towards protester from time of initial proposal submission through conduct of negotiations, ultimate rejection of basic and alternate proposals, and participation in protest proceedings before GAO cannot be substantiated, since written record fails to demonstrate alleged unfairness, and in fact suggests reasonable explanations for Army's actions. Also, fact that agency officials declined for most part to join in oral discussion of issues at GAO bid protest conference is not objectionable, since agency responded to protester's allegations in several written reports, and conference is not intended to be formal hearing 374

Closing date
Date for receipt of initial proposals

Where solicitation clearly provided for only one award in particular region, while multiple awards were provided for in other regions, protest against provision for only one award filed after closing date for receipt of proposals was untimely 432

Favoritism alleged

Protest against alleged action of contracting personnel in orally amending RFP so that only protester was required to use standard cost and pricing form different than all other competitors on day before closing date for receipt of proposals, submitted within 10 days of notification of reasons why agency would not consider proposal, is timely notwithstanding that action occurred before closing date for receipt of proposals since it was not impropriety apparent on face of solicitation. See 40 Fed. Reg. 17979, April 24, 1975 754

Evidence lacking

Offeror's claim that agency showed favoritism toward other offeror by waiving certain specification requirements is not supported by record, which shows only that one specification requirement was relaxed and such relaxation accommodated both offerors 244

Contrary to protester's assertions, Navy denies that contractor received "insider information" substantially prior to closing date for receipt of proposals relating to precise evaluation criteria and numerical breakdown. Also, GAO records do not indicate that awardee was supplied this information during bid protest involving prior procurement having identical evaluation scheme 839

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Protests under—Continued
Manning requirements Page

Incumbent protests against request for proposals (RFP) for aircraft maintenance services requiring offerors to insert hourly rate multiplied by estimated 600 man-hours for over and above work (11 percent of contract) because it does not provide for recognition of incumbent's experience and award to any other firm will not result in lowest cost. Protest is denied because no wide discrepancies in performance are expected as RFP contains stringent experience responsibility requirements, Government has significant control over man-hours to be expended, and man-hours estimate is reasonable. Moreover, recognition of experience is speculative and incumbent's suggested evaluation formulas would have no effect on competitive standing of offerors..... 1214

Merits

Merit of untimely protest concerning sufficiency of solicitation's evaluation factors is considered since arguments are intertwined with other timely and related issues concerning evaluation of protester's proposal..... 787

Although protest against validity of scrap and waste factors contained in RFP filed after closing date for receipt of best and final offers is untimely under our bid protest procedures then in effect, protest will be considered on merits since it raises issue significant to procurement practices or procedures in that allegation relates to basic principle of competitive system..... 875

Off-the-shelf items

While public exigency justification for negotiation imbues contracting officer with considerable range of discretion in determining extent of negotiation consistent with exigency of situation, and D & F reasonably supported sole-source negotiation, RFP should nevertheless be canceled and resolicited on unrestricted basis where protests prior to award indicate multimeter being procured is off-the-shelf item which other manufacturers can furnish within time required..... 358

Timeliness

Where solicitation clearly provided for only one award in particular region, while multiple awards were provided for in other regions, protest against provision for only one award filed after closing date for receipt of proposals was untimely..... 432

Since question of whether negotiated award method is proper for GSA's awards of janitorial services is of widespread interest, given number of janitorial services' awards made by GSA and number of protests pending involving negotiated janitorial services' awards, protest will be considered even though untimely raised under Bid Protest Procedures.. 693

General Accounting Office Bid Protest Procedures provide that requests for reconsideration must be filed within 10 working days by appropriate interested party or agency. However, considering agency's request that modification of recommendation in GAO decision be allowed—due to changing circumstances in procurement—has also been recognized as appropriate and is not inconsistent with Bid Protest Procedures. To decline to consider such information could jeopardize best interests of Government..... 1281

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Protests under—Continued
Timeliness—Continued
Solicitation improprieties Page

Protester's claim that agency unduly restricted competition by seeking production proposals only from development contractors instead of conducting new competition is untimely, since under 4 C.F.R. 20.2(a) issue should have been raised prior to date set for receipt of proposals 244

Allegations were filed after receipt of best and final offers that RFP was deficient for failure to disclose (1) numerical values assigned to mission suitability factors, and (2) relative importance of cost or "other factors" to mission suitability; and failure to include incumbent contractor closeout costs are untimely since they relate to deficiencies apparent before date set for receipt of initial proposals. Argument that protester did not read RFP as making cost independent evaluation factor is rejected since evaluation section clearly indicates three distinct major areas of evaluation—mission suitability, cost, and other factors 715

Protest against alleged action of contracting personnel in orally amending RFP so that only protester was required to use standard cost and pricing form different than all other competitors on day before closing date for receipt of proposals, submitted within 10 days of notification of reasons why agency would not consider proposal, is timely notwithstanding that action occurred before closing date for receipt of proposals since it was not impropriety apparent on face of solicitation. See 40 Fed. Reg. 17979, April 24, 1975 754

Although protest issues going to solicitation defects were filed after closing date for receipt of proposals and are therefore untimely raised, General Accounting Office will consider them because of interest of U.S. District Court in GAO decision 1111

Restrictive of competition

Where under terms of RFP Govt. reserved right to make any number of awards, such reservation can only be regarded as also reserving to Govt. its right to make more than three awards even though it later indicated that its contemplation was to make maximum of three awards. While offerors were led to believe, because of confusing and misleading language in RFP, that three awards would be made, harm to competitive system generated by agency's action does not necessitate recommending that corrective action be taken 529

Protest based upon contention that incumbent contractor and awardee under subject procurement knowingly submitted production plan containing incorrect and misleading data, which was incorporated into RFP, to gain competitive advantage over other offerors is denied since two separate agency audits show that data used was substantially correct. However, agency advised that verification of such data should be made prior to inclusion in solicitation rather than after protest as in instant case 875

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Scrap and waste factors
Validity
Page

Although protest against validity of scrap and waste factors contained in RFP filed after closing date for receipt of best and final offers is untimely under our bid protest procedures then in effect, protest will be considered on merits since it raises issue significant to procurement practices or procedures in that allegation relates to basic principle of competitive system---- 875

Variation from requirements

Contentions made by contracting agency—to effect that turnkey housing RFP did not require specific responses in proposals, that deviations from requirements in successful proposal were minor, that blanket offer covered all requirements, that price of successful proposal was "reasonable" within provisions of ASPR 3-805, and generally, that all offerors were fairly treated—do not convincingly demonstrate errors of fact or law in prior GAO decision. Decision is affirmed that award to proposal which substantially varied from RFP requirements was improper in light of provisions of 10 U.S.C. 2304(g) and ASPR 3-805---- 972

Requests for quotations
Award basis

Assertion that engine selected by Navy was not authorized for use with lightweight fighter is without merit, since record indicates selected engine is modified version of baseline engine listed in solicitation. Also, record indicates Navy did not improperly estimate offerors' engine modification costs---- 307

Testing, inspection, etc., requirements
Dual standards

Where request for quotations provided only for testing and inspection of product delivered under contract, failure to require preaward sample from manufacturer where such sample was required from surplus dealer creates dual standard which casts doubt on reasonableness of requirement, contrary to principles of free and open competition. However, since contract performance is completed no corrective action is available---- 648

Samples
Rejection
Reasonable basis

Although offeror-protester supplied surplus items from same lot to another agency, rejection of sample submitted in connection with current procurement was not without reasonable basis where, contrary to current procurement, protester was not required to refurbish deteriorative components under prior contract---- 648

Time for submission

Although grounds of protest regarding procuring agency's request that protester submit preaward samples are untimely under Interim Bid Protest Procedures and Standards [4 CFR 20 (1974)], in effect when protest was filed, since samples were submitted without objection and protest was not filed until approximately 5 months later, issues are considered since they are significant to procurement procedures---- 648

CONTRACTS—Continued
Negotiation—Continued
Selection process *v.* procurement
Determination of minimum needs
Page
After side-by-side testing, technical and cost evaluation, and discussions with two sources in preprocurement context, Army selected foreign MAG58 machine gun instead of American-made M60E2. Although protester now complains that selection process was procurement and Army did not comply with applicable laws and regulations, protester entered into process with "eyes wide open" and was not prejudiced. Army's selection process was necessary to determine minimum machine gun needs, since there was insufficient data for Army to make such determination prior to completion of process 1362
Sole source basis
Broadening competition
Although procurement assigned priority designation 02 is sufficient authority for contracting officer to negotiate under public exigency exception rather than formally advertise, such authority does not give contracting officer authority to negotiate with only one source where other sources can meet agency's needs as applicable statute and regulations require solicitation of proposals, including price, from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and time limitations involved 358
Determination and findings
Failure to prepare
Since Army machine gun selection program was not procurement but rather process to determine minimum needs, no written Determinations and Findings (D&F) had to be prepared prior to selection of foreign machine gun as minimum need. In any case, agency's failure to prepare D&F prior to conducting negotiations preparatory to executing sole-source contract is deviation of form rather than substance 1362
Studies and surveys
Conduct of negotiations with only firm considered to be in competitive range does not require additional D&F to support sole source award where procurement was negotiated pursuant to D&F justifying use of negotiation authority under FPR 1-3.210(a)(8) relating to procurement of studies and surveys 787
Justification
Agency's decision to procure design and development of improved system from sole-source supplier without breaking out one component of system for competitive procurement is not subject to objection where record shows agency had reasonable basis for decision 1019
Buy American Act, 41 U.S.C. 10a-d, is not applicable to proposed MAG58 machine gun purchase from foreign firm because Army has sufficient sole-source award justification and can therefore validly determine that MAG58's are not manufactured in United States "in sufficient and reasonably available commercial quantities and of a satisfactory quality." Also, Army discretionary determination that Act's application would not be in public interest cannot be questioned. In addition, Act does not apply to initial quantity of weapons to be purchased for foreign deployment and domestic training for foreign deployment 1362

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Key component breakout Page

Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs ---- 1019

Propriety

Low bidder offering surplus parts under IFB for supply of QPL aircraft parts appears to be responsive bidder, inasmuch as surplus bids were not precluded in QPL procurements and bid offering new, unused, unreconditioned, nondeteriorative surplus parts was not in violation of "New Material" clause. Decision to cancel and negotiate sole-source award on virtually same basis to surplus bidder was proper ---- 1

Agency's decision to procure design and development of improved system from sole-source supplier without breaking out one component of system for competitive procurement is not subject to objection where record shows agency had reasonable basis for decision ---- 1019

Qualified products listing. (*See* **CONTRACTS, Specifications, Qualified products, Sole source negotiation**)
Specifications. (*See* **CONTRACTS, Specifications**)
Specifications conformability. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Specifications unavailable
Basis for exception to formal advertising

Impossibility of drafting adequate specifications is criterion for authorizing negotiation under 10 U.S.C. 2304(a)(10); Armed Services Procurement Regulation 3-210.2(xiii). Where record does not show reasonable grounds to support conclusion of "impossibility," neither difficulty of drafting adequate specification for radio sets nor desire for negotiations in order to enhance or assure offerors' understanding of requirements justifies negotiation in lieu of advertised procurement. General Accounting Office (GAO) recommends that if Army cannot find other basis to authorize current ongoing negotiated procurement, RFP should be canceled ---- 1479

Subcontracts
Invoices of subcontractors
Determination of fees of prime contractors

Alternate contract payment procedure, whereby prime contractor's fee is percentage of subcontractor's invoice, and there is no requirement that subcontractor submit fixed-price proposal, violates prohibition of 10 U.S.C. 2306(a) against cost-plus-a-percentage-of-cost since (1) payment is based on predetermined percentage rate; (2) percentage rate is applied to actual performance costs; (3) contractor entitlement is uncertain at time of contracting; and (4) contractor entitlement increases commensurately with increased performance costs ---- 554

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Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited 859

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Where exercise of contract option required Navy to furnish various items of Govt. furnished property (GFP), but contract clause authorized Navy to unilaterally delete items of GFP and make necessary equitable adjustment, full value of unobligated and undelivered GFP should not be considered "obligation" as of time of option exercise for purposes of assessing violation of 31 U.S.C. 665 or 41 U.S.C. 11. Exercise of DLGN 41 contract option did not violate these statutes since recorded obligations and other binding commitment did not exceed available appropriations---- 812
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Army proposal to pay interest on amounts already due or subsequently to become due and payable under contracts executed in violation of Antideficiency Act, and for which payment has been delayed due to unavailability of funds, is improper since this would increase amount of overobligation, constituting new and additional violation of Antideficiency Act 768

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GAO will not consider protester's request that termination for default of turnkey housing contract be recommended as appropriate remedy in connection with prior decision upholding protest. Questions involved in protest as to adequacy of contract performance are matters of contract administration—which is function of contracting agency, not GAO. Also, performance defects alleged by protester do not necessarily establish grounds for termination for default, and contracting agency states it has no cause to take such action 972

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Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to requirement and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price 1159

Proprietary, etc., items. (*See* **CONTRACTS, Data, rights, etc.**)
Protests
Abeyance pending court action
Consideration nonetheless by GAO

Where small business size protest is received 1½ hours after award made on bid opening date, last day of fiscal year, termination of contract is recommended, since SBA subsequently sustained protest; contracting officer has indicated that procurement would have been referred to SBA under standard operating procedure if received before award; and contracting officer exceeded authority in that ASPR 1–703(b)(5) precludes small business set-aside award prior to expiration of 5 working days after bid opening in absence of urgency determination 439

Where circuit court grants motion to vacate district court's judgment on issues contained in protest and remands cause to district court with direction to dismiss action as moot, district court's opinion is eliminated, is not *res judicata*, and is not bar to consideration of protests, since it cannot be considered to have been decided by district court 546

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A 1975 GAO audit report expressed reservations whether contractor's 85 to 90 percent manufacturing of radio sets in Mexico satisfies Buy American Act requirement that materials must be "manufactured in the United States" in order to qualify as domestic end product, and recommended ASPR Committee consideration of issue. Recent protest decision in different factual context repeated recommendation. Considering Mexican manufacturing issue in present protest is therefore viewed as inappropriate ---- 1479
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Bidder who fails to submit, prior to bid opening, affirmative action plan under Part II of Bid Conditions, but who has properly executed and submitted Part I certification wherein bidder "will be bound by the provisions of Part II" for listed appropriate trades to be used in the work, has submitted responsive bid; that pages of Part II were not submitted with bid is of no consequence. Bids containing no Part I or Part II documentation were nonresponsive. Recommendation is made that grantor agency, which concluded that all bids were nonresponsive, advise grantee to award contract to bidder who submitted Part I certification ---- 262
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Receipt of no responsive bids to IFB requires resolicitation and, although protest that specifications were restrictive would ordinarily not be decided in that event, since it seems apparent that resolicitation will be essentially on same specifications and protester has indicated it will therefore protest and record has been completely developed, protest will be considered now ---- 445
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Protest raising issues concerning interpretation of appropriation act and "congressional intent" as public policy will be considered in this case involving selection of a Navy Air Combat Fighter (NACF), whether or not timely filed, since protest raises significant issues concerning relationship of Congress and Executive on procurement matters. Issues regarding evaluation and competition will also be considered since they are substantially intertwined with first issue and since GAO has continuing audit interest in NACF program 307
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Since agency's determination as to small business firm's responsibility was not reasonable, options should not be exercised and future needs resolicited based upon proper statement of actual needs in clear and precise terms 1051
Contracting officer's affirmative responsibility determination
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Exceptions
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Since question whether protester's data is proprietary will not be considered, capability of prime contractor to successfully complete contract without data will not be questioned 1040
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Not supported by record
Record does not support affirmative responsibility determination where agency made *sub silentio* finding that bidder had demonstrated level of achievement equivalent to or in excess of minimum level of experience set forth in IFB, i.e., that it had worked on more complex equipment for requisite length of time (approximately 5 years) wherein same sort of expertise needed in instant contract was brought to bear, since record indicates only that bidder (1) had some experience with equipment; (2) had some experience with highly sophisticated equipment; and (3) had 5 years' general experience, and does not indicate extent of experience with either specific or more complex equipment 1051
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Security clearance requirement waived—Continued Page
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In regard to contention that bidder had no opportunity to comment on agency's termination for convenience estimate furnished to GAO, Bid Protest Procedures recognize appropriateness of withholding information which, as here, agency believes is not subject to disclosure. Modified by 56 Comp. Gen. —— (B-185302, Jan. 27, 1977)..... 1412
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Contentions raised by prior contractor for radio sets—which did not submit proposal under RFP—will be considered despite allegations that

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Protest raising issues concerning interpretation of appropriation act and "congressional intent" as public policy will be considered in this case involving selection of a Navy Air Combat Fighter (NACF), whether or not timely filed, since protest raises significant issues concerning relationship of Congress and Executive on procurement matters. Issues regarding evaluation and competition will also be considered since they are substantially intertwined with first issue and since GAO has continuing audit interest in NACF program---- 307
Untimely protest is considered on merits because it reflects serious misunderstanding by agency of concepts of responsibility and responsiveness as applied in prior GAO decisions---- 999
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When court expresses interest in GAO decision, merits of protest will be considered even though protest might have been untimely filed--- 1019
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GAO will undertake reviews concerning propriety of contract awards under Federal grants made by grantees in furtherance of grant purposes upon request of prospective contractors where Federal funds in a project are significant 390

Prior reviews of contracts awarded under Federal grants are considered consistent, in the main, with principles enunciated here. However, to extent any prior precedent may be inconsistent it should not be followed. B-178960, September 14, 1973, overruled 390

Interested parties

Requirement that party be "interested" in order to lodge formal protest serves to ensure party's diligent participation in protest process so as to sharpen issues and provide complete record on which correctness of challenged procurement may be decided 397

Because other issues raised by non-small business, non-8(a) concern in protest against (8a) award are indirectly related to basic eligibility determination of firm proposed for 8(a) award, it is considered that concern is interested party as to other issues 397

Protester should be considered as interested party absent objective evidence to contrary. Mere allegation by awardee based upon its experience that protester was not eligible small business under SBA "Grandfather" clause is insufficient, considering significance of issues involved, to show protester as uninterested in protest dealing with sufficiency of notice of applicable size standard 617

In determining whether protester satisfies "interested party" requirement of GAO Bid Protest Procedures, consideration is given to nature of issues raised by protest and direct or indirect benefit or relief sought by protester. Accordingly, division of low bidder company whose bid was rejected, which would have corporate responsibility to perform if awarded contract, is "interested party" and may pursue formal protest 1467

Unions

Even if labor union is assumed to be an "interested party," there is no indication that it submitted written comments during the course of protest proceedings. Therefore, its letter submitted after decision was rendered is not for consideration in connection with pending request for reconsideration of protest decision. Modified by 56 Comp. Gen. (B-185302, Jan. 26, 1977) 1412

Small business subcontracting

Non-8(a), non-small business concern is considered interested party so long as it contends that concern proposed for 8(a) award does not belong in 8(a) category whose application prevents protester from competing; test of interested party for 8(a) protests clarifies prior discussion in *Kleen-Rite Janitorial Services, Inc.*, B-178752, March 21, 1974, 74-1 CPD 139; *City Moving and Storage Company, Inc.*, B-181167, August 16, 1974, 74-2 CPD 104; and *Kings Point Manufacturing Company, Inc.*, 54 Comp. Gen. 913, 75-1 CPD 264 397

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Bid Protest Procedures
Allegation that protest was untimely filed is unfounded since protester received formal notification as to reasons telegraphic modification was submitted late and not for award consideration on June 16 and telegram protesting award was received at GAO within 10 working days on June 20. See sec. 20.2(a) of Bid Protest Procedures, 40 Fed. Reg. 17979 (1975) 220
General Accounting Office Bid Protest Procedures provide that requests for reconsideration must be filed within 10 working days by appropriate interested party or agency. However, considering agency's request that modification of recommendation in GAO decision be allowed—due to changing circumstances in procurement—has also been recognized as appropriate and is not inconsistent with Bid Protest Procedures. To decline to consider such information could jeopardize best interests of Government 1281
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In regard to contention that bidder has no opportunity to comment on agency's termination for convenience estimate furnished to GAO, Bid Protest Procedures recognize appropriateness of withholding information which, as here, agency believes is not subject to disclosure. Modified by 56 Comp. Gen. —— (B–185302, Jan. 26, 1977) 1412
Improprieties and timeliness
Protest alleging arbitrary and capricious action on part of contracting officer in restricting procurement wholly to small business without making independent examination of competitive market conditions, filed after bid opening, is untimely under 20.2(b)(1) of Bid Protest Procedures which requires that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening be filed prior to bid opening. Sec. 20.2(b)(3) exception to 20.2(b)(1), concerning protest by mailgram, is inapplicable, as mailgram was not sent by third day prior to final date for filing protest 133
Allegation that contracting officer's original determination to advertise solicitation on unrestricted basis should not have been reversed

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by DSA, first raised almost 10 weeks after issuance of amendment which reversed contracting officer's determination, is untimely and not for consideration under 4 CFR 20.2(a) of then applicable Interim Bid Protest Procedures and Standards, which requires that such protests be filed prior to bid opening 475
Question regarding propriety of IFB's failure to reference applicable SBA "Grandfather" clause (used in determining small business size status) effective 7 days prior to bid opening, where IFB indicated different dollar threshold for small business standard, is significant issue under Bid Protest Procedures 617
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Fact that issues contained in protest are also contained in protester's suit in district court would ordinarily be bar to consideration of protest absent request or expression of interest by court in GAO decision. However, protest will be considered, since Govt. has not filed answer, suit is not active and protester has indicated that, if suit will bar consideration of protest, it will have court action dismissed without prejudice under rule 41(a)(1) of Federal Rules of Civil Procedure 546
Significant issues requirement
Since on many occasions questions raised by protester regarding deficiencies in negotiated solicitation have been discussed, there is no basis to conclude that issues untimely raised are of required level for consideration as significant issues 715
Although protest against validity of scrap and waste factors contained in RFP filed after closing date for receipt of best and final offers is untimely under our bid protest procedures then in effect, protest will be considered on merits since it raises issue significant to procurement practices or procedures in that allegation relates to basic principle of competitive system 875
Public policy, etc.
Protest raising issues concerning interpretation of appropriation act and "congressional intent" as public policy will be considered in this case involving selection of a Navy Air Combat Fighter (NACF), whether or not timely filed, since protest raises significant issues concerning relationship of Congress and Executive on procurement matters. Issues regarding evaluation and competition will also be considered since they are substantially intertwined with first issue and since GAO has continuing audit interest in NACF program 307
Subcontract awards
Merits
Where Government was integrally involved in approving "equal" equipment of prospective subcontractor, jurisdiction will be exercised to consider merits of protest against award of subcontract 1272
Subcontractor protests
Contention that in view of audit and settlement responsibilities (31 U.S.C. 41, 53, and 71) General Accounting Office lacks authority to divest itself of subcontract reviews as matter of policy is rejected 1220

CONTRACTS—Continued
Protests—Continued
Timeliness Page

Allegation that protest was untimely filed is unfounded since protester received formal notification as to reasons telegraphic modification was submitted late and not for award consideration on June 16 and telegram protesting award was received at GAO within 10 working days on June 20. See sec. 20.2(a) of Bid Protest Procedures, 40 Fed. Reg. 17979 (1975) ---- 220

Although protest, insofar as it concerns IFB discrepancy in designating correct bid opening time, is untimely under Bid Protest Procedures, since it was not filed prior to bid opening, balance of protest, i.e., contention that protester's bid should not have been rejected as late, is timely because protester filed within 10 working days after it became aware of basis for protest ---- 735

Agency reports

Though it is contended that contracting agency's procrastination in responding to protest has prevented protester from obtaining equitable and just result, record does not support allegation that all delays were caused by agency, but rather shows that substantial delays in protest proceedings are directly attributable to protester's actions ---- 1281

Considered on merits

Although protest against exclusion from competitive range was untimely filed under GAO's bid protest procedures, issues raised by protest will be considered on merits in view of GAO's continuing audit interest in particular procurement and assurances made by GAO representatives that protest would be considered. However, untimely protest of another protester against exclusion from competitive range filed over 4 months after protester became aware of reasons its proposal was rejected will not be considered on merits in view of advanced stage of GAO review ---- 60

Untimely protest is considered on merits because it reflects serious misunderstanding by agency of concepts of responsibility and responsiveness as applied in prior GAO decisions ---- 999

Protest filed with General Accounting Office also filed before court will be considered on merits despite presence of several untimely issues, since court has expressed interest in GAO decision ---- 1160

Constructive notice of GAO procedures

Although successful offeror for computer services in facilities dedicated exclusively to FEA did not comply with RFP "internal" security requirement of protection from read access by FEA users to other FEA users' programs and codes and operating system located in computer's main memory, countervailing factors mandate against disturbing award because of agency's improper relaxation of mandatory requirement without informing other offerors, e.g., lack of certainty of deficiency's effect on award selection or of whether offerors would have changed offers if specification was relaxed, agency's short life, and large excess costs and adverse effect on agency's performance of basic functions ---- 60

Contract award notice effect

Protest filed after agency forwarded notice of award of construction contract to low bidder must be considered as being filed after award since telegraphic notice of award constituted official award of contract ---- 936

CONTRACTS—Continued
Protests—Continued
Timeliness—Continued
Information copy of protest to agency *v.* formal copy to GAO Page
Fact that information copy of protest to GAO was received by procuring activity prior to bid opening does not convert otherwise untimely direct protest to GAO (protest was not received until after bid opening) under Bid Protest Procedures, since information copy was not protest to procuring activity such as to make that portion of procedures dealing with initial protests to agencies applicable 133
Negotiated contracts
Since question of whether negotiated award method is proper for GSA's awards of janitorial services is of widespread interest, given number of janitorial services' awards made by GSA and number of protests pending involving negotiated janitorial services' awards, protest will be considered even though untimely raised under Bid Protest Procedures 693
Merit of untimely protest concerning sufficiency of solicitation's evaluation factors is considered since arguments are intertwined with other timely and related issues concerning evaluation of protester's proposal 787
Allegation that part of successful proposal should have been rejected is not protest against request for proposals evaluation criteria, but against application of criteria by contracting agency in evaluating proposal. Protest filed within 10 working days after protester obtained and analyzed copy of contract, thereby learning of improper evaluation, is timely under General Accounting Office Bid Protest Procedures 1151
Protest on issues other than those considered
Issue first raised by protester at conference before General Accounting Office will not be considered on its merits, since it was entirely independent of those raised and addressed prior to that time, and its basis was known by protester more than 10 working days before conference 1467
Significant issue exception
Although grounds of protest regarding procuring agency's request that protester submit preaward samples are untimely under Interim Bid Protest Procedures and Standards [4 CFR 20 (1974)], in effect when protest was filed, since samples were submitted without objection and protest was not filed until approximately 5 months later, issues are considered since they are significant to procurement procedures 648
Solicitation improprieties
Allegations were filed after receipt of best and final offers that RFP was deficient for failure to disclose (1) numerical values assigned to mission suitability factors, and (2) relative importance of cost or "other factors" to mission suitability; and failure to include incumbent contractor closeout costs are untimely since they relate to deficiencies apparent before date set for receipt of initial proposals. Argument that protester did not read RFP as making cost independent evaluation factor is rejected since evaluation section clearly indicates three distinct major areas of evaluation—mission suitability, cost, and other factors 715

CONTRACTS—Continued
Protests—Continued
Timeliness—Continued
Solicitation improprieties—Continued Page
Protester's post-award assertion that solicitation was defective for failing to include as evaluation factor cost of possible damages arising from release of alleged proprietary data is untimely filed under Bid Protest Procedures 1040
Apparent prior to bid opening
Omission of one line item, which may have substantial cost impact in relation to other 53 items in IFB for acoustical ceiling work, does not constitute compelling reason to reject all bids and readvertise since other items are valid representation of Govt.'s needs and alternate methods exist to satisfy need of omitted item 488
Untimely protest consideration basis
Protest alleging arbitrary and capricious action on part of contracting officer in restricting procurement wholly to small business without making independent examination of competitive market conditions, filed after bid opening, is untimely under 20.2(b)(1) of Bid Protest Procedures which requires that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening be filed prior to bid opening. Sec. 20.2(b)(3) exception to 20.2(b)(1), concerning protest by mailgram, is inapplicable, as mailgram was not sent by third day prior to final date for filing protest 133
General Accounting Office Bid Protest Procedures provide that requests for reconsideration must be filed within 10 working days by appropriate interested party or agency. However, considering agency's request that modification of recommendation in GAO decision be allowed—due to changing circumstances in procurement—has also been recognized as appropriate and is not inconsistent with Bid Protest Procedures. To decline to consider such information could jeopardize best interests of Government 1281
Unsubstantiated allegation
Absence of evidence in record
Absent further evidence in record, unsubstantiated allegation that DSA has improperly decided to restrict all hat procurements within SIC 2352 to small business will not be considered 475
Wording
Mailgram to procuring activity prior to award advising that "* * * should the low bid be withdrawn the specifications are quite clear as to the procedure for this basis of award for which we would be in line" should have been construed as a preaward protest, but does not affect validity of award which is not subject to question 100
Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Reformation. (*See* **CONTRACTS, Modification**)
Requests for quotations
Negotiated procurement. (*See* **CONTRACTS, Negotiation, Requests for quotations**)

CONTRACTS—Continued
Requirements
Estimated amounts basis
Best information available Page
Where agency cannot identify precise future requirements and therefore requests estimated costs on basis of hypothetical plan which includes the types of tasks and services actually required, estimated costs submitted by offerors provide adequate basis for cost comparison between competing proposals to determine probable relative cost to agency of accepting one proposal rather than another 1111
It is not impossible to forecast costs of items for 1 year in advance even though there is no guaranteed minimum quantity since solicitation supplied estimates of quantities which would be ordered, estimates being based on information made available to GSA such as quantities of particular item ordered on prior contracts. These estimates provide guide or basis for bidding. Also, as basis to estimate freight costs, solicitation listed final destination for each item and estimated peak monthly requirement for each item 1226
Maximum/minimum order limitation
Determination to issue requirements solicitation to satisfy needs of Government for cleaning compounds, solicitation containing minimum and maximum order limitation, is valid determination within ambit of sound administrative discretion where solicitation is issued pursuant to requirements of section 1-3.409 of Federal Procurement Regulations and section 5A-72.105-3(c) of General Services Procurement Regulations and results in overall economy to Government 1226
Prices
Escalation clause evaluation
No basis is seen to object to contracting officer's finding that radio sets available under existing contract option will fulfill existing need of Government. While comparison of option prices (including effect of possible price escalation) and prices of proposals submitted under RFP may be difficult, this does not establish that consideration of option as means of of satisfying Government's requirements is precluded 1479
Overall costs
Fact that prices of items under contract calling for definite quantity with fixed delivery might be lower than prices under requirements contract does not mean that the overall cost to Government is less since indirect costs associated with definite quantity contract must be considered such as cost of extra warehouse storage for additional inventory, generated excess inventory, and cost of transporting excess inventory to other locations 1226
Research and development
Costs
Analysis
Evaluation factors
Responding to prior GAO decision, agency furnishes rational support for bare conclusions reached by third evaluator (whose views prompted source selection) in conflict with technical evaluation committee's views. Committee evaluated and scored only original proposals but not additional information resulting from negotiations considered by third evaluator which reduced technical evaluation difference of technical

CONTRACTS—Continued
Research and development—Continued
Costs—Continued
Analysis—Continued
Evaluation factors—Continued Page
committee in favor of protester. Additional information from lower cost awardee responded satisfactorily to technical problem raised by agency which, in large measure, accounted for technical evaluation difference between proposals. 54 Comp. Gen. 896, modified 499
Government-furnished property
Use denied
Allegation that Govt. permitted successful offeror to use public research vessel in performance of contract but did not make vessel available to others is denied since record shows that assistance in obtaining vessels was not provided to any offeror and successful offeror acquired vessel in question 10 years ago under grant from entity which is unrelated to procuring agency 787
Limitations
Off-the-shelf items, etc.
Replacement of "off the shelf" coaxial machine gun program involving limited testing and evaluation does not fall under Department of Defense (DOD) Design to Cost Policy Directive 5000.28. In any case, Directive is matter of DOD policy, and does not establish legal rights and responsibilities 1362
Production and development combination propriety
Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs 1019
Protester's fear that militarized disk being developed under contract for development of improved sonar system will become standard disk for use throughout agency without meaningful competition is without merit since agency indicates that it will finance development of "second source" contractor and conduct competitive procurement for standard disk 1019
Technical deficiencies
Evaluation propriety
Where Govt.'s statement of work is broad and general, proposal was nevertheless properly considered outside competitive range since, consistent with evaluation factors listed in solicitation, protester's technical proposal was considered to be so deficient as to be wholly unacceptable. Question whether Govt. unfairly construed its work statement too narrowly may not be judged solely from work statement but must be determined in light of solicitation's evaluation factors 787
Review
Federal aid, grants, etc.
Administrative reports
Multiple layers of Federal, State and local Govt. involved in typical grant review situation will not impose enormous burden on Federal grantor in producing report responsive to request for review of contract under Federal grant 390

CONTRACTS—Continued
Review—Continued
Federal aid, grants, etc.—Continued
Rational basis Page
To extent grant reviews will be concerned with application and interpretation of local procurement law, with which grantees should be familiar, they will not be disadvantaged. In other cases, since review will only be concerned with application of "basic principles," rather than all intricacies of Federal norm, it will not result in mechanistic application of Federal procurement law 390
Samples
Negotiated contracts. (*See* CONTRACTS, Negotiation, Samples)
Service Contract Act. (*See* CONTRACTS, Labor stipulations, Service Contract Act of 1965)
Set-asides
Awards to small business concerns. (*See* CONTRACTS, Awards, Small business concerns, Set-asides)
Small business concern awards. (*See* CONTRACTS, Awards, Small business concerns)
Sole source procurements. (*See* CONTRACTS, Negotiation, Sole source basis)
Specifications
Adequacy
Scope of work
Sufficiency of detail
In any negotiated procurement, burden is on offerors to affirmatively demonstrate merits of their proposals. Where RFP contemplated fixed-price contract for supply of calibration system, not developmental effort, and instructed offerors to make such demonstration on paragraph-by-paragraph basis, offeror which proposed alternative approach to meeting requirements arguably bore even heavier burden of showing how its system would satisfy Army's needs 374
Administrative determination conclusiveness
Adequacy of specifications
Drafting of specifications to meet Government's minimum needs and determination whether items offered meet specifications are properly functions of procuring agency. Thus, since determination by procuring agency that two-drum vehicle does not meet intent of specifications to obtain, as stated in IFB, "four (4) wheel drive" vehicle is reasonable, it will not be disturbed by this Office 1467
Conformability of equipment, etc., offered. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered, Administrative determination conclusiveness)
Ambiguous
Bid responsiveness *v.* bidder responsibility
Effect not prejudicial
Where Washington Plan bid appendix requires bidder to insert goals and sign appendix, bid which includes signed appendix without insertion of goals is nonresponsive since noncompliance with appendix requirements is not minor deviation which may be waived. Although appendix mistakenly made one reference to bidder "responsibility" instead of responsiveness, appendix read as whole indicated that compliance was

CONTRACTS—Continued
Specifications—Continued
Ambiguous—Continued
Bid responsiveness *v.* bidder responsibility—Continued
Effect not prejudicial—Continued Page
to be matter of responsiveness, and record indicates that protester, who was on constructive notice of correct terminology, was not prejudiced by error 1160
Determination basis
Bid responsive to reasonable interpretation of invitation for bids which is unclear as to basis for price computation may have price converted mathematically to intended basis and evaluated 1406
Different interpretation by bidders
Specifications which could be reasonably construed to permit work covered by inapplicable wage rate amendment misstated Government's minimum needs and had effect of placing bidders on unequal bidding basis. However, where impact of protester's reliance was not such as to affect its relative position as second low bidder, no corrective action is recommended 1501
Blanket offer to comply. (*See* **CONTRACTS, Specifications, Failure to furnish something required, Blanket offer to conform to specifications**)
Changes, revisions, etc.
Amendment requirement
Acknowledgment failure. (*See* **CONTRACTS, Specifications, Failure to furnish something required, Addenda acknowledgment**)
"De minimis" rule
Where only estimate as to value of invitation amendment is bidder's unsupported, self-serving statement, rejection of its bid for failure to acknowledge such amendment was proper, for in determining whether amendment has only "trivial" or "negligible" effect on bid price to permit waiver, it would be inappropriate to permit bidder seeking waiver to determine value as it would give him option to become eligible for award by citing costs that would bring him within *de minimis* rule or to avoid award by placing larger cost value on effects of amendment 599
Notification
Where agency issues telegraphic solicitation amendment one day before bid opening and telephonically notifies bidders of that fact who, without objecting, expressly acknowledge receipt of amendment, one bidder's assertion that agency did not issue written amendment and did not provide bidders with sufficient time to consider amendment is without merit 1160
Compliance
General *v.* specific statement
General statement by bidder that item offered would be fully color coded rather than a statement of compliance with one of precise color coding methods specified by agency did not require rejection of bid since in absence of express exception to methods specified by agency bidder's general statement must be construed as consistent with solicitation requirements 340

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment, etc., offered
Ability to meet requirements
Page

Question whether surplus bidders under solicitations for aircraft and aircraft related parts—incorporating ANA Bulletin No. 438c (age controls for age-sensitive elastomeric items)—can comply with Bulletin requirements for identification, marking, and storage of parts containing elastomeric components is one affecting responsibility 1

No basis exists for rejection of bid as nonresponsive under argument that generator offered would not meet specifications where bidder inserted acceptable information in "Descriptive Schedules" and furnished with bid letter from generator manufacturer certifying that generator would comply with specifications 999

Acceptance
Propriety

Argument that low bidder's proposed unit is not acceptable because it did not meet specification requirement regarding both length of public marketing of unit and type of engine offered is rejected since record supports opposite conclusion 267

Administrative determination
Accepted

After side-by-side testing, technical and cost evaluation, and discussions with two sources in preprocurement context, Army selected foreign MAG58 machine gun instead of American-made M60E2. Although protester now complains that selection process was procurement and Army did not comply with applicable laws and regulations, protester entered into process with "eyes wide open" and was not prejudiced. Army's selection process was necessary to determine minimum machine gun needs, since there was insufficient data for Army to make such determination prior to completion of process 1362

Foreign firm manufacturing MAG58 machine guns agreed to ASPR 7-104.93, which generally requires use of American-melted specialty metals. Metallurgical differences between American-melted (if used) and foreign specialty metals now used in MAG58 possibly could have significant impact on performance. However, no significant doubt has been cast on reasonableness of MAG58's selection, since Army technical personnel have found requalification of MAG58, beyond ordinary first article testing, to be unnecessary, and while there may be different technical opinions, Army judgment on this highly technical question has not been shown to lack reasonable basis 1362

Drafting of specifications to meet Government's minimum needs and determination whether items offered meet specifications are properly functions of procuring agency. Thus, since determination by procuring agency that two-drum vehicle does not meet intent of specifications to obtain, as stated in IFB, "four (4) wheel drive" vehicle is reasonable, it will not be disturbed by this Office 1467

Basis of evaluation

Procuring agency had reasonable basis for determining, after discussions had been conducted, that successful offeror's proposal for

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Administrative determination—Continued
Basis of evaluation—Continued Page
automatic data processing services complied with RFP requirements concerning data base management system, testing, manpower, dedicated facilities, communications processors, and telecommunications network ---- 60
Conclusiveness
There has been no showing that agency determination that awardee should receive award lacked reasonable basis, notwithstanding awardee's brief response to request for proposals (RFP) informational provision requiring detailing of amount of time contract team members would be devoted to contract, in view of agency determination based on awardee's technical and cost proposals and discussions with awardee that there was sufficient commitments of team members to satisfy agency requirements ---- 1315
Negotiated procurement
Govt. has not unfairly changed basic accuracy requirement in solicitation for only one offeror where contract as negotiated contained original accuracy specification but merely failed to provide detailed information necessary to establish how successful offeror would in fact implement requirement. Govt. may insist on compliance with original specification ---- 787
Compatibility with existing equipment
Protester's assertion that Navy properly could select only derivative of model selected by Air Force is incorrect, since reasonable interpretation of RFQ, read in context of applicable documents, indicates that Navy sought aircraft with optimum performance (within cost parameters) and with due consideration of design commonality with prior Air Force prototype program and with selected Air Force fighter ---- 307
Evaluation of technical acceptability
Where specification calling for "light sensing" display is silent as to how nonfunctioning of ultraviolet lamps is to be communicated to the display, "light sensing" by process accomplished by electrical sensing would not be unreasonable ---- 1272
Information deviating from specifications
Requirement for submission of manufacturer's specifications with bid to show that product offered conforms to specification is not justified since solicitation did not advise bidders with particularity both as to extent of detail required and purpose to be served by such requirement ---- 340
Literal reading of specifications
Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future ---- 592

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Negotiated procurement
Page
Assertion that engine selected by Navy was not authorized for use with lightweight fighter is without merit, since record indicates selected engine is modified version of baseline engine listed in solicitation. Also, record indicates Navy did not improperly estimate offerors' engine modification costs 307
Noncompliance
Rejection of bid
Bidder for Navy QPL products, who offers products on which elastomer components exceed age limitations allowed under applicable shelf life requirements, which have not been shown to be unreasonable, is nonresponsive. Allegedly different Air Force shelf life requirements are not necessarily determinative of Navy's shelf life requirements 1
Superior product offered
Where procuring activity believes one proposal is superior to another, determination made by higher echelon within agency that proposals are technically equal is not subject to objection since higher level personnel were acting within the scope of their authority for procurement involved 1111
Technical deficiencies
Negotiated procurement
Agency's elimination of incumbent contractor from competitive range had reasonable basis. Totality of many allegedly "informational" deficiencies made proposal so materially deficient that it could not be made acceptable except by major revisions and additions. Incumbent's low proposed estimated costs did not have to be considered since proposal was found to be totally technically unacceptable. There is no basis for favoring incumbent in competitive range determination with presumptions based merely on prior satisfactory service, since proposal must demonstrate compliance with essential RFP requirements 60
Where substantial technical uncertainties exist in initial proposals, award on basis of initial proposals is precluded though proposals may be considered technically acceptable. 10 U.S.C. 2304(g) requires written or oral discussions to be conducted with offerors in competitive range to extent necessary to resolve technical uncertainties, so that Govt. can be assured of obtaining most advantageous contract. Modified in part by 55 Comp. Gen. 972 201
Series of specification changes and requests for new best and final offers did not cause technical "leveling" of proposals, which refers to unfair practice of helping offeror bring unacceptable proposal up to level of other adequate proposals through successive rounds of negotiations, since only two proposals under consideration were both regarded as acceptable throughout testing and evaluation period and proposal which protester regards as having been brought up to level of its proposal was regarded by agency as superior proposal 244
Claims that alternative system can meet all present and future Army calibration needs at lower cost do not clearly show that RFP requirement for expandable read/write computer memory is without any reasonable basis, since Army, which must make determination of minimum

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Technical deficiencies—Continued
Negotiated procurement—Continued Page
needs and bear risk of inadequate performance resulting from improper determination, believes greater memory capacity will be needed in future to calibrate more complex equipment, that operator-configurable software will provide desirable flexibility and long-term cost savings, and that despite protester's performance claims, its approach may involve unacceptable technical and cost risks 374
Where offeror proposing alternative approach to meeting RFP requirements submitted voluminous technical literature, documents, manuals and articles but was proceeding on misconception that Army bore burden of demonstrating how its approach was not feasible, GAO cannot conclude that Army's rejection of basic and alternate proposals as technically unacceptable is shown to be without any reasonable basis. Basic proposal's failure to meet expandable memory requirement and alternate proposal's lack of information on software interface indicate reasonable basis for rejection, notwithstanding protester's allegations of numerous technical errors by Army in failing to understand approach proposed 374
Since determinations of technical acceptability are within discretion of procuring agency, in absence of clear evidence that agency acted arbitrarily, and record in this case is devoid of any evidence which would justify our Office concluding that technical evaluations were without reasonable basis, there is no basis to take exception to awards 432
Contracting officer's rejection of protester's second best and final offer as technically unacceptable was proper where cost data submitted with proposal appeared to materially change previously acceptable technical proposal and protester did not furnish adequate detailed explanation of apparent revisions 636
Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would in olve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs 1019
While concept of responsiveness is not directly applicable to proposals submitted in negotiated procurement, RFP's repeated use of this term indicates that provisions so referenced were material requirements, and that proposal failing to conform to them would be considered unacceptable 1511
Foreign firm manufacturing MAG58 machine guns agreed to ASPR 7-104.93, which generally requires use of American-melted specialty metals. Metallurgical differences between American-melted (if used) and foreign specialty metals now used in MAG58 possibly could have significant impact on performance. However, no significant doubt has been cast on reasonableness of MAG58's selection, since Army technical personnel have found requalification of MAG58, beyond ordinary first article testing, to be unnecessary, and while there may be different technical opinions, Army judgment on this highly technical question has not been shown to lack reasonable basis 1362

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Technical deficiencies—Continued
Negotiated procurement—Continued Page
Source selection authority's conclusions that protester's lower target and ceiling prices for fixed price incentive contract offered little in way of advantages to Government and were not sufficiently significant to overcome selected firm's superiority in technical and operations area is supported by record and is consistent with evaluation criteria which gave more weight to technical and operations area. Protester's contention that negotiations were not conducted in compliance with 10 U.S.C. 2304(g) is denied 1450
Two-step procurement
Protester's extrapolation from low bidder's data that low bidder would not meet contract's compaction test requirement is rejected since all permissible variations in compaction test procedures were not covered in low bidder's data and therefore unacceptability of low bidder's product has not been established 267
Tests
Government's right
Agency may legitimately conduct preprocurement tests and discussions with potential suppliers as well as consider cost when formulating minimum needs 1362
Qualified products acceptance test requirements
Applicable to all bidders
QPL acceptance test requirements in Military Specification incorporated into IFB for supply of QPL products are applicable to all bidders, not just manufacturers, even though tests may have once been performed by manufacturer to Govt.'s satisfaction or products are former Govt. surplus property 1
Necessity
No probative evidence has been presented which would show QPL acceptance tests in Military Specification incorporated into IFB for supply of QPL products are not necessary to determine products' acceptability. Responsibility for establishment of tests and procedures is within ambit of technical activity responsible for qualification of QPL products 1
Consolidation
Combination by procuring activity of two items in one solicitation (formerly two solicitations had been utilized) is proper exercise of procurement discretion since preparation and establishment of specifications to reflect needs of Govt. are matters primarily within jurisdiction of procurement agency and record substantiates fact that combination of items results in lower overall cost. Moreover, award can still be on item basis if doing so is in best interests of DC 366
Definiteness requirement
Surplus material
New, unused or reconditioned
Navy "blanket" prohibition of all surplus material (whether new and unused surplus or reconditioned surplus) is not in compliance with requirements for "free and open" competition and drafting specifications stating Govt.'s actual needs. Navy contracting officer and cognizant

CONTRACTS—Continued
Specifications—Continued
Definiteness requirement—Continued
Surplus material—Continued
New, unused or reconditioned—Continued Page
technical personnel should determine, if possible under circumstances of particular procurement, at time solicitation is issued whether surplus and/or reconditioned material will meet its actual needs---------- 1
Descriptive data
Deviations. (*See* CONTRACTS, Specifications, Deviations, Descriptive literature)
Failure to complete descriptive schedules
Bid nonresponsive
Bidder's failure to complete blanks in "Descriptive Schedules" made bid nonresponsive and was not matter of bidder's responsibility as claimed by agency---------- 999
Failure to insert specific information
Bid nonresponsive
Inclusion in IFB of six pages of "Descriptive Schedules" containing over 200 blanks in which bidders were to insert specific information concerning equipment being supplied; which were expressly made part of specifications; which were to be furnished with bid; and as to which bidders were advised to fill in all blanks or be found nonresponsive, was descriptive literature requirement even though agency failed to use descriptive literature clauses prescribed by regulations---------- 999
Failure to submit horsepower data
Bidder's failure to submit with bid manufacturer's horsepower curves substantiating engine horsepower claimed in bidder's entry upon "Descriptive Schedules" also resulted in nonresponsive bid---------- 999
"Subject to change" qualification
Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future---------- 592
Deviations
Amendment acknowledgement
Low bidder, after bid opening, cannot "cure" its failure to acknowledge receipt of IFB amendment because to do so would be tantamount to permitting submission of second bid. Bidder's alleged nonreceipt of amendment does not appear to have been result of deliberate effort to exclude bidder from competition---------- 599
Delivery provisions
Where IFB required delivery within 280 days "after date of award," telegraphic bid offering delivery "280 days after receipt of award" was properly rejected as nonresponsive, where solicitation contained provision for evaluation of bids offering delivery based upon date of receipt of contract or notice of award (rather than contract date) by adding maximum number of days normally required for delivery of award through mails. Thus evaluated, protester's bid exceeded required delivery schedule---------- 605

CONTRACTS—Continued
Specifications—Continued
Deviations—Continued
Informal *v.* substantive
Failure to return invitation to bid attachments Page

Bid which omitted pages of IFB is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear. 894

Not prejudicial to other bidders
Alternate bids

Where bid included alternate item price, bid deviated from amended bidding requirement that alternate work and price therefore be included in base bid price. However, bid may nevertheless be accepted if otherwise proper since deviation did not prejudice other bidders as bidder is obligated to perform all work and bid is low overall whether price under alternate item is included or is in addition to base bid price 168

Evaluation factors

Invitation specifications did not provide for evaluation of equipment on basis of operation and maintenance costs and thus those factors were not for consideration in selecting equipment 1272

Failure to furnish something required
Addenda acknowledgment
"Trivial" and "negligible" effect of amendment

Where only estimate as to value of invitation amendment is bidder's unsupported, self-serving statement, rejection of its bid for failure to acknowledge such amendment was proper, for in determining whether amendment has only "trivial" or "negligible" effect on bid price to permit waiver, it would be inappropriate to permit bidder seeking waiver to determine value as it would give him option to become eligible for award by citing costs that would bring him within *de minimis* rule or to avoid award by placing larger cost value on effects of amendment 599

Wage determinations

Bid which failed to acknowledge IFB amendment increasing Davis-Bacon wage rate was properly rejected as nonresponsive, since failure to acknowledge amendment was material deviation. Fact that work to be performed by craft listed in amendment (bricklayer) was not specifically required under specifications is immaterial as agency determined that, in course of contract performance, craft could be employed. However, recommendation is made that procedures be instituted to assure that wage determination modifications are reviewed to ascertain applicability to contract prior to inclusion in amendment 615

Award to bidder failing to acknowledge presumptively applicable solicitation amendment increasing Davis-Bacon wage rate may be made only if agency demonstrates (a) that increased rate does not relate to work to be performed under contract and (b) that it either was not reasonable for bidders to consider increased rates in bid preparation or that reliance upon amended rates was not prejudicial to protesting bidder in circumstances 1501

CONTRACTS—Continued
Specifications—Continued
Failure to furnish something required—Continued
Addenda acknowledgment—Continued
Waiver
Refused Page

Bidder's contention that amendment to IFB only repeated obligation required under original IFB's "Site Visit" clause, and therefore, its failure to formally acknowledge receipt thereof should be waived as minor informality is without merit for while clause required bidders to inspect site so as to acquaint themselves with general and local conditions affecting cost of performance, clause did not impose legally enforceable obligation under IFB for bidder to provide bus transportation for employees as required by amendment and thus did not give Govt. same rights against bidder as it would possess under amendment..... 599

Amended specification notice not received

Failure to acknowledge material amendment to IFB which was received and acknowledged by all other bidders justifies rejection of bid even though bidder claims it was never received, so long as there was no deliberate and conscious effort on part of agency to exclude bidder from competition..... 615

Bid guarantee
Letter of credit deficiencies

Documentary letter of credit furnished as bid guarantee does not constitute "firm commitment" as required by solicitation and ASPR 7-2003.25, thereby rendering bid nonresponsive, since letter of credit was not accompanied by bidder's signed withdrawal application which would have to be presented to bank in order for letter of credit to be honored..... 587

Blanket offer to conform to specifications

General statement by bidder that item offered would be fully color coded rather than a statement of compliance with one of precise color coding methods specified by agency did not require rejection of bid since in absence of express exception to methods specified by agency bidder's general statement must be construed as consistent with solicitation requirements..... 340

Descriptive data. (*See* **CONTRACTS, Specifications, Descriptive data**)
Information
Catalog number and manufacturer

Requirement that bidders submit manufacturer's specifications and indicate on bid manufacturer and catalog number of item offered is informational in nature and failure to comply should not have required rejection of bid since procured item was not unusually complex, was adequately described in solicitation and record did not provide adequate justification for such requirement..... 340

Manpower certification

Bidder who signed Part I certificate as member of Topeka Plan and inserted "Does not apply." under Part II which sets forth requirements for non-members of Topeka Plan is not responsive to affirmative action requirements of solicitation where bidder is not member of Topeka Plan at time of bid opening. Bidder's certification to Part I is not commitment to be bound to affirmative action requirements of solicitation

CONTRACTS—Continued
Specifications—Continued
Failure to furnish something required—Continued
Information—Continued
Manpower certification—Continued Page
where bid conditions require current membership in Topeka Plan as prerequisite to Government's acceptance of Part I certification..... 1259
Minority manpower utilization
Bidder who fails to submit, prior to bid opening, affirmative action plan under Part II of Bid Conditions, but who has properly executed and submitted Part I certification wherein bidder "will be bound by the provisions of Part II" for listed appropriate trades to be used in the work, has submitted responsive bid; that pages of Part II were not submitted with bid is of no consequence. Bids containing no Part I or Part II documentation were nonresponsive. Recommendation is made that grantor agency, which concluded that all bids were nonresponsive, advise grantee to award contract to bidder who submitted Part I certification..... 262
There is no basis to conclude that bidders were unreasonably misled as to affirmative action requirements clearly set forth which were included in IFB containing bidders' schedules, provisions, conditions, drawings and specifications, rather than with separate bid packet. Requirements clearly advised that, unless proper documentation was submitted, bid would be considered nonresponsive..... 262
Where Washington Plan bid appendix requires bidder to insert goals and sign appendix, bid which includes signed appendix without insertion of goals is nonresponsive since noncompliance with appendix requirements is not minor deviation which may be waived. Although appendix mistakenly made one reference to bidder "responsibility" instead of responsiveness, appendix read as whole indicated that compliance was to be matter of responsiveness, and record indicates that protester, who was on constructive notice of correct terminology, was not prejudiced by error..... 1160
Protester's assertion that solicitation was confusing and ambiguous because it only provided space for insertion of goals for time periods which had expired is without merit, since solicitation specified that goals for the last period for which space was provided would be applicable to the contract to be awarded..... 1160
Invitation to bid attachments
Bid which omitted pages of IFB is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear..... 894
License approval
IFB provision that successful bidder meet all requirements of Federal, State or City codes does not justify rejection of bid for failure to have city license to operate ambulance service since need for license under such general requirement is matter between local governmental unit and contractor. However, where bidder conditions bid upon possession of license, such qualification renders bid nonresponsive..... 597

CONTRACTS—Continued
Specifications—Continued
Government surplus clause
Failure to include
Effect Page

Navy's contention that surplus material can never be considered unless it has been specifically invited by solicitation is overly restrictive interpretation of ASPR 1-1208(c). Provision states that no special consideration or waiver of contract requirements can be extended to surplus material by virtue of fact that it once was owned by Govt. Therefore, agency must determine whether surplus is acceptable for each procurement and include appropriate limitation in solicitation if it is determined that surplus is not acceptable. Failure to include "Government Surplus" clause is not sufficient notice to bidders that surplus is not acceptable-- 1

Incorporation of contractor-developed "requirements" study

Where contractor of LEAA grantee developed and drafted specifications, which were substantially identical to those used in RFP, which also incorporated contractor-developed "requirements" study, contractor comes under LEAA organizational conflict of interest guideline, which was attached as condition to LEAA grant, was binding on grantee and precludes contractor from competing on RFP---------- 911

Incorporation of terms by reference
Conflict of interest guidelines

Contractor has constructive notice of LEAA organizational conflict of interest guideline where it was contained in document incorporated by reference in contract requiring the preparation of specifications. In any case, since guideline is attached as condition to LEAA grant, it is self-executing, and grantee is bound to reject contractor's proposal if contractor fell under guideline, notwithstanding grantee's inadequate notice and contrary advice to contractor---------- 911

Invitation to bid attachments
Failure to return with bid. (*See* **CONTRACTS, Specifications, Failure to furnish something required, Invitation to bid attachments**)
Manufacturers
Justification
Lacking

Requirement for submission of manufacturer's specifications with bid to show that product offered conforms to specification is not justified since solicitation did not advise bidders with particularity both as to extent of detail required and purpose to be served by such requirement- 340

Military
Acceptance test requirements
Qualified products

Contractor, who supplies products under QPL procurement, is not relieved from its obligation to perform acceptance tests required by Military Specification on basis that product passed qualification tests- 1

CONTRACTS—Continued
Specifications—Continued
Military—Continued
Conformance requirement Page
Although agency's determination whether existing Military Specifications will meet its actual needs will not be questioned unless shown to have no reasonable basis, Military Specifications are mandatory, and procuring agency should, under ASPR 1-1108, ask QPL preparing activity for waiver of those requirements (including contract acceptance test requirements) included in Military Specification defining qualified product, which are not to be required of sole-source contractor receiving award after cancellation of QPL solicitation 1
Minimum needs requirement
Administrative determination
Combination by procuring activity of two items in one solicitation (formerly two solicitations had been utilized) is proper exercise of procurement discretion since preparation and establishment of specifications to reflect needs of Govt. are matters primarily within jurisdiction of procurement agency and record substantiates fact that combination of items results in lower overall cost. Moreover, award can still be on item basis if doing so is in best interests of DC 366
Claims that alternative system can meet all present and future Army calibration needs at lower cost do not clearly show that RFP requirement for expandable read/write computer memory is without any reasonable basis, since Army, which must make determination of minimum needs and bear risk of inadequate performance resulting from improper determination, believes greater memory capacity will be needed in future to calibrate more complex equipment, that operator-configurable software will provide desirable flexibility and long-term cost savings, and that despite protester's performance claims, its approach may involve unacceptable technical and cost risks 374
Factors other than price
Although specifications based on superior characteristics in excess to Government's minimum needs are generally considered overly restrictive, Army, acting within broad discretion, could legitimately specify machine gun, as critical human survival item, to be as reliable and effective as possible. In reasonably determining that MAG58 instead of M60E2 reflected minimum machine gun need primarily because of superior reliability, Army considered MAG58's higher cost, possible lower cost effectiveness, and deficiencies (e.g., broken rivet and cracked receiver problems) and M60E2's strong points (e.g., commonality with other weapons), as well as suggested repair policy which may have significantly improved M60E2's reliability 1362
Restrictive. (*See* **CONTRACTS, Specifications, Restrictive, Minimum needs requirement**)
"New Material" clause
Exception
New, unused surplus
"New Material" clause in solicitation does not preclude bids offering new unused unreconditioned surplus material which is not overage or deteriorated 1

CONTRACTS—Continued
Specifications—Continued
"New Material" clause—Continued
Exception—Continued
New, unused surplus—Continued Page

Low bidder offering surplus parts under IFB for supply of QPL aircraft parts appears to be responsive bidder, inasmuch as surplus bids were not precluded in QPL procurements and bid offering new, unused, unreconditioned, nondeteriorative surplus parts was not in violation of "New Material" clause. Decision to cancel and negotiate sole-source award on virtually same basis to surplus bidder was proper 1

Reconditioning *v.* refurbishing

Upon examination of part, which revealed it could be easily and quickly disassembled and reassembled by nontechnical people, and in absence of any apparent critical tolerances for reassembly, GAO has doubts whether bidder's proposed replacement of overage elastomer components in new unused "critical" aircraft related part would constitute "reconditioning" in violation of "New Material" clause. However, GAO cannot disagree with ASO determination that elastomer replacement in different aircraft part constituted "reconditioning." 1

Patent disclosure
Other data. (*See* **CONTRACTS, Propriety, etc., items**)
Qualified products
Changes
Machinery, products, etc.

Although it is within discretion of QPL preparing activity to determine whether replacement of elastomer components in QPL aircraft and aircraft related parts has sufficiently changed the parts so as to consider them no longer qualified, there is some question whether they remain qualified products in view of disassembly and reassembly processes necessary to replace elastomers 1

Dealer or distributor

Protest that surplus dealer is not "regular dealer" within purview of Walsh-Healey Public Contracts Act, 41 U.S.C. 35–45, and related implementing regulations, ASPR 12–601 and 12–607, and therefore is ineligible for award, is not for consideration, since such determinations are exclusively vested with contracting officer subject to final review by Dept. of Labor 1

Government surplus clause
Restrictive interpretation

Navy's contention that surplus material can never be considered unless it has been specifically invited by solicitation is overly restrictive interpretation of ASPR 1–1208(c). Provision states that no special consideration or waiver of contract requirements can be extended to surplus material by virtue of fact that it once was owned by Govt. Therefore, agency must determine whether surplus is acceptable for each procurement and include appropriate limitation in solicitation if it is determined that surplus is not acceptable. Failure to include "Government Surplus" clause is not sufficient notice to bidders that surplus is not acceptable 1

CONTRACTS—Continued
Specifications—Continued
Qualified products—Continued
Listing
Restrictive interpretation Page

Agency's position that only bids submitted by manufacturers or their authorized distributors under QPL procurements can be considered responsive is overly restrictive interpretation of QPL requirements contained in ASPR 1-1101 *et seq.*, and would constitute QPL a qualified bidders list 1

Product designation

Bidder under QPL procurement, who fails to identify manufacturer or applicable QPL test number, but who identifies product's manufacturer's designation, is responsive to IFB, and omissions may be waived as minor informalities 1

Requirement
Waiver

Cancellation of IFB and negotiation of sole-source award to low bidder offering surplus material was not improper, even though contracting officer failed to ask QPL preparing activity for required waiver of those QPL requirements, which were not required of bidder, pursuant to ASPR 1-1108; however, recommendation is made that waiver be gotten prior to exercise of option under contract 1

Sole source negotiation

Low bidder offering surplus parts under IFB for supply of QPL aircraft parts appears to be responsive bidder, inasmuch as surplus bids were not precluded in QPL procurements and bid offering new, unused, unreconditioned, nondeteriorative surplus parts was not in violation of "New Material" clause. Decision to cancel and negotiate sole-source award on virtually same basis to surplus bidder was proper 1

Although agency's determination whether existing Military Specifications will meet its actual needs will not be questioned unless shown to have no reasonable basis, Military Specifications are mandatory, and procuring agency should, under ASPR 1-1108, ask QPL preparing activity for waiver of those requirements (including contract acceptance test requirements) included in Military Specification defining qualified product, which are not to be required of sole-source contractor receiving award after cancellation of QPL solicitation 1

Restrictive
Cancellation of invitation
Resolicitation of procurement

Receipt of no responsive bids to IFB requires resolicitation and, although protest that specifications were restrictive would ordinarily not be decided in that event, since it seems apparent that resolicitation will be essentially on same specifications and protester has indicated it will therefore protest and record has been completely developed, protest will be considered now 445

CONTRACTS—Continued
Specifications—Continued
Restrictive—Continued
Geographical location
Delivery provisions Page

Use of geographic restriction for procurement of "furnish" asphalt (that asphalt which is picked up, transported, and applied by DC) which limits procurement to those suppliers having facilities located within DC is not subject to objection, as geographic restriction serves useful purpose of eliminating those suppliers who appear unable to render acceptable "furnish" service to DC due to their decentralized location outside DC 366

Extension

Geographic restrictions constitute legitimate restriction on competition where contracting agency properly determines that particular restriction is required. Determination of proper scope of restriction is matter of judgment and discretion involving consideration of services being procured, past experience, market conditions, etc. Moreover, use of geographic limitation creates possibility that one or more potential bidders beyond limit could meet Govt.'s needs; therefore, procurement officials should consider extending geographic limit to broadest scope consistent with Govt.'s needs 366

Repair *v.* furnishing asphalt

Application of geographic restriction to "furnish" asphalt as opposed to "repair" asphalt is proper exercise of procurement discretion, as "furnish" asphalt is picked up, transported, and applied by DC workers whereas repair asphalt is both directly transported and applied by contractor and DC has sought to eliminate added expense of maintaining necessary asphalt temperature which would be required if "furnish" asphalt was procured from suppliers not centrally located within DC .. 366

Minimum needs requirement
Administrative determination

Although specifications based on superior characteristics in excess to Government's minimum needs are generally considered overly restrictive, Army, acting within broad discretion, could legitimately specify machine gun, as critical human survival item, to be as reliable and effective as possible. In reasonably determining that MAG58 instead of M60E2 reflected minimum machine gun need primarily because of superior reliability, Army considered MAG58's higher cost, possible lower cost effectiveness, and deficiencies (e.g., broken rivet and cracked receiver problems) and M60E2's strong points (e.g., commonality with other weapons), as well as suggested repair policy which may have significantly improved M60E2's reliability 1362

Particular make
Salient characteristics

Recommendation made that FPR "Brand Name or Equal" provisions be utilized in specifying computer and software requirements since

CONTRACTS—Continued
Specifications—Continued
Restrictive—Continued
Particular make—Continued
Salient characteristics—Continued Page
specifications should state agency's minimum needs and FPR provides for listing of salient characteristics where brand names are used; specifications for VS operating systems be modified to permit bidders with OS operating systems to demonstrate capabilities to meet agency's performance requirements; and there be reevaluation of barring computer operator priority reset to consider possible economic benefits in using it... 445
Samples
Preproduction sample requirement
Evaluation propriety
Although protester disagrees with contracting agency on evaluation of bid samples, it is concluded agency's judgment was not without reasonable basis in fact, since protester has not shown that bid samples were not fairly and conscientiously evaluated by agency..... 1204
Similar items
One solicitation
Combination by procuring activity of two items in one solicitation (formerly two solicitations had been utilized) is proper exercise of procurement discretion since preparation and establishment of specifications to reflect needs of Govt. are matters primarily within jurisdiction of procurement agency and record substantiates fact that combination of items results in lower overall cost. Moreover, award can still be on item basis if doing so is in best interests of DC..... 366
Lower cost
Contention that award under instant IFB can only operate to financial detriment of DC is without merit, as instant IFB resulted in lower cost to DC than prior uncombined procurements for similar items..... 366
Stock model requirements
Interpretation
Requirement that "All equipment furnished by Contractor shall be stock models for which parts are readily available" is more reasonably construed to mean that end products must be stock models rather than components or parts of equipment which are merely required to be "readily available."..... 1272
Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies**)
Tests
Conformability of equipment, etc., offered to specifications. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Tests**)
First article
Administrative determinations
Foreign firm manufacturing MAG58 machine guns agreed to ASPR 7-104.93, which generally requires use of American-melted specialty metals. Metallurgical differences between American-melted (if used) and foreign specialty metals now used in MAG58 possibly could have significant impact on performance. However, no significant doubt has

CONTRACTS—Continued
Specifications—Continued
Tests—Continued
First article—Continued
Administrative determinations—Continued Page
been cast on reasonableness of MAG58's selection, since Army technical personnel have found requalification of MAG58, beyond ordinary first article testing, to be unnecessary, and while there may be different technical opinions, Army judgment on this highly technical question has not been shown to lack reasonable basis---- 1362
Necessary amount of testing
QPL acceptance test requirements in Military Specification incorporated into IFB for supply of QPL products are applicable to all bidders, not just manufacturers, even though tests may have once been performed by manufacturer to Govt.'s satisfaction or products are former Govt. surplus property---- 1
Administrative determination
No probative evidence has been presented which would show QPL acceptance tests in Military Specification incorporated into IFB for supply of QPL products are not necessary to determine products' acceptability. Responsibility for establishment of tests and procedures is within ambit of technical activity responsible for qualification of QPL products---- 1
Determination of minimum needs
After side-by-side testing, technical and cost evaluation, and discussions with two sources in preprocurement context, Army selected foreign MAG58 machine gun instead of American-made M60E2. Although protester now complains that selection process was procurement and Army did not comply with applicable laws and regulations, protester entered into process with "eyes wide open" and was not prejudiced. Army's selection process was necessary to determine minimum machine gun needs, since there was insufficient data for Army to make such determination prior to completion of process---- 1362
Preproduction testing
Agency may legitimately conduct preprocurement tests and discussions with potential suppliers as well as consider cost when formulating minimum needs---- 1362
Requirements
Administrative determination
Protester's extrapolation from low bidder's data that low bidder would not meet contract's compaction test requirement is rejected since all permissible variations in compaction test procedures were not covered in low bidder's data and therefore unacceptability of low bidder's product has not been established---- 267
Unessential requirements
Elimination
Requirement that bidders submit manufacturer's specifications and indicate on bid manufacturer and catalog number of item offered is informational in nature and failure to comply should not have required rejection of bid since procured item was not unusually complex, was adequately described in solicitation and record did not provide adequate justification for such requirement---- 340

CONTRACTS—Continued
Status
Federal grants-in-aid Page

GAO will consider protest against contract awarded by grantee in order to advise grantor agency whether Federal competitive bidding requirements have been met and since courts before which present matter is being litigated have expressed interest in GAO views---- 139

GAO will undertake reviews concerning propriety of contract awards under Federal grants made by grantees in furtherance of grant purposes upon request of prospective contractors where Federal funds in a project are significant---- 390

Prior reviews of contracts awarded under Federal grants are considered consistent, in the main, with principles enunciated here. However, to extent any prior precedent may be inconsistent it should not be followed. B–178960, September 14, 1973, overruled---- 390

FPR does not apply to award made under EPA grant for municipal sewer construction, since FPR pertains to direct Federal procurements and reference in EPA grant regulations to "Federal law" does not incorporate FPR by reference---- 413

Where grant conditions indicate that State law shall govern procurement by grantee and State law exists on specific point in question and is followed, General Accounting Office cannot say result reached is irrational. However, since here no State law exists as to particular point in question, then consideration of the matter under Federal frame of reference is appropriate---- 1254

Subcontractors
Government control

Allegation that NASA does not possess authority to implement procedure waiving review of cost-reimbursement prime contractor award of subcontracts fails in light of fact that grant of general procurement authority carries discretion for agency to contract by any reasonable method and NASA procedure waiving review of subcontracts under stipulated circumstances is reasonable exercise of discretion and was accomplished in accordance with NASA regulations---- 1220

Listing
Invitation requirement
Listing inadvertently included

Although solicitation requirement for listing of pipe suppliers is not fully met by low bidder who lists two possible suppliers for certain categories of pipe, award may be made to low bidder. Facts show that listing requirement was inadvertently included in solicitation by agency and that second low bidder who complied fully with listing requirement was not prejudiced thereby. Moreover, listing requirement serves no valid purpose for Govt. where item being procured is commercially available as in instant case---- 955

Minority
Firm commitment for use requirement

Agency erred in merely accepting, without more, offeror's proposed use of specific minority subcontractor, then using this fact as significant basis for award decision. Evaluation of resources which offeror merely proposes without contractual control or commitment is "patently irrational." Agency must be reasonably assured that resources are firmly

CONTRACTS—Continued
Subcontractors—Continued
Minority—Continued
Firm commitment for use requirement—Continued Page
committed to offeror, especially where consideration of factor in evaluation may be determinative of award 715
Procurement procedures
Alternate contract payment procedure, whereby prime contractor's fee is percentage of subcontractor's invoice, and there is no requirement that subcontractor submit fixed-price proposal, violates prohibition of 10 U.S.C. 2306(a) against cost-plus-a-percentage-of-cost since (1) payment is based on predetermined percentage rate; (2) percentage rate is applied to actual performance costs; (3) contractor entitlement is uncertain at time of contracting; and (4) contractor entitlement increases commensurately with increased performance costs 554
Contention that in view of audit and settlement responsibilities (31 U.S.C. 41, 53, and 71) General Accounting Office lacks authority to divest itself of subcontract reviews as matter of policy is rejected 1220
Subcontracts
Administrative approval
Review by GAO
National Aeronautics and Space Administration's (NASA) exercise of general administrative functions in determining technical approaches to problem solving is not sufficient involvement in selection of subcontractor to cause our review of subcontract award since parallel development to test multiple approaches to problem solving was reasonable and specification prepared as a result thereof for use in subcontract award permitted competition, even by protester, and NASA was not involved in selection as envisioned in 54 Comp. Gen. 767 1220
Anti-Kickback Act violations
Contract for computer time/timesharing services to prime contractor who has commercial arrangements with potential subcontractors to pay standard percentage of invoice fee for finding buyer of computer time and/or services does not violate Anti-Kickback Act (41 U.S.C. 51) because commercial arrangement does not apply and prime contractor receives fee according to sliding matrix from Govt. only 554
Conflict between two contract provisions concerning who pays prime contractor's fee, subcontractor or Govt., is resolved in favor of Govt. payment since that interpretation upholds validity of contract in accord with presumption of legality. Contrary interpretation might lead to conclusion contract violated Anti-Kickback Act 554
Award propriety
Federal aid, grants, etc.
Review
GAO will consider requests for review of contracts awarded "by or for" grantees. Where record shows that grantee's engineering consultant drafted specifications, evaluated subcontractors' bids, recommended that grantee award subcontract to specific proposed subcontractor, and grantee instructed prime contractor to award questioned subcontract to company proposed by consultant, award is considered to be "for" grantee because grantee's participation had net effect of causing subcontractor's selection 390

CONTRACTS—Continued
Subcontracts—Continued
Award propriety—Continued
Federal aid, grants, etc.—Continued
Review—Continued Page
Corrective action is not recommended concerning questioned subcontract awarded under Federal grant since it cannot be concluded that questioned temperature specification for incinerator project was ambiguous or that company receiving award submitted bid which was nonresponsive to specification 390
Tax matters
Federal taxes
Inclusion or exclusion in bid evaluation
Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to requirement and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price 1159
Hotel-motel rental
When Bureau of Indian Affairs (BIA) contracts with hotel or motel to provide housing and subsistence to Indian students in transit, the Federal agency and not the beneficiary is the renter. The legal incidence of the hotel-motel rental tax imposed by Anchorage, Alaska, therefore, falls on the BIA which is constitutionally immune from State and local taxes. 53 Comp. Gen. 69 is modified accordingly 1278
Termination
Convenience of Government
Administrative determinations
Finality
While termination of contract for convenience of Govt. is matter of administrative discretion not reviewable by GAO, review of procedures leading to award of contract is within GAO jurisdiction 502
Valid
Absent bad faith or abuse of discretion
Although determination to terminate contract for convenience of Govt. rests with agency concerned and not with GAO, it is noted that court has held that in absence of bad faith or clear abuse of discretion such termination is valid and no such showing is made here 502
Antideficiency Act violations
Army proposal to terminate for convenience of Govt. contracts executed in violation of Antideficiency Act is authorized since proposed termination action would mitigate consequences of Antideficiency Act violation with respect to these contracts, in that termination costs would presumably be less than obligations now attributable to contracts 768
"Best interest of the Government" basis
Cost *v.* integrity of competitive bidding system
General Accounting Office decisions have recognized propriety of considering estimated costs in deciding whether recommendation that improperly awarded contract be terminated for convenience would be in the Government's best interests. Contention that preserving integrity of competitive bidding system requires termination regardless of costs

CONTRACTS—Continued
Termination—Continued
Convenience of Government—Continued
Cost *v.* integrity of competitive bidding system—Continued Page
is not persuasive. Modified by 56 Comp. Gen. (B–185302, Jan. 26, 1977) ---- 1412
Contractor misled
Since contractor awarded 5,000 units was reasonably led to believe that three awards, each of 10,000 units, would be made, contractor should be afforded opportunity to have contract terminated for convenience if contractor so desires ---- 529
Erroneous evaluation
Where awards were made based on partially unacceptable proposal and without reasonable assurance of lowest overall cost to Government, GAO recommends that Army reevaluate proposals (excluding unacceptable lease plan) and, if necessary, take appropriate termination for convenience and reaward action based upon reevaluation of proposals ---- 1151
Lack of competition
On reconsideration, GAO decision 55 Comp. Gen. 201—which sustained protest against award of negotiated turnkey housing procurement and recommended remedy involving renewal of competition among offerors and possible termination for convenience of existing contract—is modified in part. After considering points raised in requests for reconsideration by contracting agency, contractor and protester, recommendation in prior decision is withdrawn, and in all other respects decision is affirmed. ---- 972
GAO recommendation made to Navy in prior decision sustaining protest—which contemplated renewal of competition among offerors, with possible result that existing turnkey housing contract be terminated for convenience—is withdrawn upon reconsideration. Information presented by agency and contractor concerning value of work in place at time of decision, plus extent of subcontracting for materials, indicates implementation of such recommendation is not feasible. Protester's only possible remedy rests with its claim for proposal preparation costs, which will be considered in future GAO decision if protester wishes to pursue claim ---- 972
Not recommended
Urgency procurement
In view of estimated cost of terminating improperly awarded contract ($329,460 as of May 25, 1976; $461,244–$527,136 as of June 25, 1976), recommendation cannot be made that instant contract be terminated for convenience since that action would not be in Government's best interest where total contract price was $658,920 and contract award was based on determination of urgency. Modified by 55 Comp. Gen. 1412 ---- 1188
Partial
Where low offeror claimed exemption from CAS on ground that its offered prices were based upon its established catalog or market prices, exemption should not have been denied solely because adequate price competition was obtained by agency. Recommendation is made that agency review claim and if basis for exemption existed then consideration be given to termination for convenience of contract awarded to second low offeror and award of terminated quantitites to low offeror ---- 881

CONTRACTS—Continued
Termination—Continued
Convenience of Government—Continued
Propriety of termination Page

Contract awarded on basis of offeror's good faith certification that it is small, which status is determined erroneous by SBA, is voidable and may be terminated for convenience in discretion of agency where, as here, it is determined contracting officer should have questioned size status prior to award 502

Reporting to Congress

Where award on basis on initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. GAO recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminated for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal. Modified in part by 55 Comp. Gen. 972 201

While ASPR 10-102.5(ii) gives discretionary authority to contracting officer to decide whether bid bond deficiencies should be waived, such discretion must have been intended for application within definite rules. Consequently, absent specific finding that waiver of requirement was not in best interest of Govt., which was not made in instant case, bid should not have been rejected since it fell into stated exception; protest is therefore sustained and ASPR Committee requested to revise provision to make exception mandatory 352

Defaulting contractor. (*See* **CONTRACTS, Default**)

Effect of National Factors, Inc. and The Douglas Corp. *v.* **U.S., No. 93-63, Mar. 20, 1974**

Although determination to terminate contract for convenience of Govt. rests with agency concerned and not with GAO, it is noted that court has held that in absence of bad faith or clear abuse of discretion such termination is valid and no such showing is made here 502

Feasibility questioned

In reaching prior decision whether to recommend termination for convenience of improperly awarded contract, General Accounting Office should have considered estimated termination costs in relation to total amount of combined small business/labor surplus area set-aside award. GAO therefore recommends that Defense Supply Agency examine current feasibility of terminating contract, and earlier decision is modified to this extent. Modified by 56 Comp. Gen. —— (B-185302, Jan. 26, 1977) 1412

Negotiation procedures propriety

Although defects in negotiation procedures would ordinarily prompt recommendation that contract be terminated, if contractor was not successful after further round of negotiations, recommendation is not made considering unusual circumstances of case. Distinguished by B-185966, Mar. 17, 1976 693

CONTRACTS—Continued
Termination—Continued
Negotiation procedures propriety—Continued Page
Because of GSA's widespread difficulties with deficient performance on formally advertised janitorial services contracts, GSA's possible misunderstanding of the decisions of GAO as applied to "below cost" bidding, and GAO opinion that GSA should be given time to study alternative solutions to difficulties, termination of protested award is not recommended. Distinguished by B–185966, Mar. 17, 1976 693
"No cost"
Where applicable regulations of Federal Govt. agency require that procurement by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated 139
Not in Government's best interest
Urgency of procurement, lack of bad faith, etc.
GAO does not recommend that contract awarded to nonresponsive bidder be terminated for convenience of Govt., after considering urgency of procurement, good faith (albeit erroneous) reliance by agency on prior GAO decisions and untimeliness of protest 999
Recommendation
Small business concerns
Where small business size protest is received 1½ hours after award made on bid opening date, last day of fiscal year, termination of contract is recommended, since SBA subsequently sustained protest; contracting officer has indicated that procurement would have been referred to SBA under standard operating procedure if received before award; and contracting officer exceeded authority in that ASPR 1–703 (b)(5) precludes small business set-aside award prior to expiration of 5 working days after bid opening in absence of urgency determination 439
Solicitation inappropriate
Unduly restrictive of competition
Solicitation should be canceled and requirement resolicited where (1) low bidder found to be responsible by agency is ineligible for award because bidder failed to comply with specific and objective responsibility criterion in IFB; and (2) only other bidder's price is almost $8 million higher than that of low bidder. Also, determination that low bidder was responsible shows that specific and objective criterion was unnecessary 1043
Transportation services
Terms
Bills of lading and tariffs
Terms of contract of carriage under which carrier transports goods include both bill of lading and published applicable tariff 958

CONTRACTS—Continued
Types
Incentive Page
None of the exceptions to formal advertising (as set forth in 41 U.S.C. 252(c)(1)–(15)) expressly authorizes use of negotiations only to secure desired level of quality of janitorial services or to obtain incentive-type contract. Moreover, analysis of legislative history of Federal Property and Administrative Services Act (40 U.S.C. 471), under which questioned negotiated award of services was made, shows that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of supplies or services 693

CORPORATIONS
Agents. (*See* **AGENTS, Of private parties**)
Corporate entity
Bid submission
Rational support is found for rejection by grantee and concurrence by grantor agency of low bid submitted by "Ethridge & Griffin Const. Co. * * * a corporation, organized and existing under the law of the State of Ga * * *" and signed by individual as secretary. Corporation was and is nonexistent. Award to Griffin Construction Company would be an improper substitution. Rationale for objecting to award to entity other than named in bid is that such action could serve to undermine sound competitive bidding procedures 1254
Officers
Government employees
Contracting with Government objectionable
Where Govt. employee owns 39.95 percent of stock of corporation, it is concluded that he has substantial ownership in corporation. Conclusion is reached in view of significant history which has discouraged contracting between Govt. and its employees. Therefore, while agency restricted its view to employee's role in day-to-day management of corporation, since reasonable ground did exist, rejection of corporation low bid was not improper 295
Newly organized corporation
Bidders' experience
Experience of corporate officials prior to formation of corporation can be included when examining corporation's overall experience level for bidder responsibility determination. Therefore, mere fact that corporation had only existed since early 1975 is not determinative of its ability to meet "approximately 5 years" experience requirement 1051

COURTS
Citizen jury commissioners
Compensation
Increases
Cost-of-living adjustments
Cost-of-living provisions of 28 U.S.C. 461 do not apply to compensation of part-time United States magistrates and citizen jury commissioners. Inasmuch as section 461 lists the specific classes of judicial officers covered by its provisions, all not mentioned are deemed to have been intentionally excluded. However, 5 U.S.C. 5307 authorizes administrative adjustment of the statutory maximum compensation for part-time United States magistrates and citizen jury commissioners 1077

COURTS—Continued
Costs
Government liability
Officers and employees
Expense of suit against officer in his official capacity Page

Where U.S. Attorney undertook defense of former SBA employee who was sued as result of actions committed while acting within scope of his employment and during course of proceedings U.S. Attorney withdrew for administrative reasons, necessitating former employee's retaining services of private counsel although Govt.'s interest in defending employee continued throughout proceedings, we would not object to SBA's reimbursing former employee amount for reasonable legal fees incurred. 28 U.S.C. 516–519, 547, and 5 U.S.C. 3106 are not a bar in such circumstances since to hold otherwise would be contrary to rule that cost of defending such cases should be borne by Govt---------- 408

Decisions
Hugh J. Hyde v. *United States;* **Ct. Cl. No. 322–73 decided Apr. 6, 1976.** (*See* **COMPENSATION, Overtime, Standby, etc., time, Home as duty station**)
Testan **case (U.S.** *v.* **Testan, decided Mar. 2, 1976, —— U.S. ——).** (*See* **COMPENSATION, Removals, suspensions, etc., Back pay,** *Testan* **case**)
Employees. (*See* **COURTS, Administrative matters, Employees**)
Judgments, decrees, etc.
Payment
Indefinite appropriation availability
Judgments against Government

Judgment, entered on Feb. 4, 1976, stating in part that plaintiff Federal employees "shall receive for the period subsequent to September 14, 1974" sums representing increased salary increments originally denied under challenged agency action, is treated, for purposes of satisfying judgment, as money judgment for back pay up to date of judgment plus a mandate that agency place employees in higher salary rate as of date of judgment. Therefore, sums due plaintiffs up to date of judgment are payable, upon settlement by General Accounting Office, from permanent indefinite appropriation under 31 U.S.C. 724a, but sums due after judgment date are payable from agency appropriations for salaries and expenses---------- 1447

Jurisdiction
Contract reformation cases

Nothing requires contractor seeking contract reformation to exhaust remedy in GAO before bringing action in court for relief---------- 546

Jurors
Fees
Government employees in Federal courts
Prorated fees

Computation of jury service fee payable to Federal Government employees whose period of jury service in Federal courts overlaps in part their normal workday shall be based on jury service fee of $20 prorated over standard 8-hour workday, that is $2.50 for each hour of jury service outside hours employees worked or would have worked but for jury service. 53 Comp. Gen. 407 modified---------- 1264

COURTS—Continued
Jurors—Continued
Fees—Continued
Government employees in State courts
Prorated fees Page

Principle of 53 Comp. Gen. 407 permitting pro-rata payment of jury fees to employees for jury service in Federal courts extending beyond scheduled workday is equally applicable to jury duty performed in State courts. Employees may be permitted to retain a pro-rata portion of fee for jury service in State or municipal courts extending beyond their scheduled workday. Contrary prior decisions are no longer controlling 1266

Government employees
Granting of court leave

When end of employee's scheduled workday coincides with beginning of Federal jury service, there is no necessity to prorate jury fee. Any travel time between duty station and court is to be considered as court leave 1264

Jury service
Excess hours
Fractional hours

In computing excess hours of jury service in Federal court over number of employee's working hours in day, fractional hours shall be rounded off, one-half hour or more being considered one hour 1264

Magistrates
Compensation
Increases
Cost-of-living adjustments

Cost-of-living provisions of 28 U.S.C. 461 do not apply to compensation of part-time United States magistrates and citizen jury commissioners. Inasmuch as section 461 lists the specific classes of judicial officers covered by its provisions, all not mentioned are deemed to have been intentionally excluded. However, 5 U.S.C. 5307 authorizes administrative adjustment of the statutory maximum compensation for part-time United States magistrates and citizen jury commissioners 1077

Cost-of-living increases of 28 U.S.C. 461 should be applied to the increment of compensation fixed for the referee duties of combination referees in bankruptcy-magistrates while the cost-of-living increases of 5 U.S.C. 5307 may be applied to the increment of compensation fixed for magistrate duties of these officials. The entire compensation of combination clerk-magistrates is subject to the cost-of-living adjustment provisions of 5 U.S.C. 5307 1077

Reporters
Transcript fees
Appropriation availability

Whenever a Federal District Judge, pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure, appoints a Land Commission to hear suits for just compensation in land condemnation cases, and the order of reference indicates a desire for the proceeding to be recorded, attendance fees of the court reporter are chargeable to the appropriations of the Administrative Office of United States Courts since the Judiciary determines if reporter shall be in attendance and normally pays attendance fees in other cases 1172

COURTS—Continued
Reporters—Continued
Transcript fees—Continued
Appropriation availability—Continued Page

Court reporters are not entitled to payment in addition to their salaries for providing transcripts of land commission proceedings to judges or to land commissioners appointed by judges in land condemnation cases. Accordingly, neither the Department of Justice nor the Administrative Office of the United States Courts may pay for such transcripts from their appropriations. However, reporters whose services are obtained on a contract basis are entitled to payment, from the Administrative Office, in accordance with the provisions of their contracts 1172

State
Jurisdiction
Garnishment proceedings

State of Washington sought to garnish pay of Air Force civilian employee to collect child support under authority of sec. 459 of P.L. 93-647 by means of administrative garnishment order served on Air Force Finance Officer. Air Force refused to effect garnishment on ground that administrative order was not "legal process" within meaning of statute. In light of purpose of statute and lack of any limiting language, we believe "legal process" is sufficiently broad to permit garnishment by administrative order under Washington procedure. GAO would not object to Air Force payments under State administrative order 517

CREDIT CARDS
Fraudulent use
Protection under Truth in Lending Act

Pursuant to court decisions holding that liability protection of Truth in Lending Act for unauthorized use of credit cards extends to all credit cards, whether used for business or consumer purposes, Government is also protected under Act. *Equal Employment Opportunity Commission*, B-180512, May 17, 1974, 74-1 CPD 264 is overruled 1181

Use
Travel and transportation costs

Rental car agreement stating cost had been charged to personal credit card does evidence that employee incurred rental cost as a personal obligation and will be regarded as satisfying receipt requirements of FTR para. 1-11.3c(5) for purpose of reimbursing employee for cost of rental car. Credit card number need not be shown on invoice. From nature of transaction it must appear that Govt. could not be held liable for the expense in event of nonpayment of the obligation by employee .. 224

Gasoline for Government vehicles
Tax liability

Except for company owned stations, Government's liablity for State taxes on gasoline is generally dependent upon whether incidence thereof, by State law, is on service station or on Government as purchaser of gasoline from service station. Although through use of its credit cards Government pays national oil companies for gasoline purchased from independent service stations, oil companies are not vendors but merely participants in credit arrangements 1358

CUSTOMS
Employees
Overtime services
Reimbursement
Customs Service inspectional employees
Parties in interest not liable for retroactive salary increases Page
In 1972 and 1973 flying club arranged aircraft flights and paid for required overtime services of Customs Service inspectional employees pursuant to 19 U.S.C. 267. In 1974 Customs Service billed club for additional overtime salary payments resulting from retroactive pay increases from Oct. 1, 1972, to Jan. 6, 1973. Parties in interest are not liable for charges stemming from retroactive pay increase since generally accounts billed and paid for at prevailing rates may not be subsequently reopened and statute does not explicitly require retroactive salary increases to be paid for by parties in interest. 31 Comp. Gen. 417 and B–107243, Nov. 3, 1958, shall no longer be followed 226
Services outside regularly scheduled hours
Cost recovery
Customs Service has authority under User Charges Statute, 31 U.S.C. 483a, to implement recommendation in GAO report that administrative overhead costs be collected from parties-in-interest who benefit by special reimbursable and overtime services of Customs officers. Various statutes which provide for reimbursement by parties-in-interest of compensation and/or expenses of Customs officers for such services generally do not preempt imposition of additional user charges under 31 U.S.C. 483a 456
Services to public
Reimbursement. (*See* **FEES, Services to public**)

DAMAGES
Public property. (*See* **PROPERTY, Public, Damage, loss, etc.**)
DEBT COLLECTIONS
Federal Claims Collection Act of 1966. (*See* **FEDERAL CLAIMS COLLECTION ACT OF 1966, Debt collections**)
Point of diminishing returns
General Accounting Office manual contains provision requiring establishment of realistic points of diminishing returns beyond which further collection efforts are not justified. B–117604(17), Aug. 20, 1975, modified 1438
Waiver
Basic allowance for quarters (BAQ)
Junior Reserve Officer Training Corps instructors
While the "additional amount" to which a retired member employed as a JROTC instructor becomes entitled under 10 U.S.C. 2031(d)(1) is the difference between retired or retainer pay and active duty pay and allowances to which entitled if called or ordered to active duty, such amount is neither retired pay nor active duty pay, rather, is compensation paid to such member in a civilian capacity. As such, recovery by the U.S. of any erroneous payments of that "additional amount" may only be waived, if at all, under 5 U.S.C. 5584 44

DEBT COLLECTIONS—Continued
Waiver—Continued
Civilian employees
Compensation overpayments
Waiver entitlement basis for payment Page

Army officer, assigned as Executive Assistant to Ambassador-at-Large, retired from Army in anticipation of civilian appointment to that position. After retirement he continued to serve as Executive Assistant for 7 months before Dept. of State determined he could not be appointed. Claimant is *de facto* officer who served in good faith and without fraud. He may be paid reasonable value of services despite lack of appointment in view of fact that had compensation been paid, claimant could retain it under *de facto* rule or recovery could be waived under 5 U.S.C. 5584. Although he was not paid, administrative error arose when claimant in good faith entered on duty with understanding of Govt. obligation to pay for services. On reconsideration, B–181934, Oct. 7, 1974, is overruled, and 52 Comp. Gen. 700, amplified---------- 109

Leave payments
Lump-sum leave payment

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Lump-sum pay for annual leave may not be considered for waiver under 5 U.S.C. 5584, since payment was proper when made. Also, there is no authority to waive payment of retirement deductions on the amount of Federal pay that would have been earned during the period of separation, notwithstanding interim earnings exceeded amount of Federal pay---------- 48

Military personnel
Dependents
Erroneous Survivor Benefit Plan payments

Overpayments resulting from erroneous annuity payments under Survivor Benefit Plan (SBP) made to member's widow may not be considered for waiver under 10 U.S.C. 2774, which relates to pay and allowances but are for consideration under 10 U.S.C. 1453, which is applicable specifically to SBP payments---------- 1238

Amounts due members or beneficiaries for over reduction of retired pay or under payment of annuities due to computation of Survivor Benefit Plan base amounts under 10 U.S.C. 1447 (2) not in accordance with the rules stated in this decision should be paid to persons entitled thereto, and amounts due the United States are subject to collection or waiver under 10 U.S.C. 1453 or 2774, as applicable---------- 1432

Criteria

Criteria for waiver of erroneous payments under the SBP pursuant to 10 U.S.C. 1453 should be similar to the criteria for waiver under 5 U.S.C. 5584; 10 U.S.C. 2774 and 32 U.S.C. 716, and therefore although waiver may not be granted unless collection would be contrary to the purpose of the plan and against equity and good conscience proof of financial hardship will not be required if waiver is otherwise in order. 54 Comp. Gen. 249 and 35 *id.* 401, overruled---------- 1238

DEBT COLLECTIONS—Continued
Waiver—Continued
Military personnel—Continued
Pay, etc.
Amount of claim
Effect of set-off Page

Where member requests waiver of claim under 10 U.S.C. 2774, which is less than total erroneous payment, and he does not know that an accounting setoff for underpayment which was otherwise due him has been made or of his right to request waiver for that amount, or that erroneous payment was actually determined to be for greater amount, we would act on entire erroneous payment in view of beneficial nature of law. However, where member knows of proper total erroneous payment, accounting setoff for underpayment and his right to request waiver in such amount, but requested waiver of amount less than total, we would act only on amount of waiver request 113

Total amount of erroneous payment

Amount of claim of U.S. against member of uniformed services arising out of overpayments of pay and allowances, which is subject to consideration for waiver under 10 U.S.C. 2774, is total amount of erroneous payments made, even where audit of member's pay account reveals underpayment of pay and allowances, whether that underpayment involves same item of pay and allowances or different item than was involved in overpayment, or was in same or different period 113

DECEDENTS' ESTATES
Pay, etc., due military personnel
Beneficiary designations
Relationship unnecessary

Where claimant obtained Mexican divorce from prior spouse and subsequently married deceased member, fact that Coast Guard paid her member's unpaid pay and allowances as designated beneficiary under clause (1) of 10 U.S.C. 2771(a) does not estop Govt. from challenging validity of marriage since such payment was neither determinative of question of her marital status nor was such question even in issue 533

Persons implicated in death of decedent
Claim determined on basis of award of life insurance proceeds

Civil action in case of widow versus decedent's mother for proceeds of life insurance policy which ruled in favor of mother on specific jury finding that widow unlawfully and intentionally killed member and which conclusion was upheld by United States Court of Appeals, while not binding on GAO, is to be given considerable weight in our consideration of survivor claims where parties and issues before such court involve, in part, matters before this Office 1033

Persons causing death of decedent
Evidence of intent

Claim of widow of deceased service member for entitlement to both six months' death gratuity (10 U.S.C. 1477) and unpaid pay and allowances (10 U.S.C. 2771), where she admitted killing him and was indicted for murder, is denied, even though she claimed self-defense and *nolle prosequi* was entered on indictment, since due to certain information of record, the lack of felonious intent cannot be established 1033

DEFENSE DEPARTMENT
Directives
Design to Cost Policy Directive
Policy *v.* legal rights and responsibilities Page
Replacement of "off the shelf" coaxial machine gun program involving limited testing and evaluation does not fall under Department of Defense (DOD) Design to Cost Policy Directive 5000.28. In any case, Directive is matter of DOD policy, and does not establish legal rights and responsibilities 1362
Emergency preparedness mobilization planning program
Production Planning Schedule
Pursuant to ASPR 1-2201(d), industrial firm becomes "planned producer" of "planned" item under DOD emergency preparedness mobilization planning program when it completes and executes DD Form 1519, "Production Planning Schedule." 703
Procurement
Contracting methods
Compliance with DOD reprogramming directives
Although protester argues that Navy did not comply with DOD reprogramming directives, those directives are based on nonstatutory agreements and do not provide a proper basis for determining legality of expenditures 307
Prototype or parallel development
No organizational conflict of interest is shown where contractor who performed both contract definition including development of specifications, and actual system development is awarded contract for initial production that only it can provide 1019
Without open and competitive bidding
Fact that contractor engaged in development tasks prior to award of development and that agency intends to pay for costs incurred in those efforts does not indicate illegal action. Payment under such circumstances appears to be authorized by regulatory provision 1019

DEPARTMENTS AND ESTABLISHMENTS
Overtime policies. (*See* **REGULATIONS, Overtime policies**)
Promotion procedures. (*See* **REGULATIONS, Promotion procedures**)
Rule making authority
Federal aid, grants, contracts, etc.
Although contractual matters are statutorily exempted from rule making provisions of 5 U.S.C. 553, Secretary of Labor has waived reliance on that exemption for rule making by his Department, thereby necessitating Department of Labor compliance with statutory provisions 1160
Services between
Appropriation obligation
Automated payroll system
Interagency agreement entered into in fiscal year 1976 by General Services Administration and Administrative Office of U.S. Courts for design and implementation of automated payroll system under section 111 of Federal Property Act, 40 U.S.C. 759, rather than Economy Act, 31 U.S.C. 686, is not subject to 31 U.S.C. 686-1, which limits duration of appropriation obligations only in Economy Act transactions. Such agreement constitutes valid obligation against fiscal year 1976 Administrative Office appropriation to meet *bona fide* 1976 need 1497

DEPARTMENTS AND ESTABLISHMENTS—Continued
Services between—Continued
Certifying officers acting for two agencies. (*See* **CERTIFYING OFFICERS, Responsibility, Interagency services**)
Transfers between
Relocation expenses
Losing *v.* gaining agency
Liability for expenses Page

The relocation expenses prescribed under 5 U.S.C. 5724a(c) and 5724(e) may be paid by the gaining or losing agency to an employee separated by a reduction in force and reemployed within 1 year at another geographical location, as though the employee had been transferred in the interest of the Government without a break in service. However, the losing and gaining agency must agree as to which will be responsible for such costs 1338

DETAILS
Compensation
Higher grade duties assignment

Interpretations of regulations by agency charged with their administration are entitled to be given great weight by reviewing authority. Board of Appeals and Review, CSC, has interpreted Commission's regulations to require temporary promotion of employees detailed to higher grade positions for over 120 days where prior Commission approval has not been sought. We have concurred in the Board's interpretation and therefore 52 Comp. Gen. 920 is overruled. Amplified by 55 Comp. Gen. 785 539

Extensions
Civil Service Commission approval

Air Force detailed GS–4 employee to GS–5 position for over 1 year beginning July 1, 1970, without obtaining CSC's prior approval of extension beyond 120 days. Agency's discretionary authority to retain employee on detail continues no longer than 120 days, after which agency must either have obtained Commission approval or grant employee temporary promotion. Since agency failed to obtain approval, employee is entitled to retroactive temporary promotion from 121st day of detail to its termination 785

Decision of Dec. 5, 1975, 55 Comp. Gen. 539, entitling otherwise qualified employee to temporary promotion on 121st day of detail to higher grade position when prior approval of extension of detail beyond 120 days has not been obtained from Civil Service Commission will be applied retrospectively to extent permitted by 6-year statute of limitations applicable to GAO 785

Military personnel
Officers serving as Assistant Judge Advocates General

Court of Claims in *Selman* v. *United States*, 204 Ct. Cl. 675, held that naval officers ordered to serve in positions of Assistant Judge Advocates General are entitled to at least the pay of rear admiral (lower half) while serving in such positions whether they were "detailed" or "assigned" to such positions. Our decision at 50 Comp. Gen. 22 which determined that such officers were not entitled to pay of rear admiral (lower

DETAILS—Continued
Military personnel—Continued
Officers serving as Assistant Judge Advocates General—Continued Page
half) will no longer be followed. Consequently, successors to plaintiffs in *Selman* in the statutorily created positions are also entitled to receive pay of rear admiral (lower half) ---- 58
Temporary promotions
In lieu of detail
Agency's *v.* employee's choice
Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made ---- 836

DETECTIVE SERVICES
Employment prohibition. (*See* **PERSONAL SERVICES, Detective employment prohibition**)

DISCHARGES AND DISMISSALS
Military personnel
Discharged with readjustment pay
Travel and transportation allowances
To selected home
A Regular Army commissioned officer discharged with readjustment pay in accordance with 10 U.S.C. 3814a may receive travel and transportation allowances provided in 37 U.S.C. 404(c), 406(d) and 406(g) for members involuntarily released from active duty with readjustment pay, since the congressional intent was to treat such officers in the same manner as Reserve officers involuntarily released from active duty with readjustment pay ---- 166
Other than honorable
Transportation of dependents, household effects, etc.
Regulations may be promulgated under 37 U.S.C. 406(h) to authorize transportation of household effects and a private automobile of a member of the uniformed services serving overseas, without dependents, incident to the member's discharge under conditions other than honorable, similar to the transportation authorized members with dependents discharged in such circumstances. 44 Comp. Gen. 574 will no longer be followed; 45 Comp. Gen. 442 and 49 *id.* 695, overruled in part ---- 1183

DISCRIMINATION (*See* **NONDISCRIMINATION**)

DISTRICT OF COLUMBIA
Contracts
Labor stipulations
Affirmative action programs
Allegation that DC's policy of affirmatively promoting minority-owned business is thwarted by award under instant IFB is unsubstantiated in record presented ---- 366

DISTRICT OF COLUMBIA—Continued
Contracts—Continued
Specifications
Restrictive
Page
D.C.'s cancellation of invitation after bid opening was proper upon determination that specifications for one particular item being procured overstated user's actual needs and had detrimental effect of restricting competition ... 464
Firemen and policemen
Compensation
Increases
Applicable to U.S. Park Police and Executive Protective Service
Under sec. 501 of D.C. Police and Firemen's Salary Act of 1958, as amended, officers and members of U.S. Park Police and Executive Protective Service (formerly White House Police) are entitled to same rates of compensation as those granted under that Act to Metropolitan Police Force of D.C. By virtue of sec. 501, enactment of legislation by Council of D.C. increasing salaries of Metropolitan Police under 1958 Act will have effect of granting like increases to U.S. Park Police and Executive Protective Service until Congress otherwise provides ... 965
Procurement methods
Recommendation
Cancellation of a subsequent IFB on basis that services were no longer required was erroneous where there was in fact a continuing need for the services which was being met through a noncompetitive, informal agreement with a contractor to a Federal agency—an arrangement unauthorized by statute. Recommendation is made that D.C. discontinue present method of procurement and that services be procured through formal advertising or an intergovernmental agreement authorized by statute ... 464

DIVORCE (*See* **HUSBAND AND WIFE, Divorce**)

DOCUMENTS
Incorporation by reference
Contracts. (*See* **CONTRACTS, Incorporation of terms by reference**)

DONATIONS
Acceptance
Agriculture Department
Forest Service
Purpose of bequest
Forest Products Laboratory, Department of Agriculture, has authority to accept bequest from private citizen only for purpose of establishing and operating forestry research facilities. It may not enter into cooperative agreement with University of Wisconsin Foundation to invest proceeds of bequest and to use income for fellowships, scholarships, special seminars and symposia since agency may not do indirectly what it cannot do directly ... 1059

DONATIONS—Continued
Gifts
To Government officials, etc.
Recognition of support for USACIDC Page
Appropriated funds may not be used to buy paperweights and walnut plaques for distribution by U.S. Army Criminal Investigation Command (USACIDC) to governmental officials and other individuals in recognition of their support for USACIDC. Plaques may, however, be purchased with appropriated funds to honor employees who died in the line of duty if the use is proper under the Government Employees Incentive Awards Act, 5 U.S.C. 4501–4506, and related regulations 346
Legality
Authority requirement
Internal Revenue Service (IRS) proposal that it pay expenses of employee attending meetings and accept reimbursement directly from eligible tax exempt organizations, crediting such reimbursement to its own appropriation, is not authorized by applicable statutes. Provisions of 5 U.S.C. 4111 permit employee only to accept payments from eligible organizations, which payments are to be deducted from amounts otherwise due from employing agency. Moreover, in absence of specific authority to accept voluntary contributions or travel reimbursements, IRS would be required to deposit such funds into miscellaneous receipts of the Treasury by 31 U.S.C. 484 (1970) 1293

ENLISTMENTS
Fraudulent
Determination
Waiver of fraud *v.* avoidance of enlistment
Administrative waiver action taken by the military services on voidable fraudulent enlistments, with a "conditional" suspension of execution of discharge pending member's future good behavior, is contrary to guidance furnished in 54 Comp. Gen. 291 1421
Waiver of fraud *v.* release
Once an administrative determination is made as to fraudulent enlistment, the fraud should be waived or the individual should be promptly released from military control 1421
Reenlistments
Unexpired term of prior enlistment
Additional obligated service
Service member who, within 3 months of the expiration of his current enlistment or extension thereof, is discharged pursuant to the authority of Secretary concerned under 10 U.S.C. 1171, where such discharge is for the sole purpose of reenlisting, may not have that unexpired term of enlistment or extension thereof considered as "additional obligated service" for purpose of determining the multiplier for Selective Reenlistment Bonus computation under 37 U.S.C. 308, as amended by Pub. L. 93–277, May 10, 1974, 88 Stat. 119 37

ENVIRONMENTAL PROTECTION AGENCY
Generally. (*See* ENVIRONMENTAL PROTECTION AND IMPROVEMENT. Environmental Protection Agency)

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Environmental Protection Agency
Procurement policies and procedures
Page
Where GAO decision after lengthy protest proceeding recommended continuing competition under RFP, Environmental Protection Agency's (EPA) position that RFP is defective and should be canceled—formally documented for first time 3 months after decision and 10 months after protest was filed—raises serious questions concerning Agency's understanding of and adherence to fundamental procurements policies and procedures, since inaction by Agency in failing to ascertain and promptly disclose RFP deficiencies has created delay and confusion in procurement process 1281
Grants-in-aid
Environmental law scholarships
Proposed lump-sum grant by EPA to American Law Institute to provide scholarships to defray transportation, food, and lodging expenses at environmental law seminar does not violate 31 U.S.C. 551 which prohibits use of appropriated funds to pay expenses of conventions or gatherings without specific authority since expenditures of properly authorized grant funds are not subject to restrictions upon direct expenditure of appropriations 750
Water pollution control
Contracts
Federal Procurement Regulations
FPR does not apply to award made under EPA grant for municipal sewer construction, since FPR pertains to direct Federal procurements and reference in EPA grant regulations to "Federal law" does not incorporate FPR by reference 413
Regulations incorporating FPR cost principles in situations involving allocation and allowability of cost on grants to other than educational institutions or State and local Govts. does not make FPR generally applicable to procurements by EPA grantees. In fact, where State or local Govt. is grantee, OMB Cir. A–87 regarding allowability of costs applies and not FPR 413

EQUAL EMPLOYMENT OPPORTUNITY
Commission
Credit cards
Unauthorized use
Pursuant to court decisions holding that liability protection of Truth in Lending Act for unauthorized use of credit cards extends to all credit cards, whether used for business or consumer purposes, Government is also protected under Act. *Equal Employment Opportunity Commission*, B–180512, May 17, 1974, 74–1 CPD 264, is overruled 1181
Contract provisions. (*See* CONTRACTS, Labor stipulations, Nondiscrimination)

EQUAL EMPLOYMENT OPPORTUNITY—Continued
Grant programs
Contract awards Page
Where applicable regulations of Federal Govt. agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated---------- 139

EQUIPMENT
Automatic Data Processing Systems
Computer service
Evaluation propriety
Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage---------- 280
Time/timesharing
Contract for computer time/timesharing services to prime contractor who has commercial arrangements with potential subcontractors to pay standard percentage of invoice fee for finding buyer of computer time and/or services does not violate Anti-Kickback Act (41 U.S.C. 51) because commercial arrangement does not apply and prime contractor receives fee according to sliding matrix from Govt. only---------- 554
Fact that prime contractor of computer time/timesharing contract may have developed commercial clientele whose abilities it knows does not unduly restrict competition since no potential subcontractor is prohibited from submitting proposal which prime contractor must consider-- 554
General Services Administration
Responsibilities under Brooks Act
Validity of award by FEA for dedicated automatic data processing services through facilities management contract was not affected by Brooks Act, 40 U.S.C. 759, and implementing regulations and policies, because FEA was entitled to rely on authorizations to proceed with procurement given by OMB and GSA after reviews of solicitation and FEA's cost and other justifications. Also, provisions of OMB Cir. No. A-54 and FMC 74-5 concerning ADPE acquisitions are ordinarily executive branch policy matters not for resolution by GAO---------- 60
Interagency agreement entered into in fiscal year 1976 by General Services Administration and Administrative Office of U.S. Courts for

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
General Services Administration—Continued
Responsibilities under Brooks Act—Continued Page
design and implementation of automated payroll system under section 111 of Federal Property Act, 40 U.S.C. 759, rather than Economy Act, 31 U.S.C. 686, is not subject to 31 U.S.C. 686–1, which limits duration of appropriation obligations only in Economy Act transactions. Such agreement constitutes valid obligation against fiscal year 1976 Administrative Office appropriation to meet *bona fide* 1976 need 1497
Leaseback
Third party
Trial basis
Various GSA proposals for third party leaseback of installed and uninstalled ADPE are tentatively approved by GAO provided that equipment manufacturer's consent to leaseback arrangement be obtained where necessary. However, recommendation is made that leaseback proposals be instituted on trial basis because of problems which may arise 1012
Lease-purchase agreements
Acquisition of equipment
Direct assignment by Govt. of purchase option under ADPE lease to third party lessee for purpose of accomplishing leaseback of equipment to Govt. under more favorable terms constitutes procurement transaction rather than disposal of property and therefore laws governing disposal of Govt. property are not for application 1012
Leases
Evaluation
Systems life
Where prices of proposed lease plan for automatic data processing equipment were effective through only 4 months of 96 months' systems life, plan should have been rejected. RFP required that fixed or determinable prices throughout systems life be offered. Fact that other lease plans included in contract cover remainder of systems life is immaterial, because RFP allowed only one plan to be considered in evaluation, and unacceptable plan was only plan actually evaluated. Therefore, awards were made without reasonable assurance of lowest overall cost to Government 1151
Selection and purchase
Alternate proposals requirement
In any negotiated procurement, burden is on offerors to affirmatively demonstrate merits of their proposals. Where RFP contemplated fixed-price contract for supply of calibration system, not developmental effort, and instructed offerors to make such demonstration on paragraph-by-paragraph basis, offeror which proposed alternative approach to meeting requirements arguably bore even heavier burden of showing how its system would satisfy Army's needs 374
Mininum needs requirement
Claims that alternative system can meet all present and future Army calibration needs at lower cost do not clearly show that RPF requirement for expandable read/write computer memory is without any reasonable basis, since Army, which must make determination of

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Selection and purchase—Continued
Minimum needs requirement—Continued Page
minimum needs and bear risk of inadequate performance resulting from improper determination, believes greater memory capacity will be needed in future to calibrate more complex equipment, that operator-configurable software will provide desirable flexibility and long-term cost savings, and that despite protester's performance claims, its approach may involve unacceptable technical and cost risks---------- 374
Procurement with ADP fund
General Services Administration control
While GSA proposed leaseback arrangements tentatively are approved, GAO recommends that GSA should continue to seek adequate ADP Fund capitalization to finance ADPE purchases. Furthermore, each proposed leaseback should be approved by GSA (no blanket delegation to agencies) and lease or purchase determinations should be made and documented before leasebacks are used---------- 1012
User acceptability
Where offeror proposing alternative approach to meeting RFP requirements submitted voluminous technical literature, documents, manuals and articles but was proceeding on misconception that Army bore burden of demonstrating how its approach was not feasible, GAO cannot conclude that Army's rejection of basic and alternate proposals as technically unacceptable is shown to be without any reasonable basis. Basic proposal's failure to meet expandable memory requirement and alternate proposal's lack of information on software interface indicate reasonable basis for rejection, notwithstanding protester's allegations of numerous technical errors by Army in failing to understand approach proposed---------- 374
Service contracts
Applicability of Service Contract Act
GAO will not object to inclusion by contracting agency of Service Contract Act provisions in solicitations for data processing services, even though U.S. District Court has ruled that Act is not applicable to such services, since Dept. of Labor (DOL), which has responsibility for administering Act, has declined to follow the decision in all other jurisdictions and has been supported in its position by cognizant congressional committee, and since there is conflict within same judicial circuit as to whether decisions by DOL regarding coverage of the Act are judicially reviewable---------- 675

ESTOPPEL
Against Government
Not established
Estoppel has not been established against LEAA application of organizational conflict of interest guideline for grantee procurements to prevent grantee award to offeror, who developed and drafted specifications, notwithstanding assurances given to offeror by grantee that it could compete, since grantee's assurances cannot bind LEAA and LEAA apparently was not aware of all facts showing offeror came under guideline prior to communicating this fact to grantee---------- 911

EVIDENCE
Sufficiency
Lacking
Contract protests Page
Absent further evidence in record, unsubstantiated allegation that DSA has improperly decided to restrict all hat procurements within SIC 2352 to small business will not be considered 475
To establish time of receipt of bid modification
Time/date stamp inaccurate
Time/date stamp on bid modification may be disregarded in determining time of receipt at Government installation where independent evidence establishes that times marked by machine were inaccurate and were inconsistent with stipulated order of receipt 1146
Where time/date stamp is inaccurate, contracting officer may seek other documentary evidence maintained by installation, including telegrams, for purpose of establishing time of receipt of bid modification at Government installation 1146

EXPERTS AND CONSULTANTS
Compensation
Rates
Dollar limitation
Maximum pay rate for experts and consultants employed under Pub. L. 88-633, as amended, may not exceed $100 per day, despite AID's administrative determination to the contrary. Pub. L. 91-231 does not make the specific dollar limitation obsolete, and AID may not rely on 5 U.S.C. 3109 as authority to pay those employees at higher rates. Also, legislative histories of acts increasing the maximum amounts payable to experts and consultants of other agencies with similar dollar limitations indicate necessity of legislation to increase $100 ceiling 567
Decision 55 Comp. Gen. 567, applicable to experts and consultants hired by Department of Agriculture pursuant to delegated authority under section 626(a) of Public Law 87-195, as amended, limits pay rates for such personnel to $100 per diem since that is maximum amount authorized by section 626(a). As no applicable law similarly limits pay rates of experts and consultants hired as authorized in 5 U.S.C. 3109 (1970) by virtue of section 702 of Public Law 94-212, general rule of section 3109 governs pay rates for such personnel and they may be compensated at rates not in excess of $145.36, currently the per diem equivalent of the top step of GS-15 1237
Employment
Violation of collective bargaining agreement
Grievance charged violation of provision in collective bargaining agreement that consultants would not be hired to perform work that could be performed by agency employees. Agency stipulated that it had violated agreement but refused union's demand that consultant repay salary to U.S. Treasury. Prior to arbitration hearing, the consultant resigned. Arbitrator's award of punitive damages to be paid by agency to union may not be implemented since there is no authority to award punitive damages against U.S. or one of its agencies 564

EXPERTS AND CONSULTANTS—Continued
Retired military officers
Double compensation. (*See* **COMPENSATION, Double, Concurrent military retired pay and civilian service, Consultants**)
Travel expenses
Within metropolitan area
Commuting from residence to place of employment Page
Intermittently employed consultant may be paid transportation expenses pursuant to 5 U.S.C. 5703 and par. C3053, subpar. 2, of Joint Travel Regs., Vol. 2, for commuting from his residence to place of employment where residence is outside corporate limits but within metropolitan or geographic area of place of duty, insofar as intermittent employment occasions him transportation expenses he would not otherwise have incurred. 22 Comp. Gen. 231, overruled 199
Two appointments
Retired member of the uniformed services
A renewed 30-day exemption from reduction in retired pay in the fiscal year in which a retired Regular military officer's previous excepted appointment as a consultant to a Federal agency is converted would be in violation of the Dual Compensation Act (5 U.S.C. 5532). Where an appointment conversion is merely in the nature of a continuation and an extension of a previous excepted appointment, it is not a "new appointment" for purposes of applying the multiple appointment rule of 5 U.S.C. 5532(c)(2)(ii), but is, instead, a routine personnel action 1305
Where a retired military member consultant receives a second intermittent appointment, and an entire fiscal year has intervened since the expiration of the consultant's previous intermittent appointment, he is not entitled to an additional 30-day exemption from reduction in military retired pay if the second appointment appears to be only a renewal of the initial appointment 1305

FAIR LABOR STANDARDS ACT
Applicability
Employees of United States
Fair Labor Standards Amendments, Pub. L. 93-259
Firefighters
Overtime
Federal firefighters with 72-hour tour of duty are entitled to 12 hours overtime compensation under FLSA in 1975. Their regular rate of pay for computing overtime is determined by dividing their total compensation by number of hours in their tour of duty, 72, there being no basis for the divisor to be limited to number of hours beyond which overtime must be paid, 60. Therefore, since FLSA requires overtime pay at rate of one and one-half times regular rate of pay and firefighters have already been paid regular rate for 12 hours of overtime, extra compensation for overtime is limited to one-half their regular rate of pay 908
Professional employees exempted from overtime provisions
Although Fair Labor Standards Act of 1938 has been amended to apply to Federal employees, professional employees are exempted from application of the overtime provisions of the Act. 29 U.S.C. 213(a)(1) ... 55

FAMILY ALLOWANCES
Evacuation
Requirement
Unusual or emergency circumstances Page
Military members required to involuntarily relocate their households incident to base closings in Japan under Kanto Plain Consolidation Plan, without permanent changes of station, may not be paid dislocation allowance under 37 U.S.C. 407(a), nor may they be paid such allowance pursuant to 37 U.S.C. 405a since the relocations were not evacuations incident to unusual or emergency circumstances 932
Separation
Type 2
Ship duty
Home port changes
Family separation allowance (FSA), Type II, if otherwise allowable may not be paid to naval personnel assigned to ships merely because ship has moved from its home port but eligibility depends upon where dependents actually reside. If they reside within 50 miles (or 1½ hours traveltime) of ship while at some other port, FSA may not be paid 991
Residence location
Following decision 52 Comp. Gen. 912, if ship moves from its home port to another port within 50 miles (or 1½ hours traveltime as provided in para. 30313, DODPM) of the home port, those members attached to ship whose dependents do not reside in area of home port do not become entitled to family separation allowance, Type II 991

FEDERAL AVIATION ADMINISTRATION
Appropriations. (*See* APPROPRIATIONS, Federal Aviation Administration)

FEDERAL CLAIMS COLLECTION ACT OF 1966
Cost of collection exceeding recovery
Regulations implementing Federal Claims Collections Act provide that head of agency may terminate collection activity when further collection action will exceed amount recoverable 1438
Debt collection
Administrative responsibility
4 GAO 54.1
The Federal Claims Collection Act of 1966, 31 U.S.C. 951–953, places responsibility in the administrative agencies for collecting debts determined to be due the United States which arise as a result of their activities. This includes the authority to compromise, terminate or suspend collection action. B–117604(17), Aug. 20, 1975, modified 1438

FEDERAL HOME LOAN BANK BOARD
Appropriations. (*See* APPROPRIATIONS, Federal Home Loan Bank Board)
Insurance on bank building
Appropriation availability
Federal Home Loan Bank Board may purchase insurance covering risk of loss to new building. Government policy of insuring its own risks of loss, based on wide distribution of type and geographical location of its risks, does not apply here since total loss may be ultimately sustained by Federal Home Loan Bank System due to nature of funding for building 1321

FEDERAL MANAGEMENT CIRCULAR

Policy matters Page

LEAA organizational conflict of interest guideline is not inconsistent with FMC 74–7 Attachment 0, since provisions of FMC 74–7–0 are matters of Executive branch policy, which do not establish legal rights and responsibilities, and Office of Federal Procurement Policy has found guideline to be acceptable implementation of FMC 74–7–0----- 911

FEDERAL PROCUREMENT REGULATIONS

Applicability

Grantee procurements

Environmental Protection Agency

FPR does not apply to award made under EPA grant for municipal sewer construction, since FPR pertains to direct Federal procurements and reference in EPA grant regulations to "Federal law" does not incorporate FPR by reference---------- 413

Negotiated procurement

Identity of successful offeror

Revision of FPR recommended

Where small business size status protest was timely filed with contracting officer within 5 days after notification of successful offeror, but after award, SBA determination that protested offeror was not small at time of award does not result in contract awarded being void *ab initio*, but merely void at option of Govt., thereby precluding effective size protest. To remedy this anomaly, it is recommended that FPR be revised to require that identity of successful offeror be revealed prior to award---------- 502

Uniformity

Additive or deductive items

FPR, unlike ASPR, imposes no duty on contracting officer to record amount of funds available prior to bid opening for base bids and alternates when amount of funding is in doubt. Therefore, determination of actual available funding, and the consequential determination whether alternates, if any, will be applied, may properly be made after bid opening in case of civilian agency. However, adoption of uniform Govt-wide policy is recommended---------- 443

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT

Federal Property Management Regulations (FPMR)

Exchange/sale authority

Similar items

Silver for gold

General Services Administration acted reasonably under section 201(c) of Federal Property and Administrative Services Act of 1949, as amended, and its implementing Federal Property Management Regulations, in disapproving proposed exchange of certain quantities of silver for an equivalent dollar amount of gold. Since it appears that gold to be acquired would not serve the same specific purpose as the replaced silver, as required by regulations, proposed exchange is not of "similar" items as required by section 201(c). 41 Comp. Gen. 227 distinguished---------- 1268

FEDERAL REGISTER

Effect of publication Page

Since LEAA Manual, which was promulgated pursuant to Omnibus Crime Control and Safe Streets Act, was not published in Federal Register, only parties with actual or constructive notice are bound by its contents and constructive knowledge exists where Manual is incorporated by reference into grant or contract ---- 911

FEES

Accredited rural appraisers

Examination fees, etc.

Exams not integral part of course of instruction are not within definition of "training" in 5 U.S.C. 4101(4). Therefore, Govt. reimbursement of costs of exam leading to certification of Govt. employee as accredited rural appraiser is not permitted by terms of Govt. Employees' Training Act, 5 U.S.C. 4101–4118 ---- 759

Attorneys

Generally. (*See* **ATTORNEYS, Fees**)

Grievance proceedings

Employee entitlement to fees

Two State Department employees were named as defendants in grievance brought under Section 1820 of Volume 3, Foreign Affairs Manual, by employee they supervised. State Department refused to provide legal counsel to supervisors at grievance hearing due to personal nature of grievant's allegations and since purpose of hearing was fact finding for ultimate decision by Director of Personnel. Absent express statutory authority, the two supervisors may not be reimbursed fees of private counsel retained to represent them at the hearing ---- 1418

Contractors. (*See* **CONTRACTORS, Fees**)

Court reporter

Transcript fees. (*See* **COURTS, Reporters, Transcript fees**)

Investment adviser

Invalid

Refunds

Annual charge assessed pursuant to User Charge Statute, 31 U.S.C. 483a, by SEC upon investment advisers and deposited in Treasury as miscellaneous receipts, which charge is now considered erroneous by SEC because of recent Supreme Court decisions, may be refunded by SEC out of permanent indefinite appropriation established by 31 U.S.C. 725q–1 to pay moneys "erroneously received and covered." This refund is authorized to all who paid such invalid fee regardless of whether payment was made under protest ---- 243

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

Parking

Disposition

Under 40 U.S.C. 490(k), fees collected by Executive agency for space provided to "anyone" pursuant to that provision, including parking fees collected from employees, if rates therefor are approved, are generally to be credited to appropriations initially charged for such services, except that amounts collected in excess of actual costs must be remitted to Treasury as miscellaneous receipts ---- 897

FEES—Continued
Parking—Continued
Rates
Approval Page
Where Executive agency other than GSA provides parking space or related services to employees, or to others, agency is authorized by 40 U.S.C. 490(k) to charge occupants therefor if, but only if, rates are approved by Administrator of General Services and Office of Management and Budget ---------- 897
Services to public
Inspectional service employees
Overhead costs
Customs Service has authority under User Charges Statute, 31 U.S.C. 483a, to implement recommendation in GAO report that administrative overhead costs be collected from parties-in-interest who benefit by special reimbursable and overtime services of Customs officers. Various statutes which provide for reimbursement by parties-in-interest of compensation and/or expenses of Customs officers for such services generally do not preempt imposition of additional user charges under 31 U.S.C. 483a ---------- 456
Inspectional services
Retroactive pay increases
Reimbursement
In 1972 and 1973 flying club arranged aircraft flights and paid for required overtime services of Customs Service inspectional employees pursuant to 19 U.S.C. 267. In 1974 Customs Service billed club for additional overtime salary payments resulting from retroactive pay increases from Oct. 1, 1972, to Jan. 6, 1973. Parties in interest are not liable for charges stemming from retroactive pay increase since generally accounts billed and paid for at prevailing rates may not be subsequently reopened and statute does not explicitly require retroactive salary increases to be paid for by parties in interest. 31 Comp. Gen. 417 and B–107243, Nov. 3, 1958, shall no longer be followed ---------- 226
Comptroller General decision stating that parties in interest who use overtime services of Customs Service inspectional employees are not required to pay for employees' retroactive salary increase reflects a change in construction of law. Therefore, decision is not retroactive, but is effective from date of its issuance. In circumstances present in this case, our Office would offer no objection to collection action being terminated under 4 C.F.R. 104.3 ---------- 226
Transcripts
Court reporters. (*See* **COURTS, Reporters, Transcript fees**)
FINES
Violation of wagering tax
Refund by IRS
Appropriation chargeable
Refund by IRS of fine paid pursuant to conviction for violation of wagering tax statutes, which refund was ordered in connection with subsequent vacation of judgment, should be charged against account 20X0903 (Refunding Internal Revenue Collections) rather than account

FINES—Continued
Violation of wagering tax—Continued
Refund by IRS—Continued
Appropriation chargeable—Continued Page
20X1807 (Refund of Moneys Erroneously Received and Covered), since initial receipt of fine by IRS was apparently treated as internal revenue collection, and account 20X1807 is available only when refund is not properly chargeable to any other appropriation ---------- 625

FOREIGN CURRENCIES (*See* **FUNDS, Foreign**)

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES
Post allowance
Supplemental
Civilian employee and his family transferred to new duty station at Frankfurt, Germany, occupied nonhousekeeping transient-type quarters during which their cost for restaurant meals substantially exceeded the cost of such meals if prepared in housekeeping quarters. Since supplementary post allowance is available to defray extraordinary subsistence costs which exceed that portion of employee's salary and post allowance ordinarily spent for food and household expenses while occupying housekeeping quarters, employee may be granted allowance, not to exceed amount prescribed by Department of State Standardized Regulations section 235 (August 27, 1974) ---------- 1301
Territorial cost-of-living allowances
Basic pay requirement
Exception
Alaska Railroad employees with administratively set salaries
Amount in lieu of the cost-of-living allowance may be paid to employees in Alaska of Federal Railroad Administration, Dept. of Transportation, whose pay is fixed administratively, since statutory provisions limiting such salaries to amounts not in excess of salaries of specified grades under General Schedule refer to basic compensation rates in subch. I, Ch. 53, Title 5, U.S. Code, not to allowances in Ch. 59, Title 5, U.S. Code ---------- 196

FOREIGN GOVERNMENTS
Defense articles and services
Foreign Military Sales Act
Since protested award of procurement pursuant to section 22(a) of Foreign Military Sales Act will not involve use of appropriated funds, matter is not subject to settlement by GAO and is dismissed ---------- 674
Egypt
Suez Canal
Rehabilitation by U.S. Government
Decision by U.S. Govt., acting in its sovereign capacity, to rehabilitate Suez Canal is not a taking of a valuable contractual right requiring compensation, as claimant had only anticipated contract for services, loss of which is not responsibility of U.S. Govt. Moreover, submission of unsolicited proposal makes claimant a pure volunteer, affording no basis upon which payment may be authorized ---------- 164

FOREIGN GOVERNMENTS—Continued
Military assistance
Sales prohibitions
Commercial sources availability
Exceptions Page

In regard to contention that Army is not following foreign military sale (FMS) requirements, recent GAO decision declined jurisdiction over similar transaction and in any event Army points out that item is not commercially available for FMS purposes if government-to-government agreement is in effect ---------- 1497

FOREIGN SERVICE
Grievance proceedings
Legal fees reimbursement

Two State Department employees were named as defendants in grievance brought under Section 1820 of Volume 3, Foreign Affairs Manual, by employee they supervised. State Department refused to provide legal counsel to supervisors at grievance hearing due to personal nature of grievant's allegations and since purpose of hearing was fact finding for ultimate decision by Director of Personnel. Absent express statutory authority, the two supervisors may not be reimbursed fees of private counsel retained to represent them at the hearing ---------- 1418

FORMS
Department of Defense
Form 633
Contract pricing proposal

Protest based upon contention that incumbent contractor and awardee under subject procurement knowingly submitted production plan containing incorrect and misleading data, which was incorporated into RFP, to gain competitive advantage over other offerors is denied since two separate agency audits show that data used was substantially correct. However, agency advised that verification of such data should be made prior to inclusion in solicitation rather than after protest as in instant case ---------- 875

Form 1519
Production Planning Schedule

Pursuant to ASPR 1-2201(d), industrial firm becomes "planned producer" of "planned" item under DOD emergency preparedness mobilization planning program when it completes and executes DD Form 1519, "Production Planning Schedule." ---------- 703

FREEDOM OF INFORMATION ACT
Disclosure requests
Contract protester

Where protester files suit under Freedom of Information Act to obtain documents submitted by agency to GAO for *in camera* review, and requests delay of GAO decision on protest pending outcome of suit, delay of decision would be unreasonable because of indefinite delay of procurement process, severe impact on proposed awardee, and fact that delay would permit protester (incumbent contractor) to continue as holdover contractor long after new contractor (only possibly protester) should have been awarded contract ---------- 715

FUNDS

Appropriated. (*See* **APPROPRIATIONS**)

Balance of Payments Program

Applicability Page

Since MAG58 machine gun manufactured by foreign firm represents the Government's minimum needs, and extended period is needed to develop domestic supplier of MAG58, Army determination that Balance of Payments program (Armed Services Procurement Regulation 6-800-6-807) is not applicable to MAG58's procurement is valid---------- 1362

Counterpart

Use by Congressional committees

In absence of specific authorization in an appropriation act, 22 U.S.C.A. 1754(b) is the sole authority making counterpart funds (foreign currencies) available to members and employees of Congressional committees in connection with overseas travel. Under this provision, such funds are available only to specific committees, not including the House Select Committee on Aging, and to committees performing functions under 2 U.S.C.A. 190(d), which refers to *standing* committees but not *select* committees. Accordingly, members and employees of the House Select Committee on Aging are not authorized to use counterpart funds... 537

Federal aid, grants, etc., to States. (*See* **STATES, Federal aid, grants, etc.**)

Federal grants, etc., to other than States

Applicability of Federal statutes

Appropriation, etc., restrictions

Acquisition by agencies of aircraft and passenger motor vehicles by purchase or transfer is prohibited by 31 U.S.C. 638a, unless specifically authorized by appropriation act or other law, and this prohibition applies to acquisition by transfer by Law Enforcement Assistance Admin. of aircraft or passenger motor vehicles for use by grantees in their regular law enforcement functions because agency obtains custody and accountability and exception would reduce congressional control over aircraft and vehicles. See 44 Comp. Gen. 117---------- 348

Proposed lump-sum grant by EPA to American Law Institute to provide scholarships to defray transportation, food, and lodging expenses at environmental law seminar does not violate 31 U.S.C. 551 which prohibits use of appropriated funds to pay expenses of conventions or gatherings without specific authority since expenditures of properly authorized grant funds are not subject to restrictions upon direct expenditure of appropriations---------- 750

Competitive bidding system

Where applicable regulations of Federal Govt. agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated---------- 139

FUNDS—Continued
Federal grants, etc., to other than States—Continued
Contract status Page
GAO will consider protest against contract awarded by grantee in order to advise grantor agency whether Federal competitive bidding requirements have been met and since courts before which present matter is being litigated have expressed interest in GAO views 139
GAO will undertake reviews concerning propriety of contract awards under Federal grants made by grantees in furtherance of grant purposes upon request of prospective contractors where Federal funds in a project are significant 390
Prior reviews of contracts awarded under Federal grants are considered consistent, in the main, with principles enunciated here. However, to extent any prior precedent may be inconsistent it should not be followed. B–178960, September 14, 1973, overruled 390
Educational grants
Funding
Direct *v.* indirect overhead costs
Sec. 204(d)(2) of National Sea Grant College and Program Act of 1966, which prohibits Federal funding for purchase or rental of land, or purchase, rental, construction, preservation or repair of building, dock or vessel applies only to Federal grant payments for direct costs for listed categories. This section does not prohibit payments computed by using standard indirect overhead cost rates, even though such rates may include factors technically attributable to prohibited categories 652
Foreign
United States owned currencies
Aircraft travel
American *v.* foreign carriers
Specific provisions in appropriation statutes that authorize use of foreign currencies for projects involving foreign travel are not viewed as having been impliedly modified by enactment of 49 U.S.C. 1517; hence, Government-sponsored travel that can be financed only with such foreign currencies may be made by noncertificated carrier when otherwise available American-flag carriers will not accept such currencies 1355
Miscellaneous receipts. (*See* **MISCELLANEOUS RECEIPTS**)
Nonappropriated
Contract awards
Protest status
Since protested award of procurement pursuant to section 22(a) of Foreign Military Sales Act will not involve use of appropriated funds, matter is not subject to settlement by GAO and is dismissed 674
Private donations
Income from bequest
Use
Unspecified purposes
Forest Products Laboratory, Department of Agriculture, has authority to accept bequest from private citizen only for purpose of establishing and operating forestry research facilities. It may not enter into cooperative agreement with University of Wisconsin Foundation to invest proceeds of bequest and to use income for fellowships, scholarships, special seminars and symposia since agency may not do indirectly what it cannot do directly 1059

FUNDS—Continued
Private donations—Continued
Income from bequest—Continued
Use—Continued
Unspecified purposes—Continued Page

Proposed cooperative agreement provision which would permit recipient of funds to use funds for unspecified purposes in future at its own option is not proper. Appropriated funds may be used only for purposes for which appropriated. Proposed provision does not limit future use of funds to authorized purposes only 1059

GARNISHMENT
Federal funds
State laws

State of Washington sought to garnish pay of Air Force civilian employee to collect child support under authority of sec. 459 of P.L. 93–647 by means of administrative garnishment order served on Air Force Finance Officer. Air Force refused to effect garnishment on ground that administrative order was not "legal process" within meaning of statute. In light of purpose of statute and lack of any limiting language, we believe "legal process" is sufficiently broad to permit garnishment by administrative order under Washington procedure. GAO would not object to Air Force payments under State administrative order 517

GENERAL ACCOUNTING OFFICE
Contracts
Contractor's responsibility
Contracting officer's affirmative determination accepted
Exceptions

Pilot patent production demonstration contained in IFB and administered to bidder to ascertain technical capability constitutes specific and objective responsibility criterion and, therefore, GAO will review contracting officer's affirmative responsibility determination to see if criterion has been met 1043

Record does not support affirmative responsibility determination where agency made *sub silentio* finding that bidder had demonstrated level of achievement equivalent to or in excess of minimum level of experience set forth in IFB, i.e., that it had worked on more complex equipment for requisite length of time (approximately 5 years) wherein same sort of expertise needed in instant contract was brought to bear, since record indicates only that bidder (1) had some experience with equipment; (2) had some experience with highly sophisticated equipment; and (3) had 5 years' general experience, and does not indicate extent of experience with either specific or more complex equipment ... 1051

Since agency's determination as to small business firm's responsibility was not reasonable, options should not be exercised and future needs resolicited based upon proper statement of actual needs in clear and precise terms 1051

General Accounting Office does not review bid protests involving affirmative responsibility determinations except for actions by procuring officials which are tantamount to fraud or where definitive responsibility criteria set forth in a solicitation allegedly are violated 1295

Protests. (*See* **CONTRACTS, Protests**)

GENERAL ACCOUNTING OFFICE—Continued
Contracts—Continued
Recommendation for agency review
Justification for award Page

Responding to prior GAO decision, agency furnishes rational support for bare conclusions reached by third evaluator (whose views prompted source selection) in conflict with technical evaluation committee's views. Committee evaluated and scored only original proposals but not additional information resulting from negotiations considered by third evaluator which reduced technical evaluation difference of technical committee in favor of protester. Additional information from lower cost awardee responded satisfactorily to technical problem raised by agency which, in large measure, accounted for technical evaluation difference between proposals. 54 Comp. Gen. 896, modified 499

Recommendation for corrective action

Where award on basis of initial proposal substantially varying from RFP requirements has changed specifications and substantial uncertainties in initial proposals and improper acceptance of late price modification required written or oral discussions with all offerors in competitive range, protest is sustained. GAO recommends competition be renewed through discussions with offerors based on actual minimum requirements, disclosing information showing relative importance of price as evaluation factor. Depending on competition results, existing contract should be terminated for convenience, or, if contractor remains successful, contract should be modified pursuant to final proposal. Modified in part by 55 Comp. Gen. 972 201

Bid which failed to acknowledge IFB amendment increasing Davis-Bacon wage rate was properly rejected as nonresponsive, since failure to acknowledge amendment was material deviation. Fact that work to be performed by craft listed in amendment (bricklayer) was not specifically required under specifications is immaterial as agency determined that, in course of contract performance, craft could be employed. However, recommendation is made that procedures be instituted to assure that wage determination modifications are reviewed to ascertain applicability to contract prior to inclusion in amendment 615

Recommendation to ASPR Committee and FPR Division
Revision of late bid provisions of procurement regulations

Recommendation is made to ASPR Committee and FPR Division that GAO comments on possibility that late bid provisions involving acceptable evidence to establish timely receipt of bids may be unnecessarily causing Govt. to lose benefits of low bids be considered with respect to possible revision of procurement regulations 220

Recommendations
Reporting to Congress
Contract matters

When contract is awarded on basis of old wage rates after new Service Contract Act wage determination has been received after bid opening, option should not be exercised since proper way to determine effect of new wages is to recompete rather than assume new rate would affect bidders equally. Recommendation is being referred to appropriate congressional committees pursuant to Legislative Reorganization Act of 1970, 31 U.S.C. 1172 97

GENERAL ACCOUNTING OFFICE—Continued
Decisions
Advance
Agency heads, etc. Page
Agency heads and authorized certifying officers have statutory rights to an advance decision from the Comptroller General on propriety of paying make-whole remedies ordered by appropriate authorities. Thus, Board of Appeals and Review, CSC, when ordering make-whole remedies should permit agencies opportunity to exercise their right to an advance decision from the Comptroller General prior to implementation of remedies. Amplified by 55 Comp. Gen. 785 539
Disbursing and certifying officers
How requests should be addressed
Certifying officers should address requests for advance decisions under provisions of 31 U.S.C. 82d to the Comptroller General of the United States, Washington, D.C. 20548 645
Payments prohibited by statute
In view of certifying officer's statutory right to request and receive advance decision from the Comptroller General on matters of law, certifying officers are not "bound" by conclusion of law rendered by agency's general counsel. 31 U.S.C. 82d 297
Where there is doubt as to legality of payment, certifying officer's only complete protection from liability for erroneous payment is to request and follow Comptroller General's advance decision under 31 U.S.C. 82d 297
Procedure
Although, normally, the Comptroller General of the U.S. GAO would not render decision to question of law submitted by certifying officer unaccompanied by voucher as required by 31 U.S.C. 82d, statutory authority under which GAO renders decisions to certifying officers, since question submitted is general in nature and will be recurring one, reply to question raised is addressed to head of agency under broad authority contained in 31 U.S.C. 74, pursuant to which GAO may provide decisions to heads of departments on any question involved in payments which may be made by that department 652
Questions not on voucher
Where certifying officer seeks GAO advance decision on matters of travel incident to change of permanent duty station or attendance of meetings or training but submits voucher relating only to propriety of payment of items incident to vacation leave travel, GAO will not render decision on matters unrelated to accompanying voucher 1035
Other than heads of departments, etc.
In appropriate instances where questions of payments to be made by a Governmental department are presented to the Comptroller General for decision by a departmental official who is not the department head, the questions will be decided and transmitted to the department head as if he had submitted them under 31 U.S.C. 74 52
Questions as to legality of proposed expenditures submitted by an agency official other than the agency head may be decided and transmitted to the agency head as if questions had been submitted by him under 31 U.S.C. 74 1355

GENERAL ACCOUNTING OFFICE—Continued
Decisions—Continued
Reconsideration
New contentions *v.* errors in law or fact Page
Contentions made by contracting agency—to effect that turnkey housing RFP did not require specific responses in proposals, that deviations from requirements in successful proposal were minor, that blanket offer covered all requirements, that price of successful proposal was "reasonable" within provisions of ASPR 3-805, and generally, that all offerors were fairly treated—do not convincingly demonstrate errors of fact or law in prior GAO decision. Decision is affirmed that award to proposal which substantially varied from RFP requirements was improper in light of provisions of 10 U.S.C. 2304(g) and ASPR 3-805 -- 972
Persons authorized to request
Even if labor union is assumed to be an "interested party," there is no indication that it submitted written comments during the course of protest proceedings. Therefore, its letter submitted after decision was rendered is not for consideration in connection with pending request for reconsideration of protest decision. Modified by 56 Comp. Gen. —— (B-185302, Jan. 26, 1977) ---------- 1412
Prior recommendation withdrawn
On reconsideration, GAO decision 55 Comp. Gen. 201—which sustained protest against award of negotiated turnkey housing procurement and recommended remedy involving renewal of competition among offerors and possible termination for convenience of existing contract—is modified in part. After considering points raised in requests for reconsideration by contracting agency, contractor and protester, recommendation in prior decision is withdrawn, and in all other respects decision is affirmed ---------- 972
Reflecting change in construction of law
Effective from date of decision
Comptroller General decision stating that parties in interest who use overtime services of Customs Service inspectional employees are not required to pay for employees' retroactive salary increase reflects a change in construction of law. Therefore, decision is not retroactive, but is effective from date of its issuance. In circumstances present in this case, our Office would offer no objection to collection action being terminated under 4 C.F.R. 104.3 ---------- 226
Requests
Advance
Voucher submission
Where certifying officer seeks GAO advance decision on matters of travel incident to change of permanent duty station or attendance of meetings or training but submits voucher relating only to propriety of payment of items incident to vacation leave travel, GAO will not render decision on matters unrelated to accompanying voucher -------- 1035
Rule
Questions as to legality of proposed expenditures submitted by an agency official other than the agency head may be decided and transmitted to the agency head as if questions had been submitted by him under 31 U.S.C. 74 ---------- 1355

GENERAL ACCOUNTING OFFICE—Continued
Jurisdiction
Contracts
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions Page

General Accounting Office does not review bid protests involving affirmative responsibility determinations except for actions by procuring officials which are tantamount to fraud or where definitive responsibility criteria set forth in a solicitation allegedly are violated---- 1295

Nonappropriated fund activities

Since protested award of procurement pursuant to section 22(a) of Foreign Military Sales Act will not involve use of appropriated funds, matter is not subject to settlement by GAO and is dismissed---- 674

Protests generally. (*See* **CONTRACTS, Protests**)

Small business matters

GAO will not review determination of responsibility when SBA issues COC in view of SBA's statutory authority, absent *prima facie* showing that action was taken fraudulently or with such willful disregard of facts as to necessarily imply bad faith. Under this standard, GAO reviewed COC file and found no evidence of fraud or bad faith---- 97

Questions of alleged collusive pattern of bidding by small business firms should be referred to Attorney General by procuring agency for resolution pursuant to ASPR 1–111.2, since interpretation and enforcement of criminal laws are functions of Attorney General and Federal courts, not GAO---- 372

Subcontracts

National Aeronautics and Space Administration's (NASA) exercise of general administrative functions in determining technical approaches to problem solving is not sufficient involvement in selection of subcontractor to cause our review of subcontract award since parallel development to test multiple approaches to problem solving was reasonable and specification prepared as a result thereof for use in subcontract award permitted competition, even by protester, and NASA was not involved in selection as envisioned in 54 Comp. Gen. 767---- 1220

Contention that in view of audit and settlement responsibilities (31 U.S.C. 41, 53, and 71) General Accounting Office lacks authority to divest itself of subcontract reviews as matter of policy is rejected---- 1220

Manual
Administrative collection procedures
Point of dimishing returns
4 GAO 55.3

General Accounting Office manual contains provision requiring establishment of realistic points of diminishing returns beyond which further collection efforts are not justified. B–117604(17), Aug. 20, 1975, modified- 1438

Recommendations
Agency review of technical/cost justification for contract award

Responding to prior GAO decision, agency furnishes rational support for bare conclusions reached by third evaluator (whose views prompted source selection) in conflict with technical evaluation committee's views.

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Agency review of technical/cost justification for contract award—Continued Page
Committee evaluated and scored only original proposals but not additional information resulting from negotiations considered by third evaluator which reduced technical evaluation difference of technical committee in favor of protester. Additional information from lower cost awardee responded satisfactorily to technical problem raised by agency which, in large measure, accounted for technical evaluation difference between proposals. 54 Comp. Gen. 896, modified 499
Amended HUD regulations
Insurance premiums on loans
Claims under mobile home loan insurance pursuant to 12 U.S.C.A. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default on loan occurred while premium payments were current, but cannot be allowed if default occurred or was imminent after premium payments became delinquent. Past due premium charges may be set off against allowable claims, if lender agrees to such setoff. Alternatively, remaining insurance coverage may be canceled. In no event is set-off of future premium charges appropriate. GAO recommends, pursuant to 31 U.S.C.A. 1176, that HUD regulations be amended in terms of foregoing issues and conclusions. Modified 56 Comp. Gen. —— (B–183784, Jan. 24, 1977) 658
Contracts
Agency review of procurement policies and procedures
After considering all circumstances of procurement, GAO cannot conclude that EPA's justifications for canceling RFP are clearly without reasonable basis. However, since several of alleged justifications are subject to question, GAO recommends that EPA Administrator review and reconsider proposed cancellation in light of points addressed in decision 1281
Agency review of protest reports
Prior to submission to GAO
Though recommendation for corrective action in prior decision sustaining protest is withdrawn, decision on reconsideration makes further recommendations to Secretary of Navy. Naval Facilities Engineering Command's (NAVFAC) procedures for furnishing protest reports should be reviewed to ensure that all relevant documents—including individual technical evaluators' numerical scoring of proposals—are furnished to GAO. Also, since award was improper, Secretary should cause review of NAVFAC's actions in procurement to be undertaken to ensure compliance with law in future negotiated turnkey housing procurements 972
Janitorial services
Procurement methods
Recommendation is made that options in questioned negotiated janitorial services contract, and similar outstanding janitorial services contracts, not be exercised and that GSA immediately commence study of appropriate methods and clauses for improving formal advertising procurement method for future needs of janitorial services 693

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Contracts—Continued
Options
Not to be exercised Page

Where agency did not discuss certain areas in proposals simply because they were considered "weaknesses," in that they received less than maximum number of evaluation points, as opposed to "deficiencies," which would not satisfy Govt.'s requirements, and agency also changed award evaluation cost factors without communicating information to offerors, it is recommended that option in contract not be exercised and that requirement for option years be resolicited 859

Prior recommendation
Not feasible
Withdrawn

GAO recommendation made to Navy in prior decision sustaining protest—which contemplated renewal of competition among offerors, with possible result that existing turnkey housing contract be terminated for convenience—is withdrawn upon reconsideration. Information presented by agency and contractor concerning value of work in place at time of decision, plus extent of subcontracting for materials, indicates implementation of such recommendation is not feasible. Protester's only possible remedy rests with its claim for proposal preparation costs, which will be considered in future GAO decision if protester wishes to pursue claim 972

Revision of late bid provisions of procurement regulations

Recommendation is made to ASPR Committee and FPR Division that GAO comments on possibility that late bid provisions involving acceptable evidence to establish timely receipt of bids may be unnecessarily causing Govt. to lose benefits of low bids be considered with respect to possible revision of procurement regulations 220

District of Columbia procurement methods

Cancellation of a subsequent IFB on basis that services were no longer required was erroneous where there was in fact a continuing need for the services which was being met through a noncompetitive, informal agreement with a contractor to a Federal agency—an arrangement unauthorized by statute. Recommendation is made that D.C. discontinue present method of procurement and that services be procured through formal advertising or an intergovernmental agreement authorized by statute 464

Reporting to Congress
Contract matters

Where applicable regulations of Federal Govt. agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated 139

GENERAL SERVICES ADMINISTRATION
Authority
Space assignment
Parking Page
General Services Administration does not assert, nor does it have, authority to force agencies to accept and pay for parking space in excess of their stated needs ---- 897
User charges
Where Executive agency other than GSA provides parking space or related services to employees, or to others, agency is authorized by 40 U.S.C. 490(k) to charge occupants therefor if, but only if, rates are approved by Administrator of General Services and Office of Management and Budget ---- 897
Claims
Transportation
Loss and damage claims
Minimum amounts
This Office concurs in establishment of any reasonable minimum amount for filing claims involving loss and damage to Government shipments where cost studies indicate such action is warranted ---- 1438
Federal Property Management Regulations (FPMR)
Exchange/sale authority
Similar items
Silver for gold
General Services Administration acted reasonably under section 201(c) of Federal Property and Administrative Services Act of 1949, as amended, and its implementing Federal Property Management Regulations, in disapproving proposed exchange of certain quantities of silver for an equivalent dollar amount of gold. Since it appears that gold to be acquired would not serve the same specific purpose as the replaced silver, as required by regulations, proposed exchange is not of "similar" items as required by section 201(c). 41 Comp. Gen. 227 distinguished ---- 1268
General Supply Fund
Direct and indirect costs
Fact that prices of items under contract calling for definite quantity with fixed delivery might be lower than prices under requirements contract does not mean that the overall cost to Government is less since indirect costs associated with definite quantity contract must be considered such as cost of extra warehouse storage for additional inventory, generated excess inventory, and cost of transporting excess inventory to other locations ---- 1226
Procurement
Requirements contracts
Determination to issue requirements solicitation to satisfy needs of Government for cleaning compounds, solicitation containing minimum and maximum order limitation, is valid determination within ambit of sound administrative discretion where solicitation is issued pursuant to requirements of section 1-3.409 of Federal Procurement Regulations and section 5A-72.105-3(c) of General Services Procurement Regulations and results in overall economy to Government ---- 1226

GENERAL SERVICES ADMINISTRATION—Continued
Insurance on overseas automobiles
Regulations
Page
General Services Administration (GSA) may provide by regulation for purchase of annual or trip insurance policies on Government vehicles regularly or intermittently driven into foreign countries where requirements of law that insurance be carried or legal procedures which may result in extreme difficulties to Government employees when involved in an accident require such purchase. To the extent inconsistent, 39 Comp. Gen. 145, 19 *id.* 798, and similar cases are overruled 1343
Mileage rates for overseas automobiles
Regulations
We have no legal objections, if GSA determines it is in best interests of Government, to amendment of FTR to provide higher mileage allowance rates for operation of privately owned vehicles by Government employees in foreign countries than for operation of such vehicles in United States, within overall statutory limit. FTR are statutory regulations, and such amendments are for determination by agency authorized to promulgate the travel regulations 1343
Services for other agencies, etc.
Automated payroll system for Administrative Office of U.S. Courts
Interagency agreement entered into in fiscal year 1976 by General Services Administration and Administrative Office of U.S. Courts for design and implementation of automated payroll system under section 111 of Federal Property Act, 40 U.S.C. 759, rather than Economy Act, 31 U.S.C. 686, is not subject to 31 U.S.C. 686–1, which limits duration of appropriation obligations only in Economy Act transactions. Such agreement constitutes valid obligation against fiscal year 1976 Administrative Office appropriation to meet *bona fide* 1976 need 1497
Procurement
Automatic Data Processing Systems
Validity of award by FEA for dedicated automatic data processing services through facilities management contract was not affected by Brooks Act, 40 U.S.C. 759, and implementing regulations and policies, because FEA was entitled to rely on authorizations to proceed with procurement given by OMB and GSA after reviews of solicitation and FEA's cost and other justifications. Also, provisions of OMB Cir. No. A–54 and FMC 74–5 concerning ADPE acquisitions are ordinarily executive branch policy matters not for resolution by GAO 60
Space assignment
Parking
General Services Administration does not assert, nor does it have, authority to force agencies to accept and pay for parking space in excess of their stated needs 897

GIFTS
Donations. (*See* DONATIONS)

GOLD
Silver for gold
Exchange or sale for similar items
General Services Administration acted reasonably under section 201(c) of Federal Property and Administrative Services Act of 1949, as amended,

GOLD—Continued
Silver for gold—Continued
Exchange or sale for similar items—Continued Page
and its implementing Federal Property Management Regulations, in disapproving proposed exchange of certain quantities of silver for an equivalent dollar amount of gold. Since it appears that gold to be acquired would not serve the same specific purpose as the replaced silver, as required by regulations, proposed exchange is not of "similar" items as required by section 201(c). 41 Comp. Gen. 227 distinguished..... 1268

GRANTS
Authority of agency to impose conditions
LEAA organizational conflict of interest guideline precluding contractors who draft or develop specifications for LEAA grantee procurements from competing for those procurements, which was promulgated under LEAA rule-making authority and attached as binding condition on LEAA grants, is reasonably related to purposes of LEAA enabling legislation, since LEAA may impose reasonable conditions on its grants to assure Federal funds are expended in fiscally responsible and proper manner consistent with Federal interests, and condition is not imposed in contravention of any law..... 911
LEAA organizational conflict of interest guideline for grantee procurements, which reads: "Contractors that develop or draft specifications, requirements, statements of work and/or RFP's for a proposed procurement shall be excluded from bidding or submitting a proposal to compete for the award of such procurement" is not unenforceably vague, since terms used in guideline have clear meaning in this context..... 911
Grantee tax indebtedness
Set-off
Set-off of grant payments suspended or withheld against tax delinquency of grantee is not appropriate since grant payments are not reimbursements for expenses already incurred by grantee and therefore do not constitute debts of the United States..... 1329
Scholarships
Environmental Protection Agency
Proposed lump-sum grant by EPA to American Law Institute to provide scholarships to defray transportation, food, and lodging expenses at environmental law seminar does not violate 31 U.S.C. 551 which prohibits use of appropriated funds to pay expenses of conventions or gatherings without specific authority since expenditures of properly authorized grant funds are not subject to restrictions upon direct expenditure of appropriations..... 750
To other than States. (*See* **FUNDS, Federal grants, etc., to other than States**)
To States. (*See* **STATES, Federal aid, grants, etc.**)

GRATUITIES
Reenlistment bonus
Recoupment for failure to complete enlistment
Computation of time lost
Enlisted member's period of authorized excess leave pending appellate review of his court-martial including a bad conduct discharge is creditable service for computing period served on term of enlistment and, even

GRATUITIES—Continued
Reenlistment bonus—Continued
Recoupment for failure to complete enlistment—Continued
Computation of time lost—Continued Page
though court-martial sentence was approved and discharge effected thereafter, period of such leave is not to be included in unexpired part of member's enlistment upon which computation of recoupment of reenlistment bonuses is based 1244
Selective Reenlistment Bonus
Computation
Multiplier
Use of full month of service only
For the purpose of computing the Selective Reenlistment Bonus under 37 U.S.C. 308, as amended, a fraction of a month of additional obligated service may not be counted as a full month in determining monthly fractions of a year because, unlike similar statutes where specific authorization to do so is provided therein, 37 U.S.C. 308, as amended, contains no authorization to permit fractions of months to be counted as whole months 37
Use of unexpired term of prior enlistment
Service member who, within 3 months of the expiration of his current enlistment or extension thereof, is discharged pursuant to the authority of Secretary concerned under 10 U.S.C. 1171, where such discharge is for the sole purpose of reenlisting, may not have that unexpired term of enlistment or extension thereof considered as "additional obligated service" for purpose of determining the multiplier for Selective Reenlistment Bonus computation under 37 U.S.C. 308, as amended by Pub. L. 93-277, May 10, 1974, 88 Stat. 119 37
Use of years, months and days of service
The Selective Reenlistment Bonus entitlement provided for in 37 U.S.C. 308, as amended, may not be computed by using as the multiplier, the years, months and days of additional obligated service because that section clearly and unambiguously limits that multiplier to "the number of years, or the monthly fractions thereof, of additional obligated service" 37
Six months' death
Beneficiary designation
Where claimant obtained Mexican divorce from prior spouse and subsequently married deceased member, fact that Coast Guard paid her member's unpaid pay and allowances as designated beneficiary under clause (1) of 10 U.S.C. 2771(a) does not estop Govt. from challenging validity of marriage since such payment was neither determinative of question of her marital status nor was such question even in issue 533
Claim
Denied
Denial of claim for six months' death gratuity under 10 U.S.C. 1477 does not constitute taking of member's property without due process since amount in question is not property of deceased member but rather gratuity payable out of Federal funds specifically authorized by law 533

GRATUITIES—Continued
Six months' death—Continued
Divorce
Mexican Page

Where claimant obtained Mexican divorce from prior spouse, subsequently married member in Calif. and claims death gratuity as his surviving spouse, legality of marital status of deceased and claimant is too doubtful for payment of death gratuity in absence of declaratory decree from court of competent jurisdiction in the U.S. recognizing validity of Mexican divorce so that any impediment to the validity of claimant's marriage to member arising out of divorce proceedings may be removed_ 533

Member killed by person claiming

Claim of widow of deceased service member for entitlement to both six months' death gratuity (10 U.S.C. 1477) and unpaid pay and allowances (10 U.S.C. 2771), where she admitted killing him and was indicted for murder, is denied, even though she claimed self-defense and *nolle prosequi* was entered on indictment, since due to certain information of record, the lack of felonious intent cannot be established_____ 1033

HAWAII
Employees
Renewal agreement travel
Dependents
Alternate locations

When dependents of employee are not permitted to accompany him to post of duty outside continental U.S., or in Hawaii or Alaska, and are transported to alternate location under authority of 5 U.S.C. 5725, employee is entitled to transportation expenses for those dependents incident to own entitlement to renewal agreement travel under 5 U.S.C. 5728(a) based on cost of travel between alternate location and employee's place of actual residence at time of appointment or transfer to post of duty_____ 886

Station allowances
Military personnel. (*See* **STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.**)

HIGHWAYS
State roads
Traffic lights
Benefit of Government

Costs of procuring and installing traffic control light on Federal property to regulate traffic at intersection of Federal installation and State highway may be paid by the Army since the structure is located entirely on Federal property, for the benefit primarily of Federal employees or military members, and is necessary for safe ingress and egress to the military installations. 36 Comp. Gen. 286 and 51 *id.* 135, distinguished__ 1437

HOLIDAYS
Monday
Effect on entitlements
Subsistence
Per diem Page

Employee who traveled during working hours on Friday to report for temporary duty the following Tuesday, day after Monday holiday, may not be paid per diem for intervening 3-day weekend. While 5 U.S.C. 6101(b)(2) requires that to maximum extent practicable agencies schedule travel during regular duty hours, payment of 2 days or more additional per diem to facilitate such scheduling has been held unreasonable. Where 2 days per diem would be required and commencement of assignment cannot be otherwise scheduled, employee may be required to travel on own time 590

HOUSING
Construction
Turnkey contract. (*See* **HOUSING, "Turnkey" developers, Contracts**)
Displacement
Relocation costs
Effective date of entitlement

Tenant who vacated premises subsequent to written purchase offer by Architect of the Capitol qualifies as "displaced person" and is entitled to benefits applicable to displaced tenants under Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, since Govt. made firm offer to purchase property from owner, tenant moved after this offer, and Govt. actually acquired property 595

Loans
Default
Insurance coverage
Advance premiums

Timely payment by insured lender of premiums for mobile home loan insurance under sec. 2, title I, of National Housing Act, as amended, 12 U.S.C.A. 1703—which requires payment of premiums "in advance"—is prerequisite to continued insurance coverage. There is no basis for implication, underlying HUD proposal to set off against insurance claims past due and future premiums of delinquent lending institution, that insurance coverage is unaffected by nonpayment of premiums. Modified by 56 Comp. Gen. —— (B–183784, Jan. 24, 1977) 658

Failure to obtain

Bank requested FHA reimbursement under insurance pursuant to 12 U.S.C. 1703 for loss sustained when borrower defaulted on home improvement loan. While bank states it reported loan to FHA as required, FHA has no record that bank had applied for loan insurance and consequently bank was not billed for and did not pay advance premium required by that statute. Further, bank had actual notice that loan is not insured until acknowledged by FHA in monthly statement and bank admittedly erred in not recognizing on timely basis omission of this loan in next monthly statement rendered by FHA. Therefore, we conclude that in absence of showing of actual negligence by FHA, loan was not insured and reimbursement would be improper 891

HOUSING—Continued
Loans—Continued
Default—Continued
Mobile home repossessed and sold
Computation of Government's claim Page

Lender's claim on Govt-insured mobile home loan in default may properly be certified for payment based on sale price of mobile home, notwithstanding that regulation calls for use of higher of sale price or appraised value, where lender complied with regulations and acted consistently with protection of Govt.'s interest and where, through no fault of lender, appraised value cannot be ascertained 151

Maturity date of loan

Since note dated May 1, 1970, submitted for insurance pursuant to Title I of National Housing Act contained projected maturity date 17 days in excess of 7 years and 32 days maximum that was prescribed by statute when loan was made, claim submitted by bank—which is primarily responsible for assuring that term of note does not exceed statutory limitation—for reimbursement of its loss on note must be denied. Although note was not assigned to bank or funds disbursed thereby until May 19, 1970, statute specifically limits term of obligation or note underlying loan and makes no provision for exceptions 126

"Turnkey" developers
Contracts
Negotiation procedures

By acccpting offeror's initial turnkey housing proposal—regarded as most favorable to Govt.—which nonetheless substantially varied from specific RFP requirements, Navy waived those requirements for purposes of competition among seven offerors in competitive range. This change in specifications, without complying with provisions of ASPR 3-805.4, deprived other offerors of equal opportunity to compete and Govt. of benefits of maximum competition. Modified in part by 55 Comp. Gen. 972 201

Although there were shortcomings and omissions in proposal of awardee under Navy negotiated fixed price "turnkey" family housing procurement and relatively minor inconsistencies and errors in technical evaluation of protester's and awardee's proposal, determination by Navy, in its broad discretion, that awardee had highest technically evaluated proposal had reasonable basis, and initial proposal award based upon lowest dollar per technical quality point ratio to awardee, who had higher priced, higher technically rated proposal, was reasonable despite protester's over $600,000 lower offered price 839

Navy RFP for "turnkey" family housing, which listed major technical criteria in descending order of importance and listed and explained all subcriteria of major criteria, although subcriteria's relative weight was not disclosed, has satisfied requirement that prospective offerors be informed of broad scheme of scoring to be employed and given reasonably definite information as to degree of importance to be accorded to particular factors in relation to each other. Disclosure of precise numerical weights is not required. However, RFP is defective for failing to disclose role of price in evaluation scheme 839

HOUSING—Continued
"Turnkey" developers—Continued
Contracts—Continued
Negotiation procedures—Continued Page

On reconsideration, GAO decision 55 Comp. Gen. 201—which sustained protest against award of negotiated turnkey housing procurement and recommended remedy involving renewal of competition among offerors and possible termination for convenience of existing contract—is modified in part. After considering points raised in requests for reconsideration by contracting agency, contractor and protester, recommendation in prior decision is withdrawn, and in all other respects decision is affirmed 972

Though recommendation for corrective action in prior decision sustaining protest is withdrawn, decision on reconsideration makes further recommendations to Secretary of Navy. Naval Facilities Engineering Command's (NAVFAC) procedures for furnishing protest reports should be reviewed to ensure that all relevant documents—including individual technical evaluators' numerical scoring of proposals—are furnished to GAO. Also, since award was improper, Secretary should cause review of NAVFAC's actions in procurement to be undertaken to ensure compliance with law in future negotiated turnkey housing procurements 972

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Defaulted loans. (*See* **HOUSING, Loans, Default**)
Loans and grants
Mobile home loan insurance
"In advance" premiums

Timely payment by insured lender of premiums for mobile home loan insurance under sec. 2, title I, of National Housing Act, as amended, 12 U.S.C.A. 1703—which requires payment of premiums "in advance"—is prerequisite to continued insurance coverage. There is no basis for implication, underlying HUD proposal to set off against insurance claims past due and future premiums of delinquent lending institution, that insurance coverage is unaffected by nonpayment of premiums. Modified by 56 Comp. Gen. —— (B–183784, Jan. 24, 1977) 658

Urban redevelopment projects
Rehabilitation loan program
Appropriation availability

Under section 312 of Housing Act of 1964, as amended, and language of 1977 appropriation act, Department of Housing and Urban Development may make new commitments for rehabilitation loans immediately after August 22, 1976, from previous appropriation balances which would otherwise become unavailable after that date. Ambiguous reference to such prior appropriations in 1977 appropriation act could be read as making prior appropriations available only during fiscal year 1977. However, this narrow construction would create hiatus in funding from August 22 to October 1, 1976, which was clearly not intended by Congress 1415

HUSBAND AND WIFE
Marriage validity
Challenged
Mexican divorce Page

Where claimant obtained Mexican divorce from prior spouse and subsequently married deceased member, fact that Coast Guard paid her member's unpaid pay and allowances as designated beneficiary under clause (1) of 10 U.S.C. 2771(a) does not estop Govt. from challenging validity of marriage since such payment was neither determinative of question of her marital status nor was such question even in issue 533

Six months' death gratuity purposes

Where claimant obtained Mexican divorce from prior spouse, subsequently married member in Calif. and claims death gratuity as his surviving spouse, legality of marital status of deceased and claimant is too doubtful for payment of death gratuity in absence of declaratory decree from court of competent jurisdiction in the U.S. recognizing validity of Mexican divorce so that any impediment to the validity of claimant's marriage to member arising out of divorce proceedings may be removed 533

Married subsequent to change of station
Temporary lodging allowance entitlement

Payment of temporary lodging allowance is not authorized where member marries after being transferred to Hawaii and new wife travels to his duty station at his personal expense, since the member had no dependent on the effective date of his transfer to Hawaii and his vacating of the lodgings he originally occupied while looking for family quarters was not for reasons beyond the control of the member within contemplation of paragraph M4303-1, item 2, Volume 1, Joint Travel Regulations 1440

IMMIGRATION AND NATURALIZATION SERVICE (*See* **JUSTICE DEPARTMENT, Immigration and Naturalization Service**)

INDIAN AFFAIRS
Bureau of Indian Affairs
Contracts. (*See* **INDIAN AFFAIRS, Contracts, Bureau of Indian Affairs**)
Employees
Hotel-motel tax
Alaska

Cost of hotel or motel room to BIA employees on official business is sum of rental fee plus applicable taxes. Legal incidence of Anchorage, Alaska, hotel-motel rental tax is on the Federal employee when Government reimburses its employees via per diem or actual expenses allowance. Constitutional exemption from State and local taxes does not apply when Government is not itself contractually obligated to hotel-motel, even though it has voluntarily assumed economic burden thereof .. 1278

Contracts
Bureau of Indian Affairs
Indian Self-Determination Act
Applicability of Federal contracting laws and regulations

Proposed award of school design contract to Indian school board under title I, Public Law 93-638—"Indian Self-Determination Act"—is not objectionable, provided requirements of act and its regulations are

INDIAN AFFAIRS—Continued
Contracts—Continued
Bureau of Indian Affairs—Continued
Indian Self-Determination Act—Continued
Applicability of Federal contracting laws and regulations—Con. Page
satisfied. Act provides contracting authority covering broad range of Indian programs and independent of contracting laws and regulations ordinarily applicable to Interior Department, including Brooks Bill architect-engineer selection procedure (40 U.S.C. 541, *et seq.*, and FPR subpart 1-4.10). Therefore, protest by architectural firm competing in Brooks Bill procurement initiated prior to school board's application for contract under P.L. 93-638 is denied 765
Indian students
Hotel-motel tax
Alaska
When Bureau of Indian Affairs (BIA) contracts with hotel or motel to provide housing and subsistence to Indian students in transit, the Federal agency and not the beneficiary is the renter. The legal incidence of the hotel-motel rental tax imposed by Anchorage, Alaska, therefore, falls on the BIA which is constitutionally immune from State and local taxes. 53 Comp. Gen. 69 is modified accordingly 1278

INSURANCE
Car rentals
Vehicles operated in foreign countries
We have no legal objection to deletion of restriction in FTR (FPMR 101-7) para. 1-3.2c against reimbursement of Government employees for purchase of additional insurance available on vehicles rented for use in foreign countries if GSA determines this is in best interests of Government. FTR are statutory regulations, and question of whether or not reimbursement for costs of additional insurance on rental vehicles should be permitted, is within discretion of agency authorized to promulgate the particular regulations involved 1343
Government employee may be partially reimbursed for costs of insurance purchased on vehicle commercially leased on long-term basis to extent necessary for hire and operation of motor vehicles on German roads. Excess coverage not required by statute and regulation or by industrial custom to enable commercial hire of vehicle and operation of vehicle on German roads is considered personal to employee and may not be certified for payment 1397
Government
Self-insurer
Under long-standing policy of the Government that it is self-insurer and will not purchase commercial insurance against loss or damage to its own property, insurance should not have been purchased on a NASA exhibit loaned to a unit of the Air Force for display purposes. However, since self-insurance principle is one of policy rather than positive law and instant insurance coverage was issued in good faith, premium may be paid 1196
Exception
Federal Home Loan Bank Board building
Federal Home Loan Bank Board may purchase insurance covering risk of loss to new building. Government policy of insuring its own risks of

INSURANCE—Continued
Government—Continued
Self-insurer—Continued
Exception—Continued
Federal Home Loan Bank Board building—Continued Page
loss, based on wide distribution of type and geographical location of its risks, does not apply here since total loss may be ultimately sustained by Federal Home Loan Bank System due to nature of funding for building-- 1321
Motor vehicles
Government
Operated in foreign countries
General Services Administration (GSA) may provide by regulation for purchase of annual or trip insurance policies on Government vehicles regularly or intermittently driven into foreign countries where requirements of law that insurance be carried or legal procedures which may result in extreme difficulties to Government employees when involved in an accident require such purchase. To the extent inconsistent, 39 Comp. Gen. 145, 19 *id.* 798, and similar cases are overruled---------- 1343
Premiums
Federal Housing Administration loan insurance
Bank requested FHA reimbursement under insurance pursuant to 12 U.S.C. 1703 for loss sustained when borrower defaulted on home improvement loan. While bank states it reported loan to FHA as required, FHA has no record that bank had applied for loan insurance and consequently bank was not billed for and did not pay advance premium required by that statute. Further, bank had actual notice that loan is not insured until acknowledged by FHA in monthly statement and bank admittedly erred in not recognizing on timely basis omission of this loan in next monthly statement rendered by FHA. Therefore, we conclude that in absence of showing of actual negligence by FHA, loan was not insured and reimbursement would be improper---------- 891
Foreign insurance law requirements
We are not required to object to reimbursement of Government employees for costs of "trip insurance" purchased while operating Government-owned or privately owned vehicles in foreign countries as "miscellaneous expense" covered by Federal Travel Regulations (FTR) (FPMR 101–7) para. 1–9.1d. However, we believe change in FTR specifically providing for such reimbursement would be desirable because present applicable FTR sections do not provide for payment for any kind of insurance on vehicles operated in foreign countries---------- 1343
Mobile home loan insurance
Claims under mobile home loan insurance pursuant to 12 U.S.C.A. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default on loan occurred while premium payments were current, but cannot be allowed if default occurred or was imminent after premium payments became delinquent. Past due premium charges may be set off against allowable claims, if lender agrees to such setoff. Alternatively, remaining insurance coverage may be canceled. In no event is set-off of future premium charges appropriate. GAO recommends, pursuant to 31 U.S.C.A. 1176, that HUD regulations be amended in terms of foregoing issues and conclusions. Modified by 56 Comp. Gen. —— (B–183784, Jan. 24, 1977)---------- 658

INTEREST
Contracts
Interest on investment or borrowings Page
Failure of procuring activity to inform competing offeror in negotiated procurement for fixed-price contract that Govt. would directly reimburse contractor for interest on borrowings to finance plant expansion when reimbursement is prohibited by agency procurement regulation denied such offeror opportunity to compete on equal basis 80
Although technical "transfusion" of one offeror's unique or innovative idea to other offerors is prohibited, offeror's request for direct reimbursement by Govt. of its interest expense is not such a unique or innovative idea, but is suggestion for departure from procurement "ground rules" which, if accepted by agency, must be communicated to all competing offerors 80
Payment delay
Contracts
Army proposal to pay interest on amounts already due or subsequently to become due and payable under contracts executed in violation of Antideficiency Act, and for which payment has been delayed due to unavailability of funds, is improper since this would increase amount of overobligation, constituting new and additional violation of Antideficiency Act 76

INTERIOR DEPARTMENT
Appropriations. (*See* **APPROPRIATIONS, Interior Department**)
Bureau of Indian Affairs. (*See* **INDIAN AFFAIRS**)
Bureau of Mines
Mine inspectors
Overtime and traveltime
Mine inspectors who work first-40-hour workweeks may be compensated for time spent in travel on official business during their first 40 hours. Any time spent in nontravel work after first 40 hours is compensable overtime. B–179186, October 24, 1973, modified 99
Mine inspectors' travel, which due to nature of mine inspection work is found to be inherent part of and inseparable from their work, is compensable as regular or overtime work. However, mine inspectors are prohibited from receiving overtime compensation for any time they spend in training under Government Employees' Training Act. 5 U.S.C. 4109. B–179186, October 24, 1973, modified 99
Employees
Wage board employees
Reclamation Service. (*See* **RECLAMATION SERVICE, Employees, Wage board employees**)
National Park Service
Park police
Compensation
Increases
Under sec. 501 of D.C. Police and Firemen's Salary Act of 1958, as amended, officers and members of U.S. Park Police and Executive Protective Service (formerly White House Police) are entitled to same rates of compensation as those granted under that Act to Metropolitan Police Force of D.C. By virtue of sec. 501, enactment of legislation by Council of D.C. increasing salaries of Metropolitan Police under 1958

INTERIOR DEPARTMENT—Continued
National Park Service—Continued
Park police—Continued
Compensation—Continued
Increases—Continued Page
Act will have effect of granting like increases to U.S. Park Police and Executive Protective Service until Congress otherwise provides 965
Reclamation Service. (*See* **RECLAMATION SERVICE**)

INTERNAL REVENUE SERVICE
Employees
Claim for additional reimbursement for temporary quarters
Internal Revenue Service employee, transferred from Sao Paulo, Brazil, to Washington, D.C., incurred 48 days of temporary quarters expenses. Reimbursement for such expenses is limited to 30 days since extension for additional 30 days may be granted only for transfers to or from Alaska, Hawaii, the territories or possessions, Puerto Rico, or the Canal Zone. 5 U.S.C. 5742a(a)(3). Claim for expenses of additional 18 days spent in temporary quarters may not be allowed 1107
Contribution from private sources
Travel reimbursement
Internal Revenue Service (IRS) proposal that it pay expenses of employee attending meetings and accept reimbursement directly from eligible tax exempt organizations, crediting such reimbursement to its own appropriation, is not authorized by applicable statutes. Provisions of 5 U.S.C. 4111 permit employee only to accept payments from eligible organizations, which payments are to be deducted from amounts otherwise due from employing agency. Moreover, in absence of specific authority to accept voluntary contributions or travel reimbursements, IRS would be required to deposit such funds into miscellaneous receipts of the Treasury by 31 U.S.C. 484 (1970) 1293
Fines
Violation of wagering tax
Refunds
Appropriation chargeable
Refund by IRS of fine paid pursuant to conviction for violation of wagering tax statutes, which refund was ordered in connection with subsequent vacation of judgment, should be charged against account 20X0903 (Refunding Internal Revenue Collections) rather than account 20X1807 (Refund of Moneys Erroneously Received and Covered), since initial receipt of fine by IRS was apparently treated as internal revenue collection, and account 20X1807 is available only when refund is not properly chargeable to any other appropriation 625
Tax matters
Grantees of grant programs
Section 115 of Economic Opportunity Amendments of 1969, 42 U.S.C. 2705, requires that upon notification from Treasury Secretary of grantee tax delinquency, Director, Community Services Administration, must suspend grant payments to "any person otherwise entitled to receive a payment pursuant to a grant" in amount sufficient to satisfy delinquency. Statute does not distinguish between delinquencies incurred before and those incurred after awarding of grant but legislative history indicates all outstanding delinquencies were intended to be included.

INTERNAL REVENUE SERVICE—Continued
Tax matters—Continued
Grantees of grant programs—Continued Page
Hence, all grant payments, up to amount of total delinquency, must be suspended until satisfactory provision for payment of delinquency is made ---- 1329

IRAN
Home of selection at retirement
Military members
Member, who on retirement traveled to his home of selection in Iran with wife on American flag commercial air carrier chartered by his new employer and who had $950 included in annual statement of earnings by employer as amount paid to third party for travel expenses, is not entitled to reimbursement of air travel expenses since that travel was not performed at personal expense as required by applicable regulations ---- 761

JOINT VENTURES
Bids
Bid guarantee
Deficiencies
Documentary letter of credit furnished as bid guarantee does not constitute "firm commitment" as required by solicitation and ASPR 7-2003.25, thereby rendering bid nonresponsive, since letter of credit was not accompanied by bidder's signed withdrawal application which would have to be presented to bank in order for letter of credit to be honored ---- 587

JUDGMENTS, DECREES, ETC.
Courts. (*See* **COURTS, Judgments, decrees, etc.**)

JUSTICE DEPARTMENT
Immigration and Naturalization Service
Repair and maintenance of International Boundary fences
Appropriation of INS may be used to repair International Boundary fences on private property if expenditures and improvements are necessary for effective accomplishment of purposes of Service's appropriation, are in reasonable amounts, are made for principal benefit of U.S. and interests of Govt. are fully protected ---- 872
Law Enforcement Assistance Administration. (*See* **LAW ENFORCEMENT ASSISTANCE ADMINISTRATION**)

LABOR DEPARTMENT
Bureau of Labor Statistics
Consumer price index
Food prices
Subsistence
Relocation expenses
Transferred employee spent $912.59 for food items in 30-day period, including $425.70 in 1 day. Because Federal Travel Regulations (FPMR 101-7) para. 2-5.4a limits reimbursement to reasonable costs of meals (including groceries consumed while in temporary quarters) and Department of Labor statistics indicate family, similar to that of employee, would spend between $329 and $413 per month, such expenses are considered unreasonable in absence of additional evidence that they were justified ---- 1107

LABOR DEPARTMENT—Continued
Programs
"Win" *v.* **Service Contract Act** Page
Protests against award of contracts because possible competitive advantages may accrue to competitors availing themselves of "WIN" program (providing for limited wage rate reimbursement and tax benefits for hiring and training of welfare recipients) are denied since matter is conjectural and any competitive advantages would not result from preferential or unfair treatment by Govt. While possible ramification of WIN program might be inconsistent with one purpose of Service Contract Act of 1965, program is not contrary to any provision of Act---------- 656

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION
Grants-in-aid
Guidelines
Conflict of interest
LEAA organizational conflict of interest guideline precluding contractors who draft or develop specifications for LEAA grantee procurements from competing for those procurements, which was promulgated under LEAA rule-making authority and attached as binding condition on LEAA grants, is reasonably related to purposes of LEAA enabling legislation, since LEAA may impose reasonable conditions on its grants to assure Federal funds are expended in fiscally responsible and proper manner consistent with Federal interests, and condition is not imposed in contravention of any law---------- 911

LEASES
Agreement to execute lease
Federal project status
Relocation expenses to "displaced persons"
Effective date of entitlement
Tenant who vacated premises subsequent to written purchase offer by Architect of the Capitol qualifies as "displaced person" and is entitled to benefits applicable to displaced tenants under Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, since Govt. made firm offer to purchase property from owner, tenant moved after this offer, and Govt. actually acquired property---------- 595
Automatic Data Processing Systems
Equipment. (*See* **EQUIPMENT, Automatic Data Processing Systems, Leases**)
Oil and gas. (*See* **OIL AND GAS, Leases**)
Parking space
Appropriations. (*See* **APPROPRIATIONS, Availability, Parking space**)
Rent
Equipment, etc.
Destruction by fire
When bailed property is destroyed, its availability for use is ended and bailment is at an end. Rental payments are not authorized beyond date subject matter of bailment was destroyed---------- 356
Oil and gas. (*See* **OIL AND GAS, Leases, Rental**)

LEAVES OF ABSENCE

Administrative leave

Acclimatization rest. (*See* **LEAVES OF ABSENCE, Administrative leave, Rest periods, After overseas travel**)

Awaiting arrival of movers Page

Transferred employee seeks restoration of 8 hours annual leave charged to leave account while awaiting arrival of movers on scheduled day of travel. If agency to which employee is assigned determines that claimant delayed travel while reasonably and necessarily awaiting movers, GAO would interpose no objection if claimant was administratively excused for such time as was essential for such purpose 779

Rest periods

After overseas travel

Granting of administrative leave to employee for acclimatization rest after he completed a full day of duty and traveled over 7 hours by air on return from Guam after crossing international date line is proper exercise of administrative authority. This is so since the CSC has not issued general regulations covering the granting of administrative leave and, therefore, each agency, under general guidance of decisions of Comptroller General, which are discussed in applicable FPM Supplement, has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate 510

Annual

Accural

Maximum limitation

Forfeiture due to administrative error

Employee retired effective December 31, 1974, and received temporary appointment effective Jan. 1, 1975, not to exceed June 30, 1975. Since there was no break in service, employee's annual leave balance was transferred to new appointment and he forfeited 80 hours of annual leave at end of leave year pursuant to 5 U.S.C. 6304. Agency is requested to determine whether it violated mandatory requirement to advise employee he would forfeit annual leave if he accepted temporary appointment without break in service. If such violation occurred, leave is for restoration under 5 U.S.C. 6304(d)(1)(A) 784

Court

Jury duty

Travel time

Between duty station and court

When end of employee's scheduled workday coincides with beginning of Federal jury service, there is no necessity to prorate jury fee. Any travel time between duty station and court is to be considered as court leave 1264

Home leave travel of overseas employees

Traveltime

Employee, whose duty station is at Juneau, Alaska, must be charged annual leave for each day he would otherwise work and receive pay while on vacation leave, irrespective of when he commenced or completed travel, because 5 U.S.C. 6303(d), which provides leave-free travel time for employees whose duty station is outside the United States, does not apply to travel from Alaska, which is a State 1035

LEAVES OF ABSENCE—Continued
Lump-sum payments
Removal, suspension, etc., of employee
Refund on reinstatement Page
Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Lump-sum pay for annual leave may not be considered for waiver under 5 U.S.C. 5584, since payment was proper when made. Also, there is no authority to waive payment of retirement deductions on the amount of Federal pay that would have been earned during the period of separation, notwithstanding interim earnings exceeded amount of Federal pay 48
Military personnel
Reenlistment leave
Leave travel entitlements
There is no objection to proposed revision of Vol. 1, JTR, to grant leave entitlements under 37 U.S.C. 411b, where because of the critical nature of the member's job he is not authorized leave travel between permanent station assignments provided such travel takes place within reasonable time following the change of station, and entitlements do not exceed those provided if travel had occurred between assignments 284
Status during
Civil arrest and military confinement
Service member charged with commission of a civil offense on foreign soil is not entitled to pay and allowances for period when actually absent from military installation for purposes of judicial proceedings by foreign civil authorities unless such absence is excused as unavoidable .. 186
Court-martial review
Enlisted member's period of authorized excess leave pending appellate review of his court-martial including a bad conduct discharge is creditable service for computing period served on term of enlistment and, even though court-martial sentence was approved and discharge effected thereafter, period of such leave is not to be included in unexpired part of member's enlistment upon which computation of recoupment of reenlistment bonuses is based 1244
Travel expenses. (*See* **TRAVEL EXPENSES, Military personnel, Leaves of absence**)
Travel time
Rest stopover
Navy member returning from Teheran, Iran, to Washington, D.C., on temporary duty, who departs from Teheran at 5:35 a.m. and completes 7 hours of travel to Rome, Italy, on trip requiring at least 24 hours' total travel if he is to continue on same plane or flight, may be allowed recredit of leave and paid per diem for period of rest stopover since officer's action in utilizing stop for rest appears reasonable under circumstances 513
Sick
Care of immediate family
Award of arbitrator granting sick leave to employee who attended sick member of family not afflicted with contagious disease, who as result was not able to perform his duties, may not be implemented by agency since there is no legal authority to grant sick leave in the circumstances .. 183

LEAVES OF ABSENCE—Continued
Travel time
Rest periods Page
Granting of administrative leave to employee for acclimatization rest after he completed a full day of duty and traveled over 7 hours by air on return from Guam after crossing international date line is proper exercise of administrative authority. This is so since the CSC has not issued general regulations covering the granting of administrative leave and, therefore, each agency, under general guidance of decisions of Comptroller General, which are discussed in applicable FPM Supplement, has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate 510
Vacation leave
Outside continental U.S.
Accrual
Beginning date
Where administrative agency establishes tour of duty of 2 years, less time spent by the employee on the immediately preceding vacation leave trip, employee begins to earn vacation leave rights for each successive tour of duty on the biennial date for the commencement of such leaves of absence 1035
Alaska employees
Employee, whose duty station is at Juneau, Alaska, must be charged annual leave for each day he would otherwise work and receive pay while on vacation leave, irrespective of when he commenced or completed travel, because 5 U.S.C. 6303(d), which provides leave-free travel time for employees whose duty station is outside the United States, does not apply to travel from Alaska, which is a State 1035
Travel expenses. (*See* **TRAVEL EXPENSES, Vacation leave**)

LEGENDS
Printed
Descriptive data sheets of contract
Effect
Printed legend on descriptive data sheets submitted with bid that product specifications set forth in data sheets are subject to change without notice may be ignored in evaluating bid under brand name or equal clause since bid, read as a whole, indicates bidder's intention to furnish from stock product conforming to specifications. Effect of legend by manufacturer of equipment is to reserve right to make changes as to its items produced in future 592

LEGISLATION
Construction. (*See* **STATUTORY CONSTRUCTION**)

LETTER OF CREDIT
Bid guarantee
Deficiencies
Bid rejection Page
Documentary letter of credit furnished as bid guarantee does not constitute "firm commitment" as required by solicitation and ASPR 7-2003.25, thereby rendering bid nonresponsive, since letter of credit was not accompanied by bidder's signed withdrawal application which would have to be presented to bank in order for letter of credit to be honored ---------- 587

LICENSES
Bidder qualifications. (*See* **BIDDERS, Qualifications**)
State and municipalities
Government contractors
IFB provision that successful bidder meet all requirements of Federal, State or City codes does not justify rejection of bid for failure to have city license to operate ambulance service since need for license under such general requirement is matter between local governmental unit and contractor. However, where bidder conditions bid upon possession of license, such qualification renders bid nonresponsive ---------- 597
Use of sewage system
Revocable license for limited use
Perryville, Maryland, recreational park may be permitted to discharge sewage into VA sewage system if VA determines administratively that arrangement is in interest of Govt. and agreement constitutes only revocable license for limited use ---------- 688

LOANS
Government insured
Default
Bank's negligence, fraud or misrepresentation effect on guarantee
Bank requested FHA reimbursement under insurance pursuant to 12 U.S.C. 1703 for loss sustained when borrower defaulted on home improvement loan. While bank states it reported loan to FHA as required, FHA has no record that bank had applied for loan insurance and consequently bank was not billed for and did not pay advance premium required by that statute. Further, bank had actual notice that loan is not insured until acknowledged by FHA in monthly statement and bank admittedly erred in not recognizing on timely basis omission of this loan in next monthly statement rendered by FHA. Therefore, we conclude that in absence of showing of actual negligence by FHA, loan was not insured and reimbursement would be improper ---------- 891

LOANS—Continued
Government insured—Continued
Housing. (*See* **HOUSING, Loans**)
Limitations
Maturity date of loan Page
Since note dated May 1, 1970, submitted for insurance pursuant to Title I of National Housing Act contained projected maturity date 17 days in excess of 7 years and 32 days maximum that was prescribed by statute when loan was made, claim submitted by bank—which is primarily responsible for assuring that term of note does not exceed statutory limitation—for reimbursement of its loss on note must be denied. Although note was not assigned to bank or funds disbursed thereby until May 19, 1970, statute specifically limits term of obligation or note underlying loan and makes no provision for exceptions 126

MARINE CORPS
Members
Dependents
Proof of dependency for benefits. (*See* **MILITARY PERSONNEL, Dependents, Proof of dependency for benefits**)

MARRIAGE
Divorce. (*See* **HUSBAND AND WIFE, Divorce**)

MEDICAL TREATMENT
Ambulance services
Employee, while on temporary duty, lost consciousness during a high-blood-pressure seizure. Ambulance expense for his transportation to hospital at temporary duty post is not reimbursable under Federal Travel Regulations 1080

MEETINGS
Travel, etc., expenses
Incident to acceptance of non-Federally sponsored honor awards
If travel of Department of Defense civilian employees and military members to receive non-Federally sponsored honor awards includes attending meetings or conventions of organizations covered by 37 U.S.C. 412 (1970), 5 U.S.C. 5946 and 4110 (1970), proposed regulations which would authorize such travel at Government expense must be in accord with those statutes 1332
Other than Government meetings
Internal Revenue Service (IRS) proposal that it pay expenses of employee attending meetings and accept reimbursement directly from eligible tax exempt organizations, crediting such reimbursement to its own appropriation, is not authorized by applicable statutes. Provisions of 5 U.S.C. 4111 permit employee only to accept payments from eligible organizations, which payments are to be deducted from amounts otherwise due from employing agency. Moreover, in absence of specific authority to accept voluntary contributions or travel reimbursements, IRS would be required to deposit such funds into miscellaneous receipts of the Treasury by 31 U.S.C. 484 (1970) 1293

MEETINGS—Continued
Travel, etc., expenses—Continued
State officials Page
Decision B–166506, July 15, 1975, holding payment by EPA of transportation and lodging expenses of State officials attending National Solid Waste Management Association Convention is prohibited by 31 U.S.C. 551, unless otherwise authorized by statute, is affirmed. Provision of Administrative Expenses Act (5 U.S.C. 5703(c)), permitting payment of such expenses for persons serving Govt. without compensation does not provide necessary exception to 31 U.S.C. 551 since attendees at conference are not providing direct service to Govt. and are therefore not covered by 5 U.S.C. 5703(c)---------- 750

MILEAGE
Military personnel
Retirement
Last duty station to port of embarkation
Member, who on retirement traveled to his home of selection in Iran from Fort Hood, Texas, on American flag commercial air carrier, is not entitled to be reimbursed for transoceanic air travel since travel was not performed at personal expense. However, he is entitled to mileage allowance for himself and wife from Fort Hood to appropriate aerial port of embarkation but is limited to payment of mileage to actual port of embarkation, Dallas, Texas, since this was only travel performed at personal expense and paragraph M4151 of JTR provides that mileage is allowance payable for travel performed at personal expense---------- 761

Travel by privately owned automobile
Advantage to Government
Temporary duty
Local travel
Since rental cars and taxicabs are considered special conveyances under FTR, constructive cost of local travel by such modes may not be included as constructive cost of common carrier transportation under FTR para. 1–4.3 for purpose of determining maximum reimbursement when for personal reasons privately owned conveyance is used in lieu of common carrier transportation. However, to extent such local travel is authorized, constructive cost of common carrier transportation (bus or streetcar) for such travel may be included or use of privately owned conveyance may be approved as being advantageous to Govt. and reimbursement determined on this basis---------- 192
Between official station and temporary duty points
Employee, who traveled to temporary duty station (TDS) which was within commuting distance from his office, was not entitled to per diem but may be allowed mileage between the TDS and his official station--- 1323
Employee who traveled from his residence to his office, and then on the following day traveled to a temporary duty station (TDS), may be allowed mileage from his office to the TDS---------- 1323

MILEAGE—Continued
Travel by privately owned automobile—Continued
Between residence and terminal
Headquarters residence Page
Agency may issue regulations limiting the mileage allowable to an employee traveling to and from his residence where his residence is outside the limits of his headquarters to the distance between the origin or destination of his trip and a point not exceeding 25 miles from the corporate limits of his official duty station measured in the direction of his residence (25-mile point). However, where employee maintains residence at headquarters from which he commutes daily to work and another residence 103 miles away which he visits on weekends, when traveling from airport after official trip, he is entitled to mileage from airport to residence at headquarters 1323
Common carrier cost limitation
Computation
Total actual cost *v.* total constructive cost
Although on basis of our decisions agency travel regulation requires actual versus constructive costs for transportation and per diem to be compared separately in determining employee's reimbursement when, for personal reasons, privately owned conveyance is used in lieu of common carrier transportation, our decisions were based on interpretation of regulations which have been superseded. We interpret the current regulation, FTR para. 1–4.3, as requiring agency to determine employee's reimbursement for such travel by comparing total actual costs to total constructive costs. 45 Comp. Gen. 592 and 47 *id.* 686 will no longer be followed 192
Rates
Increases
Effective date
Blanket travel order issued on July 1, 1974, authorized per diem rate of $25 per day and mileage rate of 12 cents for use of privately owned automobile, as prescribed by Commerce Dept.'s regulations. On May 19, 1975, Temporary Reg. A–11 (GSA), implementing the Travel Expense Amendments Act of 1975, amended the Federal Travel Regs. (FTR) to increase the maximum per diem and mileage rates for official travel. Under blanket travel order, employee who traveled May 15 to 20, 1975, is entitled to higher per diem and mileage rates of amended FTR for travel on May 19 and 20 since such rates were mandatory. 49 Comp. Gen. 493 followed. 35 Comp. Gen. 148, distinguished 179
Vehicles operated in foreign countries
We have no legal objections, if GSA determines it is in best interests of Government, to amendment of FTR to provide higher mileage allowance rates for operation of privately owned vehicles by Government employees in foreign countries than for operation of such vehicles in United States, within overall statutory limit. FTR are statutory regulations, and such amendments are for determination by agency authorized to promulgate the travel regulations 1343

MILEAGE—Continued
Travel by privately owned automobile—Continued
Within metropolitan area
Commuting from residence to place of employment
Experts and consultants Page

Intermittently employed consultant may be paid transportation expenses pursuant to 5 U.S.C. 5703 and par. C3053, subpar. 2, of Joint Travel Regs., Vol. 2, for commuting from his residence to place of employment where residence is outside corporate limits but within metropolitan or geographic area of place of duty, insofar as intermittent employment occasions him transportation expenses he would not otherwise have incurred. 22 Comp. Gen. 231, overruled---------- 199

MILITARY PERSONNEL
Allowances
Quarters. (*See* **QUARTERS ALLOWANCE**)
Station. (*See* **STATION ALLOWANCES**)
Annuity elections for dependents
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Appointments. (*See* **APPOINTMENTS, Military personnel**)
Automobiles
Transportation. (*See* **TRANSPORTATION, Automobiles, Military personnel**)
Civil arrest
Status

Service member charged with commission of a civil offense on foreign soil is entitled to pay and allowances for any pretrial custodial period at a U.S. military installation where decision to incarcerate or to merely restrict member to duty station and assign him to perform duties on full-time basis remains in installation commanders. 36 Comp. Gen. 173, modified---------- 186

Service member charged with commission of a civil offense on foreign soil is to be considered constructively absent from duty and not entitled to pay and allowances when member is actually incarcerated on basis of request for incarceration by foreign civilian authorities under provisions of a treaty or other international agreement. 36 Comp. Gen. 173, modified---------- 186

Correction of military records. (*See* **MILITARY PERSONNEL, Record correction**)
Cost-of-living allowances. (*See* **STATION ALLOWANCES, Military personnel, Excess living costs outside United States**)
Courts-martial
Reenlistment bonus
Recoupment for failure to complete enlistment

Enlisted member's period of authorized excess leave pending appellate review of his court-martial including a bad conduct discharge is creditable service for computing period served on term of enlistment and, even though court-martial sentence was approved and discharge effected thereafter, period of such leave is not to be included in unexpired part of member's enlistment upon which computation of recoupment of reenlistment bonuses is based---------- 1244

MILITARY PERSONNEL—Continued

Dependents

Benefits

Survivor Benefit Plan

Retirement eligibility requirement Page

Air Force officer who had over 20 years' service when he died while on active duty was not eligible for retirement under 10 U.S.C. 8911 because less than 10 years of such service was as commissioned officer. Neither was he eligible for retirement under 10 U.S.C. 8914 which applies to enlisted members since at date of death he was officer. Therefore, widow is not entitled to SBP annuity under 10 U.S.C. 1448(d) since such annuity is contingent upon member having been qualified for retired pay 854

Certificates of dependency

Filing requirements

In view of reasonable assurance that changes in dependency status for payment of basic allowance for quarters do not go undetected under Joint Uniform Military Pay System, annual recertification of dependency certificates prescribed in 51 Comp. Gen. 231, as they relate to Marine Corps, Navy, and Air Force members, no longer will be required, provided that adequate levels of internal audit are maintained 287

Details. (*See* **DETAILS, Military personnel**)

Disability determinations

Authority

For purposes of establishing employment retention preference (5 U.S.C. 3501(a)(3), and 3502), exemption from reduction in retired pay under Dual Compensation Act (5 U.S.C. 5532(c)), and full credit for years of military service for annual leave accrual (5 U.S.C. 6303(a)) as civilian employee of Federal Govt., determinations as to whether service member's disability retirement from uniformed service resulted from injury or disease incurred as direct result of armed conflict or caused by instrumentality of war during period of war can only be made by uniformed service from which he is retired and neither employing agency nor this Office has authority to change that determination 961

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

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

Divorce. (*See* **HUSBAND AND WIFE, Divorce**)

Enlistments

Generally. (*See* **ENLISTMENTS**)

Family separation allowances (*See* **FAMILY ALLOWANCES, Separation**)

Gratuities. (*See* **GRATUITIES**)

Judge Advocates General

Assistants

Officers serving in positions

Entitled to pay of rear admirals

Court of Claims in *Selman* v. *United States*, 204 Ct. Cl. 675, held that naval officers ordered to serve in positions of Assistant Judge Advocates General are entitled to at least the pay of rear admiral (lower half) while serving in such positions whether they were "detailed" or "assigned" to such positions. Our decision at 50 Comp. Gen. 22 which determined that such officers were not entitled to pay of rear admiral (lower half) will no longer be followed. Consequently, successors to

MILITARY PERSONNEL—Continued
Judge Advocates General—Continued
Assistants—Continued
Officers serving in positions—Continued
Entitled to pay of rear admirals—Continued Page
plaintiffs in *Selman* in the statutorily created positions are also entitled to receive pay of rear admiral (lower half) ---------- 58
Mileage. (*See* **MILEAGE, Military personnel**)
Pay. (*See* **PAY**)
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Quarters allowance. (*See* **QUARTERS ALLOWANCE**)
Record correction
Retirement status
Where retired service member has sought correction of military records under 10 U.S.C. 1552 and Correction Board has denied relief sought, such action is final and conclusive on all officers of U.S. and not subject to review by GAO ---------- 961
Reenlistment bonus. (*See* **GRATUITIES, Reenlistment bonus**)
Reenlistment status. (*See* **ENLISTMENTS, Reenlistments**)
Reservists
Training duty
Per diem
Member of Reserve component ordered to annual active duty for training stayed at Navy Lodge, a nonappropriated fund temporary lodging facility, at $9 daily charge. In view of 37 U.S.C. 404(a)(4), 1 JTR para. M6000–1, which provides that members of Reserve components ordered to annual active duty for training are not entitled to per diem if Govt. quarters and mess are available, does not preclude per diem where members of Reserves incur lodging expenses at nonappropriated fund activities which were defined as Govt. quarters for purposes of 1 JTR without consideration that such expenses would be incurred--- 130
Retired pay. (*See* **PAY, Retired**)
Retirement
Travel and transportation entitlement
Dependents
Member, who on retirement traveled to his home of selection in Iran from Fort Hood, Texas, on American flag commercial air carrier, is not entitled to be reimbursed for transoceanic air travel since travel was not performed at personal expense. However, he is entitled to mileage allowance for himself and wife from Fort Hood to appropriate aerial port of embarkation but is limited to payment of mileage to actual port of embarkation, Dallas, Texas, since this was only travel performed at personal expense and paragraph M4151 of JTR provides that mileage is allowance payable for travel performed at personal expense ---------- 761
Personal expense requirement
Member, who on retirement traveled to his home of selection in Iran with wife on American flag commercial air carrier chartered by his new employer and who had $950 included in annual statement of earnings by employer as amount paid to third party for travel expenses, is not entitled to reimbursement of air travel expenses since that travel was not performed at personal expense as required by applicable regulations-- 761

MILITARY PERSONNEL—Continued
Selective reenlistment bonus. (*See* **GRATUITIES, Selective Reenlistment Bonus**)
Station allowances. (*See* **STATION ALLOWANCES, Military personnel**)
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Telephone services
Private residences Page
Military members required to relocate their households incident to base closings in Japan without permanent changes of station may not be reimbursed personal expenses incurred for purchase of rugs, drapes, curtains, and service charges for items of personal convenience not essential to the occupation of quarters. Also, reimbursement for telephone installation charges is specifically prohibited by 31 U.S.C. 679 .. 932
Transportation
Automobiles. (*See* **TRANSPORTATION, Automobiles, Military personnel**)
Household effects. (*See* **TRANSPORTATION, Household effects, Military personnel**)
Travel allowance. (*See* **TRAVEL ALLOWANCE, Military personnel**)
Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)

MISCELLANEOUS RECEIPTS
Collection proceeds
Travel reimbursement
Internal Revenue Service (IRS) proposal that it pay expenses of employee attending meetings and accept reimbursement directly from eligible tax exempt organizations, crediting such reimbursement to its own appropriation, is not authorized by applicable statutes. Provisions of 5 U.S.C. 4111 permit employee only to accept payments from eligible organizations, which payments are to be deducted from amounts otherwise due from employing agency. Moreover, in absence of specific authority to accept voluntary contributions or travel reimbursements, IRS would be required to deposit such funds into miscellaneous receipts of the Treasury by 31 U.S.C. 484 (1970) ---------- 1293
National forest permittee's fees
Department of Agriculture (Agriculture) may, pursuant to section 5 of Granger-Thye Act, enter into cooperative agreements with National Forest permittees whereby Agriculture maintains and operates waste disposal systems, permittees pay Agriculture their pro rata share of expenses for this operation and maintenance, and Agriculture deposits payments in cooperative trust accounts ---------- 1142
Refund of moneys
Erroneously received
Propriety at time of deposit
Investment adviser fees
Annual charge assessed pursuant to User Charge Statute, 31 U.S.C. 483a, by SEC upon investment advisers and deposited in Treasury as

MISCELLANEOUS RECEIPTS—Continued
Refund of moneys—Continued
Erroneously received—Continued
Propriety at time of deposit—Continued
Investment adviser fees—Continued Page
miscellaneous receipts, which charge is now considered erroneous by SEC because of recent Supreme Court decisions, may be refunded by SEC out of permanent indefinite appropriation established by 31 U.S.C. 725q–1 to pay moneys "erroneously received and covered." This refund is authorized to all who paid such invalid fee regardless of whether payment was made under protest 243
Special account *v.* miscellaneous receipts
Collections
Parking fees
Under 40 U.S.C. 490(k), fees collected by Executive agency for space provided to "anyone" pursuant to that provision, including parking fees collected from employees, if rates therefor are approved, are generally to be credited to appropriations initially charged for such services, except that amounts collected in excess of actual costs must be remitted to Treasury as miscellaneous receipts 897
Fines
Violation of wagering tax
Refund by IRS of fine paid pursuant to conviction for violation of wagering tax statutes, which refund was ordered in connection with subsequent vacation of judgment, should be charged against account 20X0903 (Refunding Internal Revenue Collections) rather than account 20X1807 (Refund of Moneys Erroneously Received and Covered), since initial receipt of fine by IRS was apparently treated as internal revenue collection, and account 20X1807 is available only when refund is not properly chargeable to any other appropriation 625

MISSING PERSONS ACT
Civilian employees
Compensation. (*See* **COMPENSATION, Missing, interned, captured, etc., employees**)

MOBILE HOMES
Loans. (*See* **HOUSING, Loans**)

NAMES
Married women
Use of married name
Payrolls
A woman, notwithstanding her marriage, has the right to use her maiden name on Govt. checks and payrolls provided that she uses the same name consistently on all Govt. records. This is, however, subject to any general regulation that might be issued by the CSC. In addition, a female employee may be carried on the payroll as Ms., regardless of her marital status, if she so desires. 19 Comp. Gen. 203, modified 177

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
Exhibit loaned to Air Force (TAW)
Insurance premiums Page
Under long-standing policy of the Government that it is self-insurer and will not purchase commercial insurance against loss or damage to its own property, insurance should not have been purchased on a NASA exhibit loaned to a unit of the Air Force for display purposes. However, since self-insurance principle is one of policy rather than positive law and instant insurance coverage was issued in good faith, premium may be paid 1196
Procurement regulations
Subcontract awards
Review
National Aeronautics and Space Administration's (NASA) exercise of general administrative functions in determining technical approaches to problem solving is not sufficient involvement in selection of subcontractor to cause our review of subcontract award since parallel development to test multiple approaches to problem solving was reasonable and specification prepared as a result thereof for use in subcontract award permitted competition, even by protester, and NASA was not involved in selection as envisioned in 54 Comp. Gen. 767 1220
Allegation that NASA does not possess authority to implement procedure waiving review of cost-reimbursement prime contractor award of subcontracts fails in light of fact that grant of general procurement authority carries discretion for agency to contract by any reasonable method and NASA procedure waiving review of subcontracts under stipulated circumstances is reasonable exercise of discretion and was accomplished in accordance with NASA regulations 1220
Space shuttle program
Silver-gold exchange
General Services Administration acted reasonably under section 201(c) of Federal Property and Administrative Services Act of 1949, as amended, and its implementing Federal Property Management Regulations, in disapproving proposed exchange of certain quantities of silver for an equivalent dollar amount of gold. Since it appears that gold to be acquired would not serve the same specific purpose as the replaced silver, as required by regulations, proposed exchange is not of "similar" items as required by section 201(c). 41 Comp. Gen. 227 distinguished 1268

NATIONAL BUREAU OF STANDARDS (*See* **COMMERCE DEPARTMENT, National Bureau of Standards**)

NAVY DEPARTMENT
Contracting methods
Aircraft procurement
Legality of expenditures
Although protester argues that Navy did not comply with DOD reprogramming directives, those directives are based on nonstatutory agreements and do not provide a proper basis for determining legality of expenditures 307

NAVY DEPARTMENT—Continued
Members
Dependents
Proof of dependency for benefits. (*See* **MILITARY PERSONNEL, Dependents, Proof of dependency for benefits**)

NIGHT WORK
Compensation. (*See* **COMPENSATION, Night work**)

NONDISCRIMINATION
Contracts. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)
Discrimination alleged
Basis of race Page

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Total interim earnings from private enterprise are for offset against total Federal backpay otherwise due, even though this results in no backpay payment. Interim earnings may not be computed and set off on a pay period by pay period basis to reduce the effect of interim earnings---------- 48

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Lump-sum pay for annual leave may not be considered for waiver under 5 U.S.C. 5584, since payment was proper when made. Also, there is no authority to waive payment of retirement deductions on the amount of Federal pay that would have been earned during the period of separation, notwithstanding interim earnings exceeded amount of Federal pay---------- 48

Officers and employees. (*See* **OFFICERS AND EMPLOYEES, Equal employment opportunity**)
Sex discrimination elimination
Married women
Use of maiden name on payrolls

A woman, notwithstanding her marriage, has the right to use her maiden name on Govt. checks and payrolls provided that she uses the same name consistently on all Govt. records. This is, however, subject to any general regulation that might be issued by the CSC. In addition, a female employee may be carried on the payroll as Ms., regardless of her marital status, if she so desires. 19 Comp. Gen. 203, modified---------- 177

OFFICE OF ECONOMIC OPPORTUNITY
Grant programs
Grantee tax indebtedness
Delinquencies

Section 115 of Economic Opportunity Amendments of 1969, 42 U.S.C. 2705, requires that upon notification from Treasury Secretary of grantee tax delinquency, Director, Community Services Administration, must suspend grant payments to "any person otherwise entitled to receive a payment pursuant to a grant" in amount sufficient to satisfy delinquency. Statute does not distinguish between delinquencies incurred before and those incurred after awarding of grant but legislative history indicates all outstanding delinquencies were intended to be included. Hence, all grant payments, up to amount of total delinquency, must be suspended until satisfactory provision for payment of delinquency is made---------- 1329

OFFICE OF FEDERAL PROCUREMENT POLICY

Scope of rulemaking authority Page

LEAA organizational conflict of interest guideline is not inconsistent with FMC 74–7 Attachment 0, since provisions of FMC 74–7–0 are matters of Executive branch policy, which do not establish legal rights and responsibilities, and Office of Federal Procurement Policy has found guideline to be acceptable implementation of FMC 74–7–0 911

OFFICERS AND EMPLOYEES

Accredited rural appraisers

Examination costs

Fees and travel expenses

Exams not integral part of course of instruction are not within definition of "training" in 5 U.S.C. 4101(4). Therefore, Govt. reimbursement of costs of exam leading to certification of Govt. employee as accredited rural appraiser is not permitted by terms of Govt. Employees' Training Act, 5 U.S.C. 4101–4118 759

Administrative leave. (*See* **LEAVES OF ABSENCE, Administrative leave**)

Ambulance services

Temporary duty. (*See* **TRAVEL EXPENSES, Temporary duty, Ambulance services**)

Appointments. (*See* **APPOINTMENTS**)

Back pay. (*See* **COMPENSATION, Removals, suspensions, etc., Back pay**)

Compensation. (*See* **COMPENSATION**)

Contracting with Government

Public policy objectionability

Corporation

Where Govt. employee owns 39.95 percent of stock of corporation, it is concluded that he has substantial ownership in corporation. Conclusion is reached in view of significant history which has discouraged contracting between Govt. and its employees. Therefore, while agency restricted its view to employee's role in day-to-day management of corporation, since reasonable ground did exist, rejection of corporation low bid was not improper 295

Exception

Expenses of renting boat and equipment from Govt. employee for purpose of performing acoustical measurements are not reimbursable as travel expenses. Equipment should have been obtained by procurement means with due regard to section 1–1.302–3 of Fed. Procurement Regs. and public policy prohibiting Govt. from contracting with its employees except for most cogent of reasons as where Govt.'s needs cannot otherwise reasonably be met. Payment may, however, be made on *quantum meruit* basis insofar as receipt of goods and services has been ratified by authorized official 681

Death in line of duty

Plaques to honor

Government Employees Incentive Awards Act

Appropriated funds may not be used to buy paperweights and walnut plaques for distribution by U.S. Army Criminal Investigation Command (USACIDC) to governmental officials and other individuals in recognition of their support for USACIDC. Plaques may, however, be purchased with appropriated funds to honor employees who died in the line of duty if the use is proper under the Government Employees Incentive Awards Act, 5 U.S.C. 4501–4506, and related regulations 346

OFFICERS AND EMPLOYEES—Continued
Debt collections. (*See* **DEBT COLLECTIONS**)
De facto Page

Army officer, assigned as Executive Assistant to Ambassador-at-Large, retired from Army in anticipation of civilian appointment to that position. After retirement he continued to serve as Executive Assistant for 7 months before Dept. of State determined he could not be appointed. Claimant is *de facto* officer who served in good faith and without fraud. He may be paid reasonable value of services despite lack of appointment in view of fact that had compensation been paid, claimant could retain it under *de facto* rule or recovery could be waived under 5 U.S.C. 5584. Although he was not paid, administrative error arose when claimant in good faith entered on duty with understanding of Govt. obligation to pay for services. On reconsideration, B–181934, Oct. 7, 1974, is overruled, and 52 Comp. Gen. 700, amplified---------- 109
Details. (*See* **DETAILS**)
Disputes
Arbitration

Collective-bargaining agreement provides that certain Internal Revenue Service career-ladder employees will be promoted effective the first pay period after 1 year in grade, but promotions of seven employees covered by agreement were erroneously delayed for periods up to several weeks. Since provision relating to effective dates of promotions becomes nondiscretionary agency requirement, if properly includable in bargaining agreement, General Accounting Office will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotions in accordance with the agreement-- 42

Federal Labor Relations Council questions the propriety of sustaining an arbitration award that orders backpay for employees deprived of overtime work in violation of a negotiated agreement. Agency violations of negotiated agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act, 5 U.S.C. 5596. Improper agency action may be either affirmative action or failure to act where agreement requires action. Thus, award of backpay to employees deprived of overtime work in violation of agreement is proper and may be paid-- 171

Award of arbitrator granting sick leave to employee who attended sick member of family not afflicted with contagious disease, who as result was not able to perform his duties, may not be implemented by agency since there is no legal authority to grant sick leave in the circumstances---------- 183

Fed. Labor Relations Council questions propriety of sustaining arbitration award of 1 hour backpay to employee deprived of overtime work in violation of negotiated labor-management agreement. Agency violations of such agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by Back Pay Act, 5 U.S.C. 5596. Therefore, where agency obligated itself in a labor-management agreement to provide 2 hours of productive work when employee is held on duty beyond his regular shift and, in violation of such agreement, provided him only 1 hour, arbitration award providing backpay to employee for the additional hour may be sustained---------- 405

OFFICERS AND EMPLOYEES—Continued
Disputes—Continued
Arbitration—Continued Page

Federal Labor Relations Council requests decision on legality of arbitration award of backpay to 54 shipyard employees for overtime and time not worked. The arbitrator found that Shipyard changed basic workweek of employees without complying with consultation requirements of negotiated agreement. However, because arbitrator did not find that but for failure of Shipyard to consult with union, change in basic workweek would not have occurred, award does not satisfy criteria of Back Pay Act, 5 U.S.C. 5596, and therefore it may not be implemented ---- 629

Federal Aviation Administration (FAA), Department of Transportation, questions propriety of implementing three arbitration awards requiring FAA to provide parking accommodations for employees. FAA does not consider it would be justified in making a determination, as required for expenditure of funds by applicable regulations, that such leased parking accommodations are necessary to avoid impairment of its operational efficiency. Inasmuch as FAA regulations incorporated by reference in the collective bargaining agreement have already made the required determination, FAA is not required to make a further determination. Accordingly, FAA may expend appropriated funds to implement awards ---- 1197

Labor union appealed General Accounting Office decision holding arbitrator's award of backpay for night shift work improperly denied to employees in violation of collective bargaining agreement could not be implemented since agency's action was not unjustified or unwarranted personnel action under Back Pay Act and no night work was actually performed. Subsequent decisions have held that omission such as failure to afford opportunity for overtime work in violation of agreement may constitute unjustified or unwarranted personnel action although overtime work was not performed. Therefore, upon reconsideration, arbitrator's award may be implemented where employees were improperly denied assignment to night shift. B–181972, August 28, 1974, reversed -- 1311

Equal employment opportunity
Discrimination actions

Employee was restored to duty after his service had been terminated during probation as a result of racial discrimination. Total interim earnings from private enterprise are for offset against total Federal backpay otherwise due, even though this results in no backpay payment. Interim earnings may not be computed and set off on a pay period by pay period basis to reduce the effect of interim earnings ---- 48

Ethics
Abuse

Where Agency representative brought protester's employee into meeting with competitor without disclosing relationship and discussion may have given protester competitive advantage, RFP should be revised to eliminate advantage, if that can be done without sacrifice to Agency interests, since such action would enhance competition and provide opportunity for all interested parties to compete. However, if Agency interests call for continuing procurement in form that precludes elimination of possible competitive advantage, protester may be excluded from portion of procurement involving possible advantage ---- 280

OFFICERS AND EMPLOYEES—Continued
Excusing from work
Purpose for excusing Page

Granting of administrative leave to employee for acclimatization rest after he completed a full day of duty and traveled over 7 hours by air on return from Guam after crossing international date line is proper exercise of administrative authority. This is so since the CSC has not issued general regulations covering the granting of administrative leave and, therefore, each agency, under general guidance of decisions of Comptroller General, which are discussed in applicable FPM Supplement, has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate---------- 510

Transferred employee seeks restoration of 8 hours annual leave charged to leave account while awaiting arrival of movers on scheduled day of travel. If agency to which employee is assigned determines that claimant delayed travel while reasonably and necessarily awaiting movers, GAO would interpose no objection if claimant was administratively excused for such time as was essential for such purpose------ 779

Expense of suit against officer in his official capacity

Where U.S. Attorney undertook defense of former SBA employee who was sued as result of actions committed while acting within scope of his employment and during course of proceedings U.S. Attorney withdrew for administrative reasons, necessitating former employee's retaining services of private counsel although Govt.'s interest in defending employee continued throughout proceedings, we would not object to SBA's reimbursing former employee amount for reasonable legal fees incurred. 28 U.S.C. 516–519, 547, and 5 U.S.C. 3106 are not a bar in such circumstances since to hold otherwise would be contrary to rule that cost of defending such cases should be borne by Govt----- 408

Two State Department employees were named as defendants in grievance brought under Section 1820 of Volume 3, Foreign Affairs Manual, by employee they supervised. State Department refused to provide legal counsel to supervisors at grievance hearing due to personal nature of grievant's allegations and since purpose of hearing was fact finding for ultimate decision by Director of Personnel. Absent express statutory authority, the two supervisors may not be reimbursed fees of private counsel retained to represent them at the hearing---------- 1418

Experts and consultants. (*See* **EXPERTS AND CONSULTANTS**)

First-40-hour employees. (*See* **OFFICERS AND EMPLOYEES, Hours of work, Forty-hour week, First forty-hour basis**)

Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)

Grievances
Classification actions
Not covered by negotiated grievance procedure

Employee's GS–12 position was reclassified administratively to GS–13, effective June 2, 1975, incident to employee's grievance related to co-workers' promotions which had become effective October 11, 1974. Reclassification of position with concomitant pay increase may not be made retroactive other than as provided in 5 CFR 511.703---------- 515

OFFICERS AND EMPLOYEES—Continued
Grievances—Continued
Union recognition Page
Federal Labor Relations Council requested decision on legality of arbitrator's award of retroactive promotion and backpay. Arbitrator found grievant was assigned higher duties but was not given temporary promotion as provided in negotiated agreement. Award may not be implemented since new position had not yet been classified and grievant cannot be promoted to a position which did not exist 1062
Handicapped
Honor award recipients
Travel expenses for attendants to attend honor award ceremonies. (*See* **TRAVEL EXPENSES, Private parties, Attendants for handicapped honor award recipients, Travel to attend award ceremonies**)
Holding two offices
Certifying officers acting for two agencies. (*See* **CERTIFYING OFFICERS, Responsibility, Interagency services**)
Hours of work
Forty-hour week
First forty-hour basis
Overtime and traveltime
Mine inspectors who work first-40-hour workweeks may be compensated for time spent in travel on official business during their first 40 hours. Any time spent in nontravel work after first 40 hours is compensable overtime. B–179186, October 24, 1973, modified 994
Workweek changes
Violation of negotiated agreement
Federal Labor Relations Council requests decision on legality of arbitration award of backpay to 54 shipyard employees for overtime and time not worked. The arbitrator found that Shipyard changed basic workweek of employees without complying with consultation requirements of negotiated agreement. However, because arbitrator did not find that but for failure of Shipyard to consult with union, change in basic workweek would not have occurred, award does not satisfy criteria of Back Pay Act, 5 U.S.C. 5596, and therefore it may not be implemented 629
Household effects
Transportation. (*See* **TRANSPORTATION, Household effects**)
Jury duty
Fees. (*See* **COURTS, Jurors, Fees**)
Leave. (*See* **LEAVES OF ABSENCE, Court**)
Leave of absence. (*See* **LEAVES OF ABSENCE**)
Medical treatment. (*See* **MEDICAL TREATMENT, Officers and employees**)
Mileage. (*See* **MILEAGE**)
Missing, interned, captured, etc.
Compensation. (*See* **COMPENSATION, Missing, interned, captured, etc., employees**)
Moving expenses
Relocation of employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

OFFICERS AND EMPLOYEES—Continued
Overseas
Quarters allowance. (*See* **QUARTERS ALLOWANCE, Civilian overseas employees**)
Overtime. (*See* **COMPENSATION, Overtime**)
Per diem. (*See* **SUBSISTENCE, Per diem**)
Promotions
Compensation. (*See* **COMPENSATION, Promotions**)
Reclassified positions
Incumbent's status Page

Employee's GS–12 position was reclassified administratively to GS–13, effective June 2, 1975, incident to employee's grievance related to co-workers' promotions which had become effective October 11, 1974. Reclassification of position with concomitant pay increase may not be made retroactive other than as provided in 5 CFR 511.703 ---------- 515

Federal Labor Relations Council requested decision on legality of arbitrator's award of retroactive promotion and backpay. Arbitrator found grievant was assigned higher duties but was not given temporary promotion as provided in negotiated agreement. Award may not be implemented since new position had not yet been classified and grievant cannot be promoted to a position which did not exist ---------- 1062

Temporary
Detailed employees

Air Force detailed GS–4 employee to GS–5 position for over 1 year beginning July 1, 1970, without obtaining CSC's prior approval of extension beyond 120 days. Agency's discretionary authority to retain employee on detail continues no longer than 120 days, after which agency must either have obtained Commission approval or grant employee temporary promotion. Since agency failed to obtain approval, employee is entitled to retroactive temporary promotion from 121st day of detail to its termination ---------- 785

Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made ---- 836

Retroactive

Two Bureau of Mines employees were detailed to higher grade positions in excess of 120 days and no prior approval of extension beyond 120 days was sought from CSC. Employees are entitled to retroactive temporary promotions for period beyond 120 days until details were terminated because Board of Appeals and Review, CSC, has interpreted regulations to require temporary promotions in such circumstances. Amplified by 55 Comp. Gen. 785 ---------- 539

Decision of Dec. 5, 1975, 55 Comp. Gen. 539, entitling otherwise qualified employee to temporary promotion on 121st day of detail to higher grade position when prior approval of extension of detail beyond 120 days has not been obtained from Civil Service Commission will be applied retrospectively to extent permitted by 6-year statute of limitations applicable to GAO ---------- 785

OFFICERS AND EMPLOYEES—Continued
Quarters allowance
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters**)
Reduction-in-force
Reemployment after break in service
Travel and transportation expenses Page
The relocation expenses prescribed under 5 U.S.C. 5724a(c) and 5724(e) may be paid by the gaining or losing agency to an employee separated by a reduction in force and reemployed within 1 year at another geographical location, as though the employee had been transferred in the interest of the Government without a break in service. However, the losing and gaining agency must agree as to which will be responsible for such costs---------- 1338
Veterans preference
Where retired service member has sought correction of military records under 10 U.S.C. 1552 and Correction Board has denied relief sought, such action is final and conclusive on all officers of U.S. and not subject to review by GAO---------- 961
Relocation expenses
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Removals, suspensions, etc.
Compensation. (*See* **COMPENSATION, Removals, suspensions, etc.**)
Residence
Twenty-five mile point
Agency may issue regulations limiting the mileage allowable to an employee traveling to and from his residence where his residence is outside the limits of his headquarters to the distance between the origin or destination of his trip and a point not exceeding 25 miles from the corporate limits of his official duty station measured in the direction of his residence (25-mile point). However, where employee maintains residence at headquarters from which he commutes daily to work and another residence 103 miles away which he visits on weekends, when traveling from airport after official trip, he is entitled to mileage from airport to residence at headquarters---------- 1323
Subsistence
Per diem (*See* **SUBSISTENCE, Per diem**)
Taxes
Motel and hotel taxes
Liability
Cost of hotel or motel room to BIA employees on official business is sum of rental fee plus applicable taxes. Legal incidence of Anchorage, Alaska, hotel-motel rental tax is on the Federal employee when Government reimburses its employees via per diem or actual expenses allowance. Constitutional exemption from State and local taxes does not apply when Government is not itself contractually obligated to hotel-motel, even though it has voluntarily assumed economic burden thereof-- 1278
Trailers
Transportation. (*See* **TRANSPORTATION, Household effects, House trailer shipments**)

OFFICERS AND EMPLOYEES—Continued
Training
Personal *v.* Government expenses
Examination costs
Accredited rural appraisers Page
Exams not integral part of course of instruction are not within definition of "training" in 5 U.S.C. 4101(4). Therefore, Govt. reimbursement of costs of exam leading to certification of Govt. employee as accredited rural appraiser is not permitted by terms of Govt. Employees' Training Act, 5 U.S.C. 4101–4118 759
Transfers
Relocation expenses
Administrative determinations
Conflict with employees
Employee who purchased two-family dwelling is entitled to pro rata reimbursement of otherwise allowable real estate expenses since OMB Circular No. A–56 does not contemplate application of fixed 50 percent formula whenever employee purchases two-family dwelling. In establishing the applicable reimbursement percentage when more than 50 percent is claimed, agency should require employee to submit specific information as to space occupied by employee as residence and living quarters and, if necessary, expert opinion as to propriety of percentage claimed 747
Authorization
Not discretionary
Where transferred employee's travel authorization did not expressly provide for reimbursement of expenses in connection with purchase of residence at new duty station, orders may be amended to authorize payment of residence transaction expenses. Provision for payment of expenses in connection with purchase or sale of residence contained at 2–6.1, FPMR 101–7, contemplates uniform allowance of such expenses to transferred employees 613
Break in service
Reemployed by another agency
The relocation expenses prescribed under 5 U.S.C. 5724a(c) and 5724(e) may be paid by the gaining or losing agency to an employee separated by a reduction in force and reemployed within 1 year at another geographical location, as though the employee had been transferred in the interest of the Government without a break in service. However, the losing and gaining agency must agree as to which will be responsible for such costs 1338
Reemployed by term appointment
Employee who was separated by RIF by NASA and employed after break in service of less than 1 month by term appointment with HEW, may be reimbursed expenses of selling house at NASA duty station since term appointment with HEW was "nontemporary appointment" and eligibility for relocation expenses arose under that section incident to RIF by NASA and employment by HEW 664

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Death or separation of employee
Reimbursement basis Page

Although employee voluntarily retired from Govt. service 4 months prior to final settlement on sale of residence at old official duty station, he is entitled to reimbursement of real estate expenses where sale was completed within 2-year extended time period following date he reported for duty at new official duty station since he completed 12 months of service required by transportation agreement, and transferred employee's right to reimbursement of real estate expenses continues after date of voluntary retirement 645

Dependents
Mother

Mother of Govt. employee who is member of employee's household is dependent parent within meaning of para. 2-1.4d, Federal Travel Regs., for purposes of relocation allowances as she receives only social security payments, which are largely required for medical expenses, and is dependent upon daughter to maintain reasonable standard of living. IRS standards for dependency do not determine entitlement under FTR 462

Flat fee expenses
House purchase or sale
Pro rata expense reimbursement. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Pro rata expense reimbursement, House purchase or sale, Flat fee expenses**)
House purchase
Insurance

Employee who purchased "owners title policy" incident to purchase of residence at new duty station as distinguished from "mortgage title policy" is precluded by section 4.2d of OMB Cir. No. A-56, revised August 17, 1971, from being reimbursed for such cost 779

Interim financing loan

Transferred employee who obtains "interim financing loan" to be used as down payment on residence at new duty station, because residence at old duty station has not yet been sold, may not be reimbursed for any expenses relating to "interim financing loan." Prohibition in 5 U.S.C. 5724a, FTR and JTR, against reimbursement of any losses on sale of residence due to market conditions is sufficiently broad to preclude reimbursement here, since need for "interim financing loan" arises because of market conditions 679

Not consummated

Employee who was in process of purchasing new residence incident to transfer and was prevented from completing purchase transaction by second transfer may have deposit forfeited included as miscellaneous expense allowance incident to his two transfers and he would be entitled to maximum miscellaneous expense allowance for each transfer as provided in para. 2-3.3b, FTR, not to exceed actual miscellaneous expense incurred 628

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
House purchase—Continued
Pro rata expense reimbursement Page

Employee who purchased two-family dwelling is entitled to pro rata reimbursement of otherwise allowable real estate expenses since OMB Circular No. A–56 does not contemplate application of fixed 50 percent formula whenever employee purchases two-family dwelling. In establishing the applicable reimbursement percentage when more than 50 percent is claimed, agency should require employee to submit specific information as to space occupied by employee as residence and living quarters and, if necessary, expert opinion as to propriety of percentage claimed..... 747

Flat fee expenses

Where employee purchases two-family dwelling, otherwise allowable real estate expenses which are based on flat fee, without regard to purchase price, should, if reasonable, be reimbursed in toto..... 747

House trailers, mobile homes, etc.
Household effects shipment precluded

Employee who moves household goods from old station to new station pursuant to transfer may not later claim expenses for transportation of mobile home under FTR para. 2–7.1(a)..... 228

Purchase costs

Employee who, pursuant to transfer of station, purchased mobile home for use as residence at new station may be reimbursed for miscellaneous expenses normally associated with relocation of mobile homes. FTR. para. 2–3.1(b)..... 228

Separate shipment of household effects for part of distance
Reimbursement limitation

Incident to transfer to Alaska, employee transported mobile home from Keyser, W. Va., to Seattle, Wash., where it was determined that it did not meet Alaskan specifications. Employee stored trailer in Seattle and completed shipment of household goods to Alaska on GBL. Regarding reimbursement for transportation of mobile home, rule in 39 Comp. Gen. 40 is applicable. Credit should be allowed under FTR para. 2–7.3a for shipment of mobile home from Keyser to Seattle. Employee is not entitled to further allowance under authorization for shipment of household goods on GBL. Total payment under both authorizations may not exceed cost which would have been incurred by Govt. had either method been used for entire distance..... 526

Leases
Lease-breaking expenses
Tax withholding

Employee claims reimbursement for withholding taxes deducted from 1975 settlement by Transportation and Claims Division. Settlement reimbursed employee for lease-breaking expenses in amount of $108.66. Under 26 U.S.C. 217 (1970), it appears that employee would be permitted deduction and that amount reimbursed would not be subject to withholding. However, 3 Treasury Fiscal Requirements Manual 3020.50 (April 1970) allows adjustment of errors in withholding only during same calendar year in which error was made. Since error was made during 1975 calendar year, adjustment was automatically effected when employee filed income tax returns for that year..... 1251

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Miscellaneous expenses
Allowable amount Page

Incident to transfer, employee claims miscellaneous expense for alteration of draperies and cost of new rug. Employee states that $500 miscellaneous expense was authorized on work sheets utilized in preparing budget estimates on travel authorization. Such figures are mere estimates and are without legal effect to create entitlement. Entitlement to relocation expenses, including miscellaneous expense, flows from and must be determined by statute and implementing regulations..... 1251

Evidence of expenses in excess of $200

Employee claims miscellaneous expense for alteration of draperies and purchase of new rug incident to establishing new residence upon transfer. Claim was denied by Transportation and Claims Division since employee failed to submit documentation required by Federal Travel Regulations (FPMR 101–7) para. 2–3.3a (May 1973) for alteration of draperies and since reimbursement for new items such as rugs is specifically prohibited by FTR para. 2–3.1c. Upon submission of proper documentation, amount claimed for alteration of draperies may be reconsidered. However, denial of cost of new rug was proper, and is sustained..... 1251

House deposit forfeiture

Employee who was in process of purchasing new residence incident to transfer and was prevented from completing purchase transaction by second transfer may have deposit forfeited included as miscellaneous expense allowance incident to his two transfers and he would be entitled to maximum miscellaneous expense allowance for each transfer as provided in para. 2–3.3b, FTR, not to exceed actual miscellaneous expense incurred..... 628

Nonreimbursable
Real property losses

Transferred employee who obtains "interim financing loan" to be used as down payment on residence at new duty station, because residence at old duty station has not yet been sold, may not be reimbursed for any expenses relating to "interim financing loan." Prohibition in 5 U.S.C. 5724a, FTR and JTR, against reimbursement of any losses on sale of residence due to market conditions is sufficiently broad to preclude reimbursement here, since need for "interim financing loan" arises because of market conditions..... 679

Pro rata expense reimbursement
House purchase or sale
Two-family dwelling

Employee who purchased two-family dwelling is entitled to pro rata reimbursement of otherwise allowable real estate expenses since OMB Circular No. A–56 does not contemplate application of fixed 50 percent formula whenever employee purchases two-family dwelling. In establishing the applicable reimbursement percentage when more than 50 percent is claimed, agency should require employee to submit specific information as to space occupied by employee as residence and living quarters and, if necessary, expert opinion as to propriety of percentage claimed.. 747

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Reemployment after separation
Term appointment
Page

Employee who was separated by RIF by NASA and employed after break in service of less than 1 month by term appointment with HEW, may be reimbursed expenses of selling house at NASA duty station since term appointment with HEW was "nontemporary appointment" and eligibility for relocation expenses arose under that section incident to RIF by NASA and employment by HEW 664

Two agencies involved
Liability for expenses

The relocation expenses prescribed under 5 U.S.C. 5724a(c) and 5724(e) may be paid by the gaining or losing agency to an employee separated by a reduction in force and reemployed within 1 year at another geographical location, as though the employee had been transferred in the interest of the Government without a break in service. However, the losing and gaining agency must agree as to which will be responsible for such costs 1338

"Settlement date" limitation on property transactions
Extension
Retirement of employee prior to residence sale

Although employee voluntarily retired from Govt. service 4 months prior to final settlement on sale of residence at old official duty station, he is entitled to reimbursement of real estate expenses where sale was completed within 2-year extended time period following date he reported for duty at new official duty station since he completed 12 months of service required by transportation agreement, and transferred employee's right to reimbursement of real estate expenses continues after date of voluntary retirement 645

Subsistence expenses
Reasonableness of meal costs

Although employing agency has initial responsibility to determine reasonableness of expenditures for subsistence while occupying temporary quarters, General Accounting Office has right and duty to review circumstances of each case submitted to it regarding reasonableness of such expenses 1107

Taxes

Employee claims reimbursement for withholding taxes deducted from 1975 settlement by Transportation and Claims Division. Settlement reimbursed employee for lease-breaking expenses in amount of $108.66. Under 26 U.S.C. 217 (1970), it appears that employee would be permitted deduction and that amount reimbursed would not be subject to withholding. However, 3 Treasury Fiscal Requirements Manual 3020.50 (April 1970) allows adjustment of errors in withholding only during same calendar year in which error was made. Since error was made during 1975 calendar year, adjustment was automatically effected when employee filed income tax returns for that year 1251

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Transfers—Continued
Relocation expenses—Continued
Taxes—Continued
Application of *Allstate Ins. Co.* v. *U.S.*
Prior to 1970 Page

Court of Claims in *Allstate Insurance Co.* v. *U.S.*, 530 F. 2d 378, held that reimbursement of moving expenses was not compensation for services. That decision does not affect withholding of income tax from relocation expense payments for 1970 and following years, because case dealt with tax years 1965–1969, and statute was amended for tax years beginning after December 31, 1969. Section 82 was added to Internal Revenue Code by 1969 amendment and includes reimbursement of moving expenses within gross income as compensation for services..... 1504

Temporary quarters
Computation of allowable amount
Subsistence expenses

Employee, transferred from Sao Paulo, Brazil, to Washington, D.C., spent $912.59 for food items in 30-day period, including $425.70 in 1 day, for his family of four. Based upon U.S. Department of Labor statistics, monthly food budget for family of four in Washington, D.C., would have been between $329 and $413. Therefore, amount of food expenses should be reduced to reasonable amount in computing temporary quarters allowance..... 1107

High cost of living area

Civilian employee of U.S. Customs Service was transferred from San Diego, California, to downtown Los Angeles, California, a designated high rate geographical area, and he occupied temporary quarters in Los Angeles. He is entitled to reimbursement at the maximum statutory per diem rate of $35 as prescribed by paragraph 2–5.4c of the Federal Travel Regulations and section 5702(a) of Title 5, U.S. Code. He is not entitled to the daily rate of $37 designated for temporary duty travel in Los Angeles, and the $33 per diem rate established by regulation is not applicable..... 1337

Private or commercial lodgings *v.* permanent-type Government quarters

The description of temporary quarters in Federal Travel Regulations para. 2–5.2c and 2 Joint Travel Regulations para. C8250 as "any lodging obtained from private or commercial sources" does not prohibit the payment of temporary quarters subsistence allowance when permanent-type Government-owned quarters are occupied temporarily..... 1429

Security deposit forfeited

Employee who cancels 3-month lease for temporary quarters and forfeits security deposit for breach of lease, is not entitled to reimbursement on theory that forfeited security deposit constitutes allowable subsistence expense..... 779

Subsistence expenses
High cost of living area

Determination of reasonableness of expenditures of employee for subsistence while occupying temporary quarters may be made (by

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Temporary quarters—Continued
Subsistence expenses—Continued
High cost of living area—Continued Page

employing agency or GAO) by reference to statistics and other information gathered by Government agencies, such as U.S. Department of Labor, Bureau of Labor Statistics, regarding living costs in relevant area ---- 1107

Reasonableness of meal costs

Transferred employee spent $912.59 for food items in 30-day period, including $425.70 in 1 day. Because Federal Travel Regulations (FPMR 101–7) para. 2–5.4a limits reimbursement to reasonable costs of meals (including groceries consumed while in temporary quarters) and Department of Labor statistics indicate family, similar to that of employee, would spend between $329 and $413 per month, such expenses are considered unreasonable in absence of additional evidence that they were justified ---- 1107

Time limitation

Internal Revenue Service employee, transferred from Sao Paulo, Brazil, to Washington, D.C., incurred 48 days of temporary quarters expenses. Reimbursement for such expenses is limited to 30 days since extension for additional 30 days may be granted only for transfers to or from Alaska, Hawaii, the territories or possessions, Puerto Rico, or the Canal Zone. 5 U.S.C. 5742a(a)(3). Claim for expenses of additional 18 days spent in temporary quarters may not be allowed ---- 1107

What constitutes

Department of Defense employee's claim for reimbursement of temporary quarters subsistence expenses incurred incident to transfer to new official duty station in Canal Zone is allowable where claimant intended to move to family-type quarters when they became available but lived in permanent bachelor-type Government quarters during 46 days of the 60-day entitlement period ---- 1429

Title insurance

Employee who purchased "owners title policy" incident to purchase of residence at new duty station as distinguished from "mortgage title policy" is precluded by section 4.2d of OMB Cir. No. A–56, revised August 17, 1971, from being reimbursed for such cost ---- 779

Two-family dwellings. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Pro rata expense reimbursement, House purchase or sale, Two-family dwelling**)

Uniform allowances

Where transferred employee's travel authorization did not expressly provide for reimbursement of expenses in connection with purchase of residence at new duty station, orders may be amended to authorize payment of residence transaction expenses. Provision for payment of expenses in connection with purchase or sale of residence contained at 2–6.1, FPMR 101–7, contemplates uniform allowance of such expenses to transferred employees ---- 613

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Travel by foreign air carriers. (*See* **TRAVEL EXPENSES, Air travel, Foreign air carriers, Prohibition, Availability of American carriers**)
Travel expenses. (*See* **TRAVEL EXPENSES**)
Traveltime
Hours of departure
"Reasonable" and/or "practical" hour Page
Employee who traveled during working hours on Friday to report for temporary duty the following Tuesday, day after Monday holiday, may not be paid per diem for intervening 3-day weekend. While 5 U.S.C. 6101(b)(2) requires that to maximum extent practicable agencies schedule travel during regular duty hours, payment of 2 days or more additional per diem to facilitate such scheduling has been held unreasonable. Where 2 days per diem would be required and commencement of assignment cannot be otherwise scheduled, employee may be required to travel on own time 590
Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)
Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Civilian employees**)
Weekend return travel expenses. (*See* **TRAVEL EXPENSES, Return to official station on nonworkdays**)

OIL AND GAS
Leases
Rental
Disposition of receipts from oil and gas rights
Receipts from oil and gas leases on lands within the National Wildlife Refuge System, and administered by the Fish and Wildlife Service, whether lands were made part of the System by acquisition or by withdrawal from public domain, are required to be disposed of pursuant to 16 U.S.C. 715s rather than pursuant to the Mineral Leasing Act which generally prescribes disposition of receipts from leases of mineral rights in public lands, because, to the extent there is conflict between requirements of the statutes, the more recent one is controlling 117

ORDERS
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Retroactive
Rule
Employee of National Oceanic and Atmospheric Administration whose per diem was reduced by 55 percent as he purchased ground accommodations package in conjunction with airline ticket may be reimbursed full London per diem. Rule is that travel orders may not be retroactively changed to increase or decrease entitlements after travel has been performed 1241
Blanket or repeated
Travel
Effective date of increases
Mileage and per diem rates
Blanket travel order issued on July 1, 1974, authorized per diem rate of $25 per day and mileage rate of 12 cents for use of privately

ORDERS—Continued
Blanket or repeated—Continued
Travel—Continued
Effective date of increases—Continued
Mileage and per diem rates—Continued Page
owned automobile, as prescribed by Commerce Dept.'s regulations. On May 19, 1975, Temporary Reg. A–11 (GSA), implementing the Travel Expense Amendments Act of 1975, amended the Federal Travel Regs. (FTR) to increase the maximum per diem and mileage rates for official travel. Under blanket travel order, employee who traveled May 15 to 20, 1975, is entitled to higher per diem and mileage rates of amended FTR for travel on May 19 and 20 since such rates were mandatory. 49 Comp. Gen. 493 followed. 35 Comp. Gen. 148, distinguished..... 179

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PARKING FACILITIES
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Arbitration award implementation
Federal Aviation Administration (FAA), Department of Transportation, questions propriety of implementing three arbitration awards requiring FAA to provide parking accommodations for employees. FAA does not consider it would be justified in making a determination, as required for expenditure of funds by applicable regulations, that such leased parking accommodations are necessary to avoid impairment of its operational efficiency. Inasmuch as FAA regulations incorporated by reference in the collective bargaining agreement have already made the required determination, FAA is not required to make a further determination. Accordingly, FAA may expend appropriated funds to implement awards..... 1197
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Authority
General Services Administration does not assert, nor does it have, authority to force agencies to accept and pay for parking space in excess of their stated needs..... 897

PATENTS
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Allegation that private parties may have violated protester's patents or proprietary information raises questions dealing with dispute solely between private parties and is not for General Accounting Office consideration..... 1272
Agency may use data supplied with restrictive legend to evaluate drawings submitted by other offerors so long as such data is not released outside the Government. Moreover, where it appears that drawings were furnished to agency without restriction, General Accounting Office is precluded from concluding that Government does not have unrestricted rights in such drawings..... 1289

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Contention that manufacture of system being procured by Government will violate patents of protester will not be considered, since exclusive remedy of aggrieved party is action in Court of Claims against Government for damages ---- 1272
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PAY
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Service member charged with commission of a civil offense on foreign soil is entitled to pay and allowances for any pretrial custodial period at a U.S. military installation where decision to incarcerate or to merely restrict member to duty station and assign him to perform duties on full-time basis remains in installation commanders. 36 Comp. Gen. 173, modified ---- 186
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Service member charged with commission of a civil offense on foreign soil is not entitled to pay and allowances for period when actually absent from military installation for purposes of judicial proceedings by foreign civil authorities unless such absence is excused as unavoidable ---- 186
NATO status of forces agreement
Service member charged with commission of a civil offense on foreign soil is to be considered constructively absent from duty and not entitled to pay and allowances when member is actually incarcerated on basis of request for incarceration by foreign civilian authorities under provisions of a treaty or other international agreement. 36 Comp. Gen. 173, modified ---- 186
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Reservists
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Pay subject to deduction for civilian earnings
Enlisted member of the U.S. Naval Reserve who after being ordered to active duty filed petition for habeas corpus on grounds that he was not a member and was determined by Federal court order to have been lawfully enlisted and in military status is entitled to pay and allowances during litigation, regardless of whether he performs military duties. However, settlement of member's claim for such pay and allowances is subject to deduction of gross civilian earnings when he performed no meaningful or useful services for U.S. Govt. during the period ---- 507

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Flight pay. (*See* **PAY, Aviation duty**)
Aviation duty
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Involuntary removal Page
Proposed amendment to E.O. 11157 which would authorize incentive pay for up to 120 days to enlisted members involuntarily removed from flight status without notice is reasonably restricted to effecting the primary purpose of the statute (37 U.S.C. 301) authorizing such pay and, therefore, would be valid ---------- 121
Limited duration
Incentive pay entitlement
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Civilian employees. (*See* **COMPENSATION**)
Incentive
Hazardous duty
Flight pay. (*See* **PAY, Aviation duty**)
Judge Advocates General
Assistants
Officers serving in positions
Entitled to pay of rear admirals
Court of Claims in *Selman* v. *United States*, 204 Ct. Cl. 675, held that naval officers ordered to serve in positions of Assistant Judge Advocates General are entitled to at least the pay of rear admiral (lower half) while serving in such positions whether they were "detailed" or "assigned" to such positions. Our decision at 50 Comp. Gen. 22 which determined that such officers were not entitled to pay of rear admiral (lower half) will no longer be followed. Consequently, successors to plaintiffs in *Selman* in the statutorily created positions are also entitled to receive pay of rear admiral (lower half) ---------- 58
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Service member charged with commission of a civil offense on foreign soil is entitled to pay and allowances for any pretrial custodial period at a U.S. military installation where decision to incarcerate or to merely restrict member to duty station and assign him to perform duties on full-time basis remains in installation commanders. 36 Comp. Gen. 173, modified ---------- 186
Promotions
Special appointment
By President with advice and consent of Senate
Navy officer whose permanent grade was rear admiral (O–8) and who was serving as admiral (O–10) under 10 U.S.C. 5231, was transferred

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Promotions—Continued
Special appointment—Continued
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directly to temporary disability retired list (TDRL) pursuant to 10 U.S.C. 1202 and then died before Senate could confirm him on the permanent retired list as admiral (O–10) pursuant to 10 U.S.C. 5233. Regardless of grade to which he was entitled on retired list under 10 U.S.C. 1372, or other law, under Formula No. 2, 10 U.S.C. 1401, such member's retired pay while on the TDRL is to be computed on basic pay of admiral (O–10) and Survivor Benefit Plan annuity based thereon..... 667
Readjustment payment at discharge
Regular commissioned officers
Travel and transportation allowances entitlement
To selected home
A Regular Army commissioned officer discharged with readjustment pay in accordance with 10 U.S.C. 3814a may receive travel and transportation allowances provided in 37 U.S.C. 404(c), 406(d) and 406(g) for members involuntarily released from active duty with readjustment pay, since the congressional intent was to treat such officers in the same manner as Reserve officers involuntarily released from active duty with readjustment pay..... 166
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Retired
Additional
Extraordinary heroism. (*See* **PAY, Retired, Combat citations, Extraordinary heroism**)
Disability
Computation
Method
Most favorable formula
Enlisted member of Army who is eligible for voluntary retirement for over 20 years of service, and who would be entitled to 10 percent increase for act of extraordinary heroism in computation of retired pay, is entitled to such increase if he is retired for disability, since retired pay computation statute applicable to disability retirements authorizes computation of retired pay on basis of formula most favorable to member if he is otherwise entitled to compute retired pay under another provision of law..... 701
Disability not result of active duty
Where retired service member has sought correction of military records under 10 U.S.C. 1552 and Correction Board has denied relief sought, such action is final and conclusive on all officers of U.S. and not subject to review by GAO..... 961
Extraordinary heroism
Although 10 U.S.C. 3914, which authorizes voluntary retirement with more than 20 and less than 30 years' service, provides that members so retired will be members of Army Reserve and perform involun-

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Disability—Continued
Extraordinary heroism—Continued Page
tary active duty as prescribed by law, retirement and receipt of retired pay under that section are separate and distinct from the Reserve obligations and members retired for disability after having 20 years' service may receive retired pay computed under applicable formula even though not in Reserve ---- 701
Most favorable formula method of computation. (*See* **PAY, Retired, Disability, Computation, Method, Most favorable formula**)
Temporary retired list
Death prior to Senate confirmation to appointment on permanent retired list
Navy officer whose permanent grade was rear admiral (0–8) and who was serving as admiral (0–10) under 10 U.S.C. 5231, was transferred directly to temporary disability retired list (TDRL) pursuant to 10 U.S.C. 1202 and then died before Senate could confirm him on the permanent retired list as admiral (0–10) pursuant to 10 U.S.C. 5233. Regardless of grade to which he was entitled on retired list under 10 U.S.C. 1372, or other law, under Formula No. 2, 10 U.S.C. 1401, such member's retired pay while on the TDRL is to be computed on basic pay of admiral (0–10) and Survivor Benefit Plan annuity based thereon ---- 667
Survivor Benefit Plan
Annuity deductions
Where retired member waived his retired pay to receive VA compensation but informed CSC that purpose of such waiver was to have his Civil Service annuity computed on basis of his total Federal service, we must conclude that member waived his retired pay for purposes of increasing his Civil Service annuity (pursuant to subchapter III of chapter 83 of Title 5, U.S. Code) even though Navy was not so advised until after member's death. Accordingly, his widow is not eligible for Survivor Benefit Plan annuity; however, she is entitled to all such costs remitted by member ---- 684
Children
Status after death or remarriage of eligible spouse
When member provided Survivor Benefit Plan coverage for widow or widower and dependent children and widow or widower becomes ineligible for annuity, the dependent children are entitled to the full annuity as provided by the member even though the annuity of the widow or widower had been reduced by the amount of Dependency and Indemnity Compensation received ---- 1409
Cost-of-living adjustments
Designated base amounts
All base amounts designated under 10 U.S.C. 1447(2) upon which Survivor Benefit Plan annuities are based are subject to cost-of-living adjustments under 10 U.S.C. 1401a(b) ---- 1432
Less than maximum coverage
Base amounts designated under 10 U.S.C. 1447(2)(B) upon which Survivor Benefit Plan annuities are computed when member elects less than maximum coverage are not subject to adjustment under 10 U.S.C. 1401a(d) or (e) which apply modified cost-of-living adjustments to retired pay computation at time of retirement ---- 1432

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Cost-of-living adjustments—Continued
Over reduction of retired pay or under payment of annuities
Disposition
Page

Amounts due members or beneficiaries for over reduction of retired pay or under payment of annuities due to computation of Survivor Benefit Plan base amounts under 10 U.S.C. 1447(2) not in accordance with the rules stated in this decision should be paid to persons entitled thereto, and amounts due the United States are subject to collection or waiver under 10 U.S.C. 1453 or 2774, as applicable 1432

Dependency and indemnity compensation
Refund entitlement
Computation

Widow or widower of member who elected coverage under Survivor Benefit Plan is entitled to refund of deductions made from retired pay if the annuity is reduced based upon receipt of Dependency and Indemnity Compensation. Such refund, however, should be computed on the basis of reductions in retired pay caused by coverage of spouse and no refund may be made based upon the reductions in retired pay caused by member's election of coverage for dependent children 1409

Erroneous payments
Waived

Overpayments resulting from erroneous annuity payments under Survivor Benefit Plan (SBP) made to member's widow may not be considered for waiver under 10 U.S.C. 2774, which relates to pay and allowances but are for consideration under 10 U.S.C. 1453, which is applicable specifically to SBP payments 1238

Reinstatement
After waiver withdrawal

During period that an SBP participant has in effect a waiver of military retired pay for purposes of receiving a civil service annuity based on combining military service with civil service, under provisions of 10 U.S.C. 1450(d) and 1452(e) such SBP participation is suspended, but if waiver is no longer effective for any reason, previously elected SBP participation would be resumed and military retired pay reduced thereafter 1178

Retirement eligibility requirement

Air Force officer who had over 20 years' service when he died while on active duty was not eligible for retirement under 10 U.S.C. 8911 because less than 10 years of such service was as commissioned officer. Neither was he eligible for retirement under 10 U.S.C. 8914 which applies to enlisted members since at date of death he was officer. Therefore, widow is not entitled to SBP annuity under 10 U.S.C. 1448(d) since such annuity is contingent upon member having been qualified for retired pay 854

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Revocation, etc.
Administrative error
Secretarial prerogative Page

Members who retired before SBP effective date and elected to participate in the Plan under subsec. 3(b) of Pub. L. 92-425 may not unilaterally revoke such elections during the 18-month period provided for such election or at any time thereafter. Revocation or correction of an SBP election based on "administrative error" is a secretarial prerogative under 10 U.S.C. 1454. 53 Comp. Gen. 393, modified 158

Election based on misinformation

Revocation or correction of an SBP election based upon "administrative error" is a secretarial prerogative under 10 U.S.C. 1454 and may be exercised to revoke or modify SBP coverage based upon a finding that the member received erroneous or insufficient information and that such information caused him to make an election he would not otherwise have made 158

Spouse
Base

Navy officer whose permanent grade was rear admiral (0-8) and who was serving as admiral (O-10) under 10 U.S.C. 5231, was transferred directly to temporary disability retired list (TDRL) pursuant to 10 U.S.C. 1202 and then died before Senate could confirm him on the permanent retired list as admiral (O-10) pursuant to 10 U.S.C. 5233. Regardless of grade to which he was entitled on retired list under 10 U.S.C. 1372, or other law, under Formula No. 2, 10 U.S.C. 1401, such member's retired pay while on the TDRL is to be computed on basic pay of admiral (O-10) and Survivor Benefit Plan annuity based thereon 667

Erroneous payments waived

Criteria for waiver of erroneous payments under the SBP pursuant to 10 U.S.C. 1453 should be similar to the criteria for waiver under 5 U.S.C. 5584; 10 U.S.C. 2774 and 32 U.S.C. 716, and therefore although waiver may not be granted unless collection would be contrary to the purpose of the plan and against equity and good conscience proof of financial hardship will not be required if waiver is otherwise in order. 54 Comp. Gen. 249 and 35 *id.* 401, overruled 1238

Termination or reduction
Refunds

Widow or widower of member who elected coverage under Survivor Benefit Plan is entitled to refund of deductions made from retired pay if the annuity is reduced based upon receipt of Dependency and Indemnity Compensation. Such refund, however, should be computed on the basis of reductions in retired pay caused by coverage of spouse and no refund may be made based upon the reductions in retired pay caused by member's election of coverage for dependent children 1409

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Survivor Benefit Plan *v.* Civil Service Retirement Survivorship Plan Page

Where retired member waived his retired pay to receive VA compensation but informed CSC that purpose of such waiver was to have his Civil Service annuity computed on basis of his total Federal service, we must conclude that member waived his retired pay for purposes of increasing his Civil Service annuity (pursuant to subchapter III of chapter 83 of Title 5, U.S. Code) even though Navy was not so advised until after member's death. Accordingly, his widow is not eligible for Survivor Benefit Plan annuity; however, she is entitled to all such costs remitted by member 684

Election

A military retiree, who elects to participate in Survivor Benefit Plan (SBP), 10 U.S.C. 1447–1455, and who later elects to combine his military service credits with his civil service credits for the purpose of receiving a civil service annuity, may elect to participate in the civil service survivor benefits program at a level lower than that which he has in the SBP 1178

Termination or reduction
Children's benefits

When member provided Survivor Benefit Plan coverage for widow or widower and dependent children and widow or widower becomes ineligible for annuity, the dependent children are entitled to the full annuity as provided by the member even though the annuity of the widow or widower had been reduced by the amount of Dependency and Indemnity Compensation received 1409

Waiver for civilian retirement benefits
Revocation
Survivor Benefit Plan participation resumed

During period that an SBP participant has in effect a waiver of military retired pay for purposes of receiving a civil service annuity based on combining military service with civil service, under provisions of 10 U.S.C. 1450(d) and 1452(e) such SBP participation is suspended, but if waiver is no longer effective for any reason, previously elected SBP participation would be resumed and military retired pay reduced thereafter 1178

Waiver for veterans benefits
Reduction in retired pay effect
Employment of retiree

A retired Regular commissioned officer who accepts Federal civilian employment, and who immediately executes a waiver of retired pay pursuant to 38 U.S.C. 3105 in order to receive veterans' disability compensation, which award is administratively delayed but when granted by VA is made effective retroactively to date of waiver, has in effect reduced the legally authorized retired pay by the amount of the veterans' compensation; therefore, retired pay payments received by the member during the retroactive period must be adjusted under the dual compensation formula of 5 U.S.C. 5532 from the effective date of the waiver ... 1402

PAY—Continued
Service credits
Absence due to misconduct, etc.
Enlisted members' absences
Confinement under court-martial sentence Page

Enlisted member's period of authorized excess leave pending appellate review of his court-martial including a bad conduct discharge is creditable service for computing period served on term of enlistment and, even though court-martial sentence was approved and discharge effected thereafter, period of such leave is not to be included in unexpired part of member's enlistment upon which computation of recoupment of reenlistment bonuses is based 1244

Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)

PAYMENTS
Absence or unenforceability of contract
Quantum meruit
Approval of service, etc., if requested

Expenses of renting boat and equipment from Govt. employee for purpose of performing acoustical measurements are not reimbursable as travel expenses. Equipment should have been obtained by procurement means with due regard to section 1–1.302–3 of Fed. Procurement Regs. and public policy prohibiting Govt. from contracting with its employees except for most cogent of reasons as where Govt.'s needs cannot otherwise reasonably be met. Payment may, however, be made on *quantum meruit* basis insofar as receipt of goods and services has been ratified by authorized official 681

Volunteer services
Unsolicited proposals

Decision by U.S. Govt., acting in its sovereign capacity, to rehabilitate Suez Canal is not a taking of a valuable contractual right requiring compensation, as claimant had only anticipated contract for services, loss of which is not responsibility of U.S. Govt. Moreover, submission of unsolicited proposal makes claimant a pure volunteer, affording no basis upon which payment may be authorized 164

Receipts
Acceptability

Rental car agreement stating cost had been charged to personal credit card does evidence that employee incurred rental cost as a personal obligation and will be regarded as satisfying receipt requirements of FTR para. 1–11.3c(5) for purpose of reimbursing employee for cost of rental car. Credit card number need not be shown on invoice. From nature of transaction it must appear that Govt. could not be held liable for the expense in event of nonpayment of the obligation by employee 224

PAYROLLS
Signatures
Married women

A woman, notwithstanding her marriage, has the right to use her maiden name on Govt. checks and payrolls provided that she uses the

PAYROLLS—Continued
Signatures—Continued
Married women—Continued Page
same name consistently on all Govt. records. This is, however, subject to any general regulation that might be issued by the CSC. In addition, a female employee may be carried on the payroll as Ms., regardless of her marital status, if she so desires. 19 Comp. Gen. 203, modified 177

PERSONAL SERVICES
Detective employment prohibition
Violation
Company whose corporate charter specifically authorizes investigative as well as protective functions, and which is licensed as detective agency under Massachusetts statute prescribing separate licenses for detective and protective agencies, is a detective agency for purposes of 5 U.S.C. 3108 and may not be employed by Federal agency, even though employment is solely to perform guard services. Modified by 56 Comp. Gen. —— (B–180257, Jan. 6, 1977) 1472
Private contract *v.* Government personnel
Collective bargaining agreement
Violation
Grievance charged violation of provision in collective bargaining agreement that consultants would not be hired to perform work that could be performed by agency employees. Agency stipulated that it had violated agreement but refused union's demand that consultant repay salary to U.S. Treasury. Prior to arbitration hearing, the consultant resigned. Arbitrator's award of punitive damages to be paid by agency to union may not be implemented since there is no authority to award punitive damages against U.S. or one of its agencies 564

POWERS OF ATTORNEY
Revocation
Death
Incident to evacuation of U.S. personnel and local national employees from Vietnam, employees turning in Vietnamese piasters were given receipts on the bases of which Treasury checks were subsequently issued. Checks for payees still in Vietnam were placed in special deposit account pursuant to 31 U.S.C. 123–128 for benefit of payees and may not be paid out to relatives in U.S. who claim power of attorney to receive proceeds 1234

PRESIDENT
Authority
Military personnel utilization
Section 3 of War Powers Resolution requires the President to consult with Congress before and during introduction of U.S. Armed Forces into hostilities or situations clearly indicating imminent hostilities. Legislative history of section 3 is clear that requirement is not satisfied by token statement of actions intended to be taken. While evidence in hearings subsequent to *Mayaguez* rescue suggests President merely informed Congress of decisions already made, requirements of section 3 are not sufficiently definitive to establish violation in present circumstances 1081

PRESIDENT—Continued
Authority—Continued
Protection of American lives and property abroad Page
President possesses some unilateral constitutional power to protect lives and property of Americans abroad, even in absence of specific congressional authorization. Courts have sustained or alluded to such authority and its exercise has considerable historical support. Language of War Powers Resolution as whole indicates it was not meant to directly restrict President's power, its basic purpose being to involve Congress in decision-making process of future wars. Thus War Powers Resolution in effect neither initially precludes nor sanctions military initiatives by the President for these purposes---------- 1081
Rescue of foreign nationals
Seven funding limitation statutes prohibit use of appropriated funds for combat activity in Indochina. While legislative history of seven acts is not entirely clear respecting President's rescue power, there are some specific statements that such power is not restricted, and the overall intent of seven acts was to curtail bombing and offensive military action in Southeast Asia. Therefore, President's recent evacuation of Americans from Saigon did not conflict with such statutes---------- 1081
War Powers Resolution effect
Section 4 of War Powers Resolution requires President to report to Congress the basis for, facts surrounding, and estimated duration of introduction of U.S. Armed Forces in three types of situations. However, since Resolution does not expressly require President to specify which situation prompted the report and such specification is immaterial anyway since final decision of initiation of section 5 actions is up to Congress, it appears that the President met section 4 requirements----- 1081

PROCUREMENT
Defense programs
Full funding
"Full funding" of military procurement programs is not statutory requirement, and deviation from full funding does not necessarily or automatically indicate violation of 31 U.S.C. 665 or 41 U.S.C. 11- 812
Ground rules
Departure
Although technical "transfusion" of one offeror's unique or innovative idea to other offerors is prohibited, offeror's request for direct reimbursement by Govt. of its interest expense is not such a unique or innovative idea, but is suggestion for departure from procurement "ground rules" which, if accepted by agency, must be communicated to all competing offerors---------- 802

PROPERTY
Private
Acquisition
Relocation expenses to "displaced persons"
Effective date of entitlement
Tenant who vacated premises subsequent to written purchase offer by Architect of the Capitol qualifies as "displaced person" and is entitled

PROPERTY—Continued
Private—Continued
Acquisition—Continued
Relocation expenses to "displaced persons"—Continued
Effective date of entitlement—Continued Page
to benefits applicable to displaced tenants under Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, since Govt. made firm offer to purchase property from owner, tenant moved after this offer, and Govt. actually acquired property---------- 595
Damage, loss, etc.
Government liability
Rented equipment destroyed by fire
Bailee, in case of bailment of mutual benefit, is held to standard of due care and ordinary prudence. While presumption of negligence ordinarily arises from destruction of bailed property, rule does not apply where property is destroyed by fire---------- 356
Federal funds for repairs, etc.
Justification
Appropriation of INS may be used to repair International Boundary fences on private property if expenditures and improvements are necessary for effective accomplishment of purposes of Service's appropriation, are in reasonable amounts, are made for principal benefit of U.S. and interests of Govt. are fully protected---------- 872
Repairs and improvements
International Boundary fences
INS's "necessary expenses" appropriation is available to repair boundary fences under jurisdiction of other Federal agencies provided INS determines expenditure is necessary to enforcement of immigration laws and other agencies do not intend to make repairs as promptly as necessary to deter unlawful immigration. Rule that where appropriation is made for particular object, it confers authority to incur expenses which are necessary, proper, or incident thereto, unless there is another appropriation that makes more specific provision therefor, is inapplicable since there is no specific appropriation for repair of boundary fences---------- 872
Public
Damage, loss, etc.
Carrier's liability
Air carriers. (*See* **AIRCRAFT, Carriers, Property damage, loss, etc., Liability of carrier**)
Burden of proof
Disallowanee of carrier's amended claim for refund of amount administratively deducted from its account due to damage to floodlight units is sustained where carrier is liable for damage without proof of negligence unless damage is affirmatively shown to be result of one of exceptions to its liability as a common carrier, *Federated Department Stores* v. *Brinke*, 450 F.2d 1223 (5th Cir., 1971), and cases cited. Evidence on carrier's freight bill indicates extent of damage and allegations of faulty packaging without evidence that packaging was sole cause of damage will not rebut presumption of negligence by carrier---------- 611

PROPERTY—Continued
Public—Continued
Damage, loss, etc—Continued
Carrier's liability—Continued
Burden of proof—Continued Page

Mobile home delivered to carrier in good condition, delivered to consignee in damaged condition, and ascertainment of amount of damage establishes prima facie case. *Missouri Pacific R.R* v. *Elmore & Stahl*, 377 U.S. 134, 138 ---- 1209

Carrier has burden of proof to show that inherent defect was sole cause of damage ---- 1209

Carmack Amendment to ICC Act

Mobile home carriers are subject to Carmack Amendment, 49 U.S.C. 20(11) ---- 1209

Common law rule

At common law common carrier could not escape liability by showing absence of negligence ---- 1209

Durables. (*See* **PROPERTY, Public, Damage, loss, etc., Durables**)

Perishables. (*See* **PROPERTY, Public, Damage, loss, etc., Perishables**)

Prima facie **case.** (*See* **PROPERTY, Public, Damage, loss, etc., Carrier's liability, Burden of proof**)

Tariff exclusion

Carrier's tariff item excluding it from liability is ambiguous, and appears to be rule exempting carrier from own negligence, and therefore is in violation of 49 U.S.C. 20(11) ---- 1209

Durables

Cases involving perishable goods apply to durable goods ---- 1209

Excess

Utilization

Acquisition by agencies of aircraft and passenger motor vehicles by purchase or transfer is prohibited by 31 U.S.C. 638a, unless specifically authorized by appropriation act or other law, and this prohibition applies to acquisition by transfer by Law Enforcement Assistance Admin. of aircraft or passenger motor vehicles for use by grantees in their regular law enforcement functions because agency obtains custody and accountability and exception would reduce congressional control over aircraft and vehicles. See 44 Comp. Gen. 117 ---- 348

Exchange or sale for similar items

Silver for gold

General Services Administration acted reasonably under section 201(c) of Federal Property and Administrative Services Act of 1949, as amended, and its implementing Federal Property Management Regulations, in disapproving proposed exchange of certain quantities of silver for an equivalent dollar amount of gold. Since it appears that gold to be acquired would not serve the same specific purpose as the replaced silver, as required by regulations, proposed exchange is not of "similar" items as required by section 201(c). 41 Comp. Gen. 227 distinguished ---- 1268

PROPERTY—Continued
Public—Continued
License
Use of sewage system Page
Perryville, Maryland, recreational park may be permitted to discharge sewage into VA sewage system if VA determines administratively that arrangement is in interest of Govt. and agreement constitutes only revocable license for limited use 688
Space assignment
Charge assessment
Where Executive agency other than GSA provides parking space or related services to employees, or to others, agency is authorized by 40 U.S.C. 490(k) to charge occupants therefor if, but only if, rates are approved by Administrator of General Services and Office of Management and Budget 897
Surplus
Disposition
Water
VA hospital which has water filtration plant currently running at half its rated capacity may sell water to town of Perryville, Maryland recreational park, if VA administratively determines plant in ordinary course of business produces excess water and sale is in Govt.'s interest .. 688
What constitutes
Direct assignment by Govt. of purchase option under ADPE lease to third party lessee for purpose of accomplishing leaseback of equipment to Govt. under more favorable terms constitutes procurement transaction rather than disposal of property and therefore laws governing disposal of Govt. property are not for application 1012

PROTESTS
Contracts. (*See* **CONTRACTS, Protests**)

QUARTERS
Occupancy of nonappropriated fund lodging facilities
Reservists
Training duty periods
Member of Reserve component ordered to annual active duty for training stayed at Navy Lodge, a nonappropriated fund temporary lodging facility, at $9 daily charge. In view of 37 U.S.C. 404(a)(4), 1 JTR para. M6000-1, which provides that members of Reserve components ordered to annual active duty for training are not entitled to per diem if Govt. quarters and mess are available, does not preclude per diem where members of Reserves incur lodging expenses at nonappropriated fund activities which were defined as Govt. quarters for purposes of 1 JTR without consideration that such expenses would be incurred 130

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Dependents
Certificates of dependency
Filing requirements
Annual recertification Page

In view of reasonable assurance that changes in dependency status for payment of basic allowance for quarters do not go undetected under Joint Uniform Military Pay System, annual recertification of dependency certificates prescribed in 51 Comp. Gen. 231, as they relate to Marine Corps, Navy and Air Force members, no longer will be required, provided that adequate levels of internal audit are maintained 287

Junior Reserve Officer Training Corps instructors
Recalled to active duty
Overseas areas

Where retired members are employed as administrators or instructors in the JROTC program under 10 U.S.C. 203(d) at DOD-operated schools on U.S. military bases in foreign countries and occupy Govt. owned or controlled quarters which are determined by such installation commander to be adequate for the member and dependents for his grade or rating if called to active duty at that location, such retired member may not be credited with BAQ in the computation of the "additional amount" payable to him under 10 U.S.C. 2031(d)(1) 44

Civilian overseas employees
Temporary quarters. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters**)
Junior Reserve Officer Training Corps instructors
Civilian overseas employees. (*See* **QUARTERS ALLOWANCE, Civilian overseas employees, Junior Reserve Training Corps instructors**)

RECLAMATION SERVICE
Employees
Wage board employees
Retroactive increases

Wage survey at Interior installation, commenced in time to be effective Feb. 4, 1973, was not effected until May 7, 1973, because wage board rates were set by labor-management negotiated agreement and there was question of union representation. Wage adjustment may not be effective retroactively since the provisions in 5 U.S.C. 5344 regarding the effective date of wage board pay adjustments are not applicable to labor-management agreements and no tentative agreement as to the effective date of the wage adjustment was made prior to May 7, 1973 .. 162

REGULATIONS
Authority
To issue regulations
Reasonable exercise of discretion

LEAA "blanket" guideline for grantee procurements precluding contractors who develop or draft specifications for procurements from competing is reasonable exercise of LEAA discretion to implement grant procurement policy, since it was promulgated in response to congressional concern and in implementation of FMC 74-7-0 to insure bias free specifications and to prevent unfair competitive advantage by specifications' preparer 911

REGULATIONS—Continued

Compliance

Mandatory *v.* permissive Page

Blanket travel order issued on July 1, 1974, authorized per diem rate of $25 per day and mileage rate of 12 cents for use of privately owned automobile, as prescribed by Commerce Dept.'s regulations. On May 19, 1975, Temporary Reg. A–11 (GSA), implementing the Travel Expense Amendments Act of 1975, amended the Federal Travel Regs. (FTR) to increase the maximum per diem and mileage rates for official travel. Under blanket travel order, employee who traveled May 15 to 20, 1975, is entitled to higher per diem and mileage rates of amended FTR for travel on May 19 and 20 since such rates were mandatory. 49 Comp. Gen. 493 followed. 35 Comp. Gen. 148, distinguished 179

Conflict of interest guidelines

Clear meaning

LEAA organizational conflict of interest guideline for grantee procurements, which reads: "Contractors that develop or draft specifications, requirements, statements of work and/or RFP's for a proposed procurement shall be excluded from bidding or submitting a proposal to compete for the award of such procurement" is not unenforceably vague, since terms used in guideline have clear meaning in this context.. 911

Constructive notice

Since LEAA Manual, which was promulgated pursuant to Omnibus Crime Control and Safe Streets Act, was not published in Federal Register, only parties with actual or constructive notice are bound by its contents and constructive knowledge exists where Manual is incorporated by reference into grant or contract 911

Federal Register publication. (*See* **FEDERAL REGISTER, Effect of publication**)

Incorporated by reference in negotiated agreement

Agency interpretation *v.* plain language of regulations

When agency regulations are incorporated by reference in negotiated agreement, arbitrator should accord great deference to agency interpretation of regulations it has promulgated. However, where regulations are plain on their face, no interpretation is required and arbitrator was correct in rejecting agency interpretation at variance with plain language of regulations 427

Notice

Federal Register, (*See* **FEDERAL REGISTER**)

Overtime policies

Collective bargaining agreement

Federal Labor Relations Council questions the propriety of sustaining an arbitration award that orders backpay for employees deprived of overtime work in violation of a negotiated agreement. Agency violations of negotiated agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act, 5 U.S.C. 5596. Improper agency action may be either affirmative action or failure to act where agreement requires action. Thus, award of backpay to employees deprived of overtime work in violation of agreement is proper and may be paid 171

REGULATIONS—Continued
Overtime policies—Continued
Collective bargaining agreement—Continued Page

Fed. Labor Relations Council questions propriety of sustaining arbitration award of 1 hour backpay to employee deprived of overtime work in violation of negotiated labor-management agreement. Agency violations of such agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by Back Pay Act, 5 U.S.C. 5596. Therefore, where agency obligated itself in a labor-management agreement to provide 2 hours of productive work when employee is held on duty beyond his regular shift and, in violation of such agreement, provided him only 1 hour, arbitration award providing backpay to employee for the additional hour may be sustained 405

Promotion procedures
After details

Two Bureau of Mines employees were detailed to higher grade positions in excess of 120 days and no prior approval of extension beyond 120 days was sought from CSC. Employees are entitled to retroactive temporary promotions for period beyond 120 days until details were terminated because Board of Appeals and Review, CSC, has interpreted regulations to require temporary promotions in such circumstances. Amplified by 55 Comp. Gen. 785 539

Air Force detailed GS–4 employee to GS–5 position for over 1 year beginning July 1, 1970, without obtaining CSC's prior approval of extension beyond 120 days. Agency's discretionary authority to retain employee on detail continues no longer than 120 days, after which agency must either have obtained Commission approval or grant employee temporary promotion. Since agency failed to obtain approval, employee is entitled to retroactive temporary promotion from 121st day of detail to its termination 785

Collective bargaining agreement

Collective-bargaining agreement provides that certain Internal Revenue Service career-ladder employees will be promoted effective the first pay period after 1 year in grade, but promotions of seven employees covered by agreement were erroneously delayed for periods up to several weeks. Since provision relating to effective dates of promotions becomes nondiscretionary agency requirement, if properly includable in bargaining agreement, General Accounting Office will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotions in accordance with the agreement 42

Federal Labor Relations Council questions propriety of implementing arbitration award that sustains grievance of two Community Services Admin. employees for retroactive promotions and backpay. Because record contains substantial evidence that grievants would probably have been demoted shortly after they should have been promoted—evidence which arbitrator apparently did not consider—award is indefinite. Matter should be remanded to arbitrator for additional proceedings with instructions that he hear evidence on whether demotions would have occurred and, if so, on what date 427

REGULATIONS—Continued
Promotion procedures—Continued
Discretionary
Agency's *v.* employee's choice Page
Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made ---------- 836
Promulgation
Implementation of grant procurement policy
LEAA "blanket" guideline for grantee procurements precluding contractors who develop or draft specifications for procurements from competing is reasonable exercise of LEAA discretion to implement grant procurement policy, since it was promulgated in response to congressional concern and in implementation of FMC 74-7-0 to insure bias free specifications and to prevent unfair competitive advantage by specifications' preparer ---------- 911
Recipient chargeable with knowledge
Since LEAA Manual, which was promulgated pursuant to Omnibus Crime Control and Safe Streets Act, was not published in Federal Register, only parties with actual or constructive notice are bound by its contents and constructive knowledge exists where Manual is incorporated by reference into grant or contract ---------- 911
Recommendation by General Accounting Office
Insurance premium charges
Housing and Urban Development Department
Claims under mobile home loan insurance pursuant to 12 U.S.C.A. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default on loan occurred while premium payments were current, but cannot be allowed if default occurred or was imminent after premium payments became delinquent. Past due premium charges may be set off against allowable claims, if lender agrees to such setoff. Alternatively, remaining insurance coverage may be canceled. In no event is set-off of future premium charges appropriate. GAO recommends, pursuant to 31 U.S.C.A. 1176, that HUD regulations be amended in terms of foregoing issues and conclusions. Modified by 56 Comp. Gen. —— (B-183784, Jan. 24, 1977) ---------- 658
Travel
Federal
Insurance on rented vehicles
We have no legal objection to deletion of restriction in FTR (FPMR 101-7) para. 1-3.2c against reimbursement of Government employees for purchase of additional insurance available on vehicles rented for use in foreign countries if GSA determines this is in best interests of Government. FTR are statutory regulations, and question of whether or not reimbursement for costs of additional insurance on rental vehicles should be permitted, is within discretion of agency authorized to promulgate the particular regulations involved ---------- 1343

REGULATIONS—Continued
Travel—Continued
Federal—Continued
Insurance on rented vehicles—Continued Page

Government employee may be partialy reimbursed for costs of insurance purchased on vehicle commercially leased on long-term basis to extent necessary for hire and operation of motor vehicles on German roads. Excess coverage not required by statute and regulation or by industrial custom to enable commercial hire of vehicle and operation of vehicle on German roads is considered personal to employee and may not be certified for payment 1397

Mileage rates for overseas automobiles

We have no legal objections, if GSA determines it is in best interests of Government, to amendment of FTR to provide higher mileage allowance rates for operation of privately owned vehicles by Government employees in foreign countries than for operation of such vehicles in United States, within overall statutory limit. FTR are statutory regulations, and such amendments are for determination by agency authorized to promulgate the travel regulations 1343

Joint
Effective date of increases
Mileage and per diem rates

Blanket travel order issued on July 1, 1974, authorized per diem rate of $25 per day and mileage rate of 12 cents for use of privately owned automobile, as prescribed by Commerce Dept.'s regulations. On May 19, 1975, Temporary Reg. A–11 (GSA), implementing the Travel Expense Amendments Act of 1975, amended the Federal Travel Regs. (FTR) to increase the maximum per diem and mileage rates for official travel. Under blanket travel order, employee who traveled May 15 to 20, 1975, is entitled to higher per diem and mileage rates of amended FTR for travel on May 19 and 20 since such rates were mandatory. 49 Comp. Gen. 493 followed. 35 Comp. Gen. 148, distinguished 179

Military personnel
Transportation of household effects, etc.
Dishonorable discharge

Regulations may be promulgated under 37 U.S.C. 406(h) to authorize transportation of household effects and a private automobile of a member of the uniformed services serving overseas, without dependents, incident to the member's discharge under conditions other than honorable, similar to the transportation authorized members with dependents discharged in such circumstances. 44 Comp Gen. 574 will no longer be followed; 45 Comp Gen. 442 and 49 *id.* 695, overruled in part 1183

Subsistence
Per diem
"Lodgings-plus"

Employee may not be paid per diem under lodgings-plus system based on payment of $14 per night for lodging at home of son's neighbor absent information showing that $14 amount reflects additional expenses incurred by host as result of employee's stay. However, agency may issue regulations providing that, when it is known in advance that employees will lodge with friends or relatives, it may determine that lodgings-plus system is inappropriate and establish specific per diem rates under FTR para. 1–7.3c 856

REGULATIONS—Continued
Waivers
Abuse of discretion requirement Page
Contractor, precluded by LEAA organizational conflict of interest guideline from competing on LEAA grantee's procurement for which it drafted and developed specifications, has not shown that LEAA refusal to grant waiver of guideline, promulgated under LEAA rule-making authority and binding on grantees, was for reasons so insubstantial as to constitute abuse of discretion 911
Financial hardship
Criteria for waiver of erroneous payments under the SBP pursuant to 10 U.S.C. 1453 should be similar to the criteria for waiver under 5 U.S.C. 5584; 10 U.S.C. 2774 and 32 U.S.C. 716, and therefore although waiver may not be granted unless collection would be contrary to the purpose of the plan and against equity and good conscience proof of financial hardship will not be required if waiver is otherwise in order. 54 Comp. Gen. 249 and 35 *id.* 401, overruled 1238

RENT (*See* **LEASES, Rent**)

REPORTS
Administrative
Contract protest
Reports substantiate administrative determination
Allegations of Army officials' persistent unfairness towards protester from time of initial proposal submission through conduct of negotiations, ultimate rejection of basic and alternate proposals, and participation in protest proceedings before GAO cannot be substantiated, since written record fails to demonstrate alleged unfairness, and in fact suggests reasonable explanations for Army's actions. Also, fact that agency officials declined for most part to join in oral discussion of issues at GAO bid protest conference is not objectionable, since agency responded to protester's allegations in several written reports, and conference is not intended to be formal hearing 374
Contract reviews
Multiple layers of Federal, State and local Govt. involved in typical grant review situation will not impose enormous burden on Federal grantor in producing report responsive to request for review of contract under Federal grant 390

RETIREMENT
Civilian
Service credits
Military service
Waiver of retired pay
Where retired member waived his retired pay to receive VA compensation but informed CSC that purpose of such waiver was to have his Civil Service annuity computed on basis of his total Federal service, we must conclude that member waived his retired pay for purposes of increasing his Civil Service annuity (pursuant to subchapter III of chapter 83 of Title 5, U.S. Code) even though Navy was not so advised until after member's death. Accordingly, his widow is not eligible for Survivor Benefit Plan annuity; however, she is entitled to all such costs remitted by member 684

RETIREMENT—Continued
Military personnel
Retired pay. (*See* **PAY, Retired**)

SALES
Surplus. (*See* **PROPERTY, Public, Surplus**)

SCHOOLS, COLLEGES, ETC. (*See* **COLLEGES, SCHOOLS, ETC.**)

SECURITIES AND EXCHANGE COMMISSION
Fees
Investment adviser
Refunds Page

Annual charge assessed pursuant to User Charge Statute, 31 U.S.C. 483a, by SEC upon investment advisers and deposited in Treasury as miscellaneous receipts, which charge is now considered erroneous by SEC because of recent Supreme Court decisions, may be refunded by SEC out of permanent indefinite appropriation established by 31 U.S.C. 725q-1 to pay moneys "erroneously received and covered." This refund is authorized to all who paid such invalid fee regardless of whether payment was made under protest 243

SET-OFF
Authority
Common law right

Where it was determined that contractor had underpaid three employees in violation of Davis-Bacon Act, 40 U.S.C. 276a, and funds were administratively withheld from balance due on contract to cover underpayments, claims of underpaid workers have priority over later IRS levy. 46 Comp. Gen. 178, which held that IRS levy had priority over claims of underpaid employees, is modified to extent that it is inconsistent 744

Contract payments
Assignments
Claim matured prior to assignment

Govt. contractor's assignment to bank of contract proceeds executed after contractor's operations ceased is invalid under 31 U.S.C. 203 since purpose of statute removing bar to assignments is to induce financial institutions to lend money to finance contractor's operations 155

Debt collections
Military personnel
Waiver

Where member requests waiver of claim under 10 U.S.C. 2774, which is less than total erroneous payment, and he does not know that an accounting setoff for underpayment which was otherwise due him has been made or of his right to request waiver for that amount, or that erroneous payment was actually determined to be for greater amount, we would act on entire erroneous payment in view of beneficial nature of law. However, where member knows of proper total erroneous payment, accounting setoff for underpayment and his right to request waiver in such amount, but requested waiver of amount less than total, we would act only on amount of waiver request 113

SET-OFF—Continued
Federal aid funds
Tax debts
Page
Set-off of grant payments suspended or withheld against tax delinquency of grantee is not appropriate since grant payments are not reimbursements for expenses already incurred by grantee and therefore do not constitute debts of the United States 1329
Past due *v.* future premiums
Mobile home insurance claims
Timely payment by insured lender of premiums for mobile home loan insurance under sec. 2, title I, of National Housing Act, as amended, 12 U.S.C.A. 1703—which requires payment of premiums "in advance"—is prerequisite to continued insurance coverage. There is no basis for implication, underlying HUD proposal to set off against insurance claims past due and future premiums of delinquent lending institution, that insurance coverage is unaffected by nonpayment of premiums. Modified by 56 Comp. Gen. — (B–183784, Jan. 24, 1977) 658
Claims under mobile home loan insurance pursuant to 12 U.S.C.A. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default on loan occurred while premium payments were current, but cannot be allowed if default occurred or was imminent after premium payments became delinquent. Past due premium charges may be set off against allowable claims, if lender agrees to such setoff. Alternatively, remaining insurance coverage may be canceled. In no event is set-off of future premium charges appropriate. GAO recommends, pursuant to 31 U.S.C.A. 1176, that HUD regulations be amended in terms of foregoing issues and conclusions. Modified by 56 Comp. Gen. — (B–183784, Jan. 24, 1977) 658
Transportation
Property damage, etc.
Reclaim of set-off
Air carrier is liable for damages sustained to shipment of Govt. property notwithstanding contention of improper packing, since applicable tariff filed with CAB provides that acceptance of shipment constitutes prima facie evidence of proper packing and puts burden of proof on carrier to show absence of negligence. Issue of liability is determinable under provisions of tariff; common law rules and presumptions apply only when not in conflict with tariff 149

SMALL BUSINESS ADMINISTRATION
Authority
Small business concerns
Allocation of 8(a) subcontracts
Review does not suggest that SBA has arbitrarily decided that proposed 8(a) concern is still in need of further assistance through proposed 8(a) award 397
Certifications
Effective date
Where firm purchases assets of concern previously found by SBA to be large business, suggestion is made that SBA consider adopting rule requiring such firm to request small business certificate prior to self-certifying status as small 469

SMALL BUSINESS ADMINISTRATION—Continued
Authority—Continued
Small business concerns—Continued
Size standards Page

Any situation which could reasonably be construed as being one in which procuring agency advocates use of size standard differing from that then applicable under SBA regulation would amount to encroachment whether intentional or unintentional on SBA's exclusive jurisdiction. Thus, where, as here, applicable SBA regulations were changed 7 days prior to bid opening and IFB can reasonably be construed as setting forth size standard differing from SBA's, encroachment has occurred and impact of encroachment on competition must be analyzed-- 617

Contracts
Awards to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

STATE DEPARTMENT
Employees
Grievance proceedings
Legal fees reimbursement

Two State Department employees were named as defendants in grievance brought under Section 1820 of Volume 3, Foreign Affairs Manual, by employee they supervised. State Department refused to provide legal counsel to supervisors at grievance hearing due to personal nature of grievant's allegations and since purpose of hearing was fact finding for ultimate decision by Director of Personnel. Absent express statutory authority, the two supervisors may not be reimbursed fees of private counsel retained to represent them at the hearing---------- 1418

Foreign Service. (*See* **FOREIGN SERVICE**)

STATES
Federal aid, grants, etc.
Contract status

GAO will undertake reviews concerning propriety of contract awards under Federal grants made by grantees in furtherance of grant purposes upon request of prospective contractors where Federal funds in a project are significant---------- 390

Prior reviews of contracts awarded under Federal grants are considered consistent, in the main, with principles enunciated here. However, to extent any prior precedent may be inconsistent it should not be followed. B–178960, September 14, 1973, overruled---------- 390

FPR does not apply to award made under EPA grant for municipal sewer construction, since FPR pertains to direct Federal procurements and reference in EPA grant regulations to "Federal law" does not incorporate FPR by reference---------- 413

Where grant conditions indicate that State law shall govern procurement by grantee and State law exists on specific point in question and is followed, General Accounting Office cannot say result reached is irrational. However, since here no State law exists as to particular point in question, then consideration of the matter under Federal frame of reference is appropriate---------- 1254

STATES—Continued
Federal aid, grants, etc—Continued
Educational institutions
Grantee tax indebtedness
Delinquencies Page

Since statute authorizing grant to college for equal opportunity demonstration program contemplates that portion of grant will be used to pay employment and other taxes required by Internal Revenue Service Code, tax delinquency may be paid by granting agency to IRS on behalf of grantee from suspended or withheld grant funds to extent of delinquencies arising from current or prior Federal grants. However, delinquencies not attributable to current or prior Federal grants may not be paid from suspended grant funds 1329

Federal regulations
Compliance

Where grantor agency issues regulation requiring grantees to make contract awards under grants through maximum competition to low responsive, responsible bidder, unless grantor takes action necessary to assure grantee compliance, there will be no guarantee that conditions which agency requires to carry out congressional purposes will be met .. 1254

Municipalities
Contracts
Awarded under State law

Contract awarded under Iowa law pursuant to EPA grant to City of Davenport, Iowa, appears to be improper. City's construction of bid, which contained discrepancy between unit price and extended price for one item which resulted in displacement of another bid, was not proper because intended bid price for item was subject to more than one reasonable interpretation. Valid and binding contract comes into being under Iowa law only if essence of contract awarded is contained within four corners of bid submitted 413

Federal Procurement Regulations *v.* OMB Circular A–87

Regulations incorporating FPR cost principles in situations involving allocation and allowability of cost on grants to other than educational institutions or State and local Govts. does not make FPR generally applicable to procurements by EPA grantees. In fact, where State or local Govt. is grantee, OMB Cir. A–87 regarding allowability of costs applies and not FPR 413

Highways
Traffic lights
Benefit of Government

Costs of procuring and installing traffic control light on Federal property to regulate traffic at intersection of Federal installation and State highway may be paid by the Army since the structure is located entirely on Federal property, for the benefit primarily of Federal employees or military members, and is necessary for safe ingress and egress to the military installations. 36 Comp. Gen. 286 and 51 *id.* 135, distinguished 1437

STATION ALLOWANCES
Miltiary personnel
Excess living costs outside United States, etc.
Reservists performing active duty
Less than 20 weeks Page

In view of the broad authority contained in 37 U.S.C. 405, Vol. 1, Joint Travel Regs., may be amended to authorize payment of station allowances at with or without dependent rates as appropriate to members of Reserve components who perform active duty for less than 20 weeks outside the U.S. or in Hawaii or Alaska and who reside permanently in those areas with their families (if any)---------- 135

Temporary lodgings
Dependent(s) acquired subsequent to transfer

Payment of temporary lodging allowance is not authorized where member marries after being transferred to Hawaii and new wife travels to his duty station at his personal expense, since the member had no dependent on the effective date of his transfer to Hawaii and his vacating of the lodgings he originally occupied while looking for family quarters was not for reasons beyond the control of the member within contemplation of paragraph M4303–1, item 2, Volume 1, Joint Travel Regulations. 1440

Temporary lodgings
Military personnel. (*See* **STATION ALLOWANCES, Military personnel, Temporary lodgings**)

STATUTES OF LIMITATION
Claims
Transportation
Joint carrier service
Motor-water and rail-water

When ocean carrier has issued joint tender with a motor or rail carrier and the motor or rail carrier is subject to 3-year statute of limitations under 49 U.S.C. 66 and that time period has expired, the ocean carrier's claim for the applicable transportation charges is barred---------- 174

STATUTORY CONSTRUCTION
Change in construction of law
Prospective effect

Comptroller General decision stating that parties in interest who use overtime services of Customs Service inspectional employees are not required to pay for employees' retroactive salary increase reflects a change in construction of law. Therefore, decision is not retroactive, but is effective from date of its issuance. In circumstances present in this case, our Office would offer no objection to collection action being terminated under 4 C.F.R. 104.3---------- 226

Conflicting provisions
More recent one controlling

Receipts from oil and gas leases on lands within the National Wildlife Refuge System, and administered by the Fish and Wildlife Service, whether lands were made part of the System by acquisition or by withdrawal from public domain, are required to be disposed of pursuant to 16 U.S.C. 715s rather than pursuant to the Mineral Leasing Act which generally prescribes disposition of receipts from leases of mineral rights in public lands, because, to the extent there is conflict between requirements of the statutes, the more recent one is controlling---------- 117

SUBSISTENCE

Per diem

Actual expenses

Determination Page

P.L. 94–22 provides express authority to reimburse employees for actual subsistence expenses for travel to high cost areas designated in travel regulations. Accordingly, agencies which believe that other localities should be so designated, should request GSA to add those localities to listing of high cost areas in Federal Travel Regs..... 609

GAO woul not object to appropriate changes that GSA might wish to make in criteria for determining when "unusual circumstances" exist to justify actual expense reimbursement to travelers. Also, GSA is not precluded by law or legislative history from modifying the Federal Travel Regs. by citing additional situations involving "unusual circumstances."..... 609

Lodgings at more than one temporary duty station

Where employee of Federal Mediation and Conciliation Service incurred dual lodging expenses on same nights, and travel order authorized reimbursement of actual subsistence expenses not to exceed $40 per day and his subsistence expenses exceeded $40 each day, reimbursement of actual subsistence expenses up to $40 each day may be made, provided appropriate agency official determines employee had no alternative but to retain lodgings at regular temporary duty post while occupying lodgings at other temporary posts..... 690

Permanent change of station

Relocation expenses

Civilian employee of U.S. Customs Service was transferred from San Diego, California, to downtown Los Angeles, California, a designated high rate geographical area, and he occupied temporary quarters in Los Angeles. He is entitled to reimbursement at the maximum statutory per diem rate of $35 as prescribed by paragraph 2-5.4c of the Federal Travel Regulations and section 5702(a) of Title 5, U.S. Code. He is not entitled to the daily rate of $37 designated for temporary duty travel in Los Angeles, and the $33 per diem rate established by regulation is not applicable..... 1337

Area of entitlement

Mileage from permanent duty station

Employee, who traveled to temporary duty station (TDS) which was within commuting distance from his office, was not entitled to per diem but may be allowed mileage between the TDS and his official station.... 1323

Constructive costs

Privately owned vehicle travel

Common carrier cost limitation

Although on basis of our decisions agency travel regulation requires actual versus constructive costs for transportation and per diem to be compared separately in determining employee's reimbursement when, for personal reasons, privately owned conveyance is used in lieu of common carrier transportation, our decisions were based on interpretation of regulations which have been superseded. We interpret the current

SUBSISTENCE—Continued
Per diem—Continued
Constructive costs—Continued
Privately owned vehicle travel—Continued
Common carrier cost limitation Page
regulation, FTR para. 1–4.3, as requiring agency to determine employee's reimbursement for such travel by comparing total actual costs to total constructive costs. 45 Comp. Gen. 592 and 47 *id.* 686 will no longer be followed 192
Fractional days
Thirty-minute period at beginning or end
Employee performing temporary duty (TDY) assignment was denied reimbursement of per diem for quarter beginning 6 p.m. on June 6, 1975, since he returned to residence at 6:15 p.m. after returning from TDY by earliest possible air transportation. Agency interprets provisions of Federal Travel Regulations (FPMR 101–7) para. 1–7.6c concerning 30-minute rule as requiring denial of employee's claim, absent "compelling extenuating circumstances." While agency's determination concerning "official necessity" under para. 1–7.6c will not be disturbed unless arbitrary or capricious, employee's claim may be allowed since record fully supports employee's contention that due to official necessity, he could not have arrived prior to beginning of quarter 1186
Hours of departure
During duty hours
Employee who traveled during working hours on Friday to report for temporary duty the following Tuesday, day after Monday holiday, may not be paid per diem for intervening 3-day weekend. While 5 U.S.C. 6101(b)(2) requires that to maximum extent practicable agencies schedule travel during regular duty hours, payment of 2 days or more additional per diem to facilitate such scheduling has been held unreasonable. Where 2 days per diem would be required and commencement of assignment cannot be otherwise scheduled, employee may be required to travel on own time 590
Increases. (*See* **SUBSISTENCE, Per diem, Rates, Increases**)
"Lodgings-plus" basis
Staying with friends, relatives, etc.
Employee may not be paid per diem under lodgings-plus system based on payment of $14 per night for lodging at home of son's neighbor absent information showing that $14 amount reflects additional expenses incurred by host as result of employee's stay. However, agency may issue regulations providing that, when it is known in advance that employees will lodge with friends or relatives, it may determine that lodgings-plus system is inappropriate and establish specific per diem rates under FTR para. 1–7.3c 856
Military personnel
Nonappropriated fund lodging facilities occupied
Reservists
Member of Reserve component ordered to annual active duty for training stayed at Navy Lodge, a nonappropriated fund temporary lodging facility, at $9 daily charge. In view of 37 U.S.C. 404(a)(4), 1

SUBSISTENCE—Continued
Per diem—Continued
Military personnel—Continued
Nonappropriated fund lodging facilities occupied—Continued
Reservists—Continued Page

JTR para. M6000–1, which provides that members of Reserve components ordered to annual active duty for training are not entitled to per diem if Govt. quarters and mess are available, does not preclude per diem where members of Reserves incur lodging expenses at nonappropriated fund activities which were defined as Govt. quarters for purposes of 1 JTR without consideration that such expenses would be incurred..... 130

Temporary duty
Layover time
Aero Club aircraft mechnical difficulties

Air Force member who traveled on temporary duty using Aero Club aircraft which incurred mechanical difficulties causing a layover of four days may not be reimbursed per diem for the layover time since M4406–3 of 1 JTR provides that per diem in this circumstance not exceed the amount which would have been payable had the member used such commercial transportation as would have been available..... 1247

Rest stopover

Navy member returning from Teheran, Iran, to Washington, D.C., on temporary duty, who departs from Teheran at 5:35 a.m. and completes 7 hours of travel to Rome, Italy, on trip requiring at least 24 hours' total travel if he is to continue on same plane or flight, may be allowed recredit of leave and paid per diem for period of rest stopover since officer's action in utilizing stop for rest appears reasonable under circumstances..... 513

Rates
Increases
Effective date

Blanket travel order issued on July 1, 1974, authorized per diem rate of $25 per day and mileage rate of 12 cents for use of privately owned automobile, as prescribed by Commerce Dept.'s regulations. On May 19, 1975, Temporary Reg. A–11 (GSA), implementing the Travel Expense Amendments Act of 1975, amended the Federal Travel Regs. (FTR) to increase the maximum per diem and mileage rates for official travel. Under blanket travel order, employee who traveled May 15 to 20, 1975, is entitled to higher per diem and mileage rates of amended FTR for travel on May 19 and 20 since such rates were mandatory. 49 Comp. Gen. 493 followed. 35 Comp. Gen. 148, distinguished..... 179

Lodging costs
Staying with friends, relatives, etc.

Employee may not be paid per diem under lodgings-plus system based on payment of $14 per night for lodging at home of son's neighbor absent information showing that $14 amount reflects additional expenses incurred by host as result of employee's stay. However, agency may issue regulations providing that, when it is known in advance that employees will lodge with friends or relatives, it may determine that lodgings-plus system is inappropriate and establish specific per diem rates under FTR para. 1–7.3c..... 856

SUBSISTENCE—Continued
Per diem—Continued
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Permanent change of station
Relocation expenses *Page*

Civilian employee of U.S. Customs Service was transferred from San Diego, California, to downtown Los Angeles, California, a designated high rate geographical area, and he occupied temporary quarters in Los Angeles. He is entitled to reimbursement at the maximum statutory per diem rate of $35 as prescribed by paragraph 2–5.4c of the Federal Travel Regulations and section 5702(a) of Title 5, U.S. Code. He is not entitled to the daily rate of $37 designated for temporary duty travel in Los Angeles, and the $33 per diem rate established by regulation is not applicable 1337

Reduction
Ground accommodations package
Air travel

Employee of National Oceanic and Atmospheric Administration whose per diem was reduced by 55 percent as he purchased ground accommodations package in conjunction with airline ticket may be reimbursed full London per diem. Rule is that travel orders may not be retroactively changed to increase or decrease entitlements after travel has been performed 1241

Temporary duty
Per diem *v.* temporary promotion

Employee was advised prior to detail action that, if she so elected, she could be promoted temporarily but would not receive per diem while at temporary duty station. She elected to receive per diem in lieu of temporary promotion. Although temporary promotion was discretionary, agency had no right to require employee to make such choice. Since agency states that employee would have been promoted but for the improper action, unjustified or unwarranted personnel action occurred and retroactive promotion with backpay for period of detail may be made .. 836

Ten hour limitation. (*See* **SUBSISTENCE, Per diem, Hours of departure, etc., Less than ten hours travel**)

Thirty-minute rule
Arrival and departure time evidence

Employee performing temporary duty (TDY) assignment was denied reimbursement of per diem for quarter beginning 6 p.m. on June 6, 1975, since he returned to residence at 6:15 p.m. after returning from TDY by earliest possible air transportation. Agency interprets provisions of Federal Travel Regulations (FPMR 101–7) para. 1–7.6e concerning 30-minute rule as requiring denial of employee's claim, absent "compelling extenuating circumstances." While agency's determination concerning "official necessity" under para. 1–7.6e will not be disturbed unless arbitrary or capricious, employee's claim may be allowed since record fully supports employee's contention that due to official necessity, he could not have arrived prior to beginning of quarter 1186

SUBSISTENCE ALLOWANCE
Foreign areas
Extraordinary subsistence expenses Page
Civilian employee and his family transferred to new duty station at Frankfurt, Germany, occupied nonhousekeeping transient-type quarters during which their cost for restaurant meals substantially exceeded the cost of such meals if prepared in housekeeping quarters. Since supplementary post allowance is available to defray extraordinary subsistence costs which exceed that portion of employee's salary and post allowance ordinarily spent for food and household expenses while occupying housekeeping quarters, employee may be granted allowance, not to exceed amount prescribed by Department of State Standardized Regulations section 235 (August 27, 1974) 1301
SURPLUS PROPERTY (*See* **PROPERTY, Public Surplus**)
TAXES
Bid evaluation. (*See* **BIDS, Evaluation, Tax inclusion or exclusion**)
Contract matters. (*See* **CONTRACTS, Tax matters**)
Federal
Excise
Contract price adjustment
Protest that low bidder did not include Federal Excise Tax (F.E.T.) in its bid price under invitation which provided that all Federal, State and local taxes (including F.E.T.) were included in bid price and resulting contract price is denied as bidder took no exception to requirement and unless bid affirmatively shows that taxes are excluded, it is presumed that taxes are included in bid price 1159
Government contracts
Inclusion or exclusion in bids. (*See* **BIDS, Evaluation, Tax inclusion or exclusion**)
Income
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Taxes**)
Indebtedness
Grantees of grant programs
Section 115 of Economic Opportunity Amendments of 1969, 42 U.S.C. 2705, requires that upon notification from Treasury Secretary of grantee tax delinquency, Director, Community Services Administration, must suspend grant payments to "any person otherwise entitled to receive a payment pursuant to a grant" in amount sufficient to satisfy delinquency. Statute does not distinguish between delinquencies incurred before and those incurred after awarding of grant but legislative history indicates all outstanding delinquencies were intended to be included. Hence, all grant payments, up to amount of total delinquency, must be suspended until satisfactory provision for payment of delinquency is made 1329
Set-off of grant payments suspended or withheld against tax delinquency of grantee is not appropriate since grant payments are not reimbursements for expenses already incurred by grantee and therefore do not constitute debts of the United States 1329
Since statute authorizing grant to college for equal opportunity demonstration program contemplates that portion of grant will be used to pay employment and other taxes required by Internal Revenue

TAXES—Continued
Federal—Continued
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Grantees of grant programs—Continued Page
Service Code, tax delinquency may be paid by granting agency to IRS on behalf of grantee from suspended or withheld grant funds to extent of delinquencies arising from current or prior Federal grants. However, delinquencies not attributable to current or prior Federal grants may not be paid from suspended grant funds---- 1329
Fuel
State. (*See* **TAXES, State, Gasoline**)
Gasoline
State. (*See* **TAXES, State, Gasoline**)
Relocation expenses
Transfers
Officers and employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Taxes**)
State
Federal employees
Temporary duty
Cost of hotel or motel room to BIA employees on official business is sum of rental fee plus applicable taxes. Legal incidence of Anchorage, Alaska, hotel-motel rental tax is on the Federal employee when Government reimburses its employees via per diem or actual expenses allowance. Constitutional exemption from State and local taxes does not apply when Government is not itself contractually obligated to hotel-motel, even though it has voluntarily assumed economic burden thereof---- 1278
Gasoline
California
California service stations are charged with collecting State sales tax from consumers "insofar as it can be done." Incidence of this tax is on the vendee (purchaser), *Diamond National Corp.* v. *State Board of Equalization*, 44 U.S.L.W. 3591 (U.S. April 20, 1976), and United States is constitutionally immune from payment thereof. To claim its constitutional immunity from California sales taxes on purchase of gasoline, Government must comply with reasonable State requirements---- 1358
Hawaii
Hawaii's fuel tax is imposed as a license tax on distributors of motor fuel based on total gallons sold. Incidence of tax is on distributor, not ultimate purchaser of the fuel. Hence, United States is not constitutionally immune from economic burden of this tax. Further, Hawaii's exemption from tax on sales to United States applies only to purchases from distributor and does not affect pruchases from independent service stations---- 1358
New Mexico
New Mexico special fuel use tax, applicable to sale of diesel-engine fuel used to propel motor vehicle on highways, attaches at time of delivery of fuel and "shall be collected" by dealer from purchaser of the fuel. Hence, incidence of this tax is on purchaser of the fuel and United States in purchasing diesel-engine fuel is constitutionally immune from payment thereof---- 1358

TAXES—Continued
State—Continued
Gasoline—Continued
Pennsylvania Page

Pennsylvania's fuel use tax is imposed on dealer-users of fuel; dealer-user is defined to include retailer who delivers fuel into fuel tanks of motor vehicles. Since incidence of tax is on vendor of the fuel, not the vendee, United States is not constitutionally immune from economic burden of this tax on gasoline sales from service stations. However, Pennsylvania statute exempts from payment of tax any fuel used by or sold and delivered to the United States when such sales and deliveries are supported by documentary evidence satisfactory to State that vendee is the United States 1358

Government immunity
Gasoline for Government vehicles

Except for company owned stations, Government's liability for State taxes on gasoline is generally dependent upon whether incidence thereof, by State law, is on service station or on Government as purchaser of gasoline from service station. Although through use of its credit cards Government pays national oil companies for gasoline purchased from independent service stations, oil companies are not vendors but merely participants in credit arrangements 1358

Hotel-motel tax

When Bureau of Indian Affairs (BIA) contracts with hotel or motel to provide housing and subsistence to Indian students in transit, the Federal agency and not the beneficiary is the renter. The legal incidence of the hotel-motel rental tax inposed by Anchorage, Alaska, therefore, falls on the BIA which is constitutionally immune from State and local taxes. 53 Comp. Gen. 69 is modified accordingly 1278

Room rental transient tax
Alaska

Cost of hotel or motel room to BIA employees on official business is sum of rental fee plus applicable taxes. Legal incidence of Anchorage, Alaska, hotel-motel rental tax is on the Federal employee when Government reimburses its employees via per diem or actual expenses allowance. Constitutional exemption from State and local taxes does not apply when Government is not itself contractually obligated to hotel-motel, even though it has voluntarily assumed economic burden thereof .. 1278

Tax exempt organizations
Donor payments
Travel reimbursement
Government employees

Internal Revenue Service (IRS) proposal that it pay expenses of employee attending meetings and accept reimbursement directly from eligible tax exempt organizations, crediting such reimbursement to its own appropriation, is not authorized by applicable statutes. Provisions of 5 U.S.C. 4111 permit employee only to accept payments from eligible organizations, which payments are to be deducted from amounts otherwise due from employing agency. Moreover, in absence of specific authority to accept voluntary contributions or travel reimbursements, IRS would be required to deposit such funds into miscellaneous receipts of the Treasury by 31 U.S.C. 484 (1970) 1293

TELEPHONES
Private residences
Military housing
Government furnished Page

Military members required to relocate their households incident to base closings in Japan without permanent changes of station may not be reimbursed personal expenses incurred for purchase of rugs, drapes, curtains, and service charges for items of personal convenience not essential to the occupation of quarters. Also, reimbursement for telephone installation charges is specifically prohibited by 31 U.S.C. 679 ---- 932

TRAILER ALLOWANCES
Civilian personnel
Separate shipments of household effects, etc., and house trailer

Employee who moves household goods from old station to new station pursuant to transfer may not later claim expenses for transportation of mobile home under FTR para. 2-7.1(a) ---- 228

Reimbursement limitation

Incident to transfer to Alaska, employee transported mobile home from Keyser, W. Va., to Seattle, Wash., where it was determined that it did not meet Alaskan specifications. Employee stored trailer in Seattle and completed shipment of household goods to Alaska on GBL. Regarding reimbursement for transportation of mobile home, rule in 39 Comp. Gen. 40 is applicable. Credit should be allowed under FTR para. 2-7.3a for shipment of mobile home from Keyser to Seattle. Employee is not entitled to further allowance under authorization for shipment of household goods on GBL. Total payment under both authorizations may not exceed cost which would have been incurred by Govt. had either method been used for entire distance ---- 526

TRANSPORTATION
Additional costs
Accessorial charges. (*See* **TRANSPORTATION, Accessorial charges**)
Detention charges
Government liability

Arrival of shipping documents in advance of actual unloading is irrelevant to issue whether U.S. is liable for vehicle detention charges for unloading performed in excess of 2 hours where motor carrier, with knowledge of fact that vehicles are scheduled for unloading at ocean terminal by Military Traffic Management Command, offers to perform transportation services which include use of its vehicles at no extra charge for 2 hours for unloading ---- 301

Air carriers
Foreign
American carrier availability
Authority to use foreign aircraft

HEW employee may use foreign flag air carriers during travel while performing temporary duty because the use of one such carrier saved more than 12 hours from origin airport to destination airport than use of American flag air carrier, and use of other such carrier is essential to accomplish the Dept.'s mission, which would render American flag air carriers "unavailable" under § 5 of International Air Transportation Fair Competitive Practices Act of 1974, Pub. L. 93-623, 88 Stat. 2104 (49 U.S.C. 1517) ---- 52

TRANSPORTATION—Continued
Air carriers—Continued
Foreign—Continued
American carrier availability—Continued
Authority to use foreign aircraft—Continued Page

Consistent with the Fly America Guidelines, traveler should use certificated service available at point of origin to furthest practicable interchange point on a usually traveled route. Where origin or interchange point of such route is not serviced by a certificated carrier, noncertificated service should be used to the nearest practicable interchange point to connect with certificated service. Travelers will not be held accountable for nonsubstantial differences in distances between points serviced by certificated carriers. The foregoing principles are not controlling where their application results in use of noncertificated service for actual travel between the United States and another continent..... 1230

Foreign currencies not accepted

Specific provisions in appropriation statutes that authorize use of foreign currencies for projects involving foreign travel are not viewed as having been impliedly modified by enactment of 49 U.S.C. 1517; hence, Government-sponsored travel that can be financed only with such foreign currencies may be made by noncertificated carrier when otherwise available American-flag carriers will not accept such currencies..... 1355

Loss and damage liability

Air carrier is liable for damages sustained to shipment of Govt. property notwithstanding contention of improper packing, since applicable tariff filed with CAB provides that acceptance of shipment constitutes prima facie evidence of proper packing and puts burden of proof on carrier to show absence of negligence. Issue of liability is determinable under provisions of tariff; common law rules and presumptions apply only when not in conflict with tariff..... 149

Claim against air carrier for damage to shipment moved on Govt. bill of lading is not subject to notice requirements of governing air tariff because use of Govt. bill of lading—which in Condition 7 contains waiver of usual notice requirements—is required by air tariff and creates ambiguity over applicability of notice requirements which is resolved in favor of shipper..... 958

Automobiles
Military personnel
Advance shipments
Discharge of member other than honorable

Regulations may be promulgated under 37 U.S.C. 406(h) to authorize transportation of household effects and a private automobile of a member of the uniformed services serving overseas, without dependents, incident to the member's discharge under conditions other than honorable, similar to the transportation authorized members with dependents discharged in such circumstances. 44 Comp. Gen. 574 will no longer be followed; 45 Comp. Gen. 442 and 49 *id.* 695, overruled in part..... 1183

TRANSPORTATION—Continued
Automobiles—Continued
Military personnel—Continued
Ferry transportation
Alaska State Ferry System Page

Incident to permanent change of station Coast Guard member's privately owned vehicle was transported via Alaska State Ferry System from Juneau, Alaska, to Seattle, Washington. Member is entitled to such transportation at Govt. expense since "privately owned American shipping services," as used in 10 U.S.C. 2634 authorizing transportation at Govt. expense of a privately owned motor vehicle of member of armed force ordered to make permanent change of station, includes State-owned vessels 672

Constitutes transoceanic travel

Although there is no authority in current regulations under which full fare (including that part attributable to transportation of the automobile) for Hovercraft crossing of the English Channel may be paid incident to temporary duty travel of military personnel, it does not appear that payment of such full fare would be objectionable under appropriate regulations if travel by automobile, including transoccanic ferry service, is specifically authorized as advantageous to the Government since the transportation of the automobile may be considered as incident to authorized travel of the member in appropriate circumstances 1072

English Channel

Member who is authorized travel by privately owned vehicle (POV) as advantageous to the Government incident to temporary duty at various places in Switzerland and Germany away from his permanent duty station in London, England, is not entitled to reimbursement of full fare including charge for transportation of an automobile by Hovercraft from Dover to Calais and return; however, he may be reimbursed an amount reasonably representing that part of the fare attributable to personal travel. 49 Comp. Gen. 416, modified 1072

Bills of lading
Contract status

Terms of contract of carriage under which carrier transports goods include both bill of lading and published applicable tariff 958

Cargo Preference Act
Shipments to Chittagong, Bangladesh

LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to port of Chittagong in Bangladesh contravenes the 1954 Cargo Preference Act because direct service to Chittagong is available by U.S.-flag breakbulk vessels and because special circumstances (here, geographic configuration of port precluding use of normal LASH unloading operations) cannot be used to circumvent the cargo preference laws 1097

TRANSPORTATION—Continued
Carmack Amendment of 1906
Damage to mobile home shipments Page
Mobile home carriers are subject to Carmack Amendment, 49 U.S.C. 20(11) ---- 1209
Carriers
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Claims
Generally. (*See* **CLAIMS, Transportation**)
Contracts
Readjustment provisions
Interpretation
Interpretation of readjustment provisions in contracts for transportation of fuel in pipelines is upheld where carrier's intention is plain on the face of its offer, where carrier receives a reasonable return on investment, and where if offer were ambiguous it would have to be construed strongly against the carrier author ---- 1423
Dependents
Alternate locations
Renewal agreement travel
When dependents of employee are not permitted to accompany him to post of duty outside continental U.S., or in Hawaii or Alaska, and are transported to alternate location under authority of 5 U.S.C. 5725, employee is entitled to transportation expenses for those dependents incident to own entitlement to renewal agreement travel under 5 U.S.C. 5728(a) based on cost of travel between alternate location and employee's place of actual residence at time of appointment or transfer to post of duty ---- 886
Military personnel
Dislocation allowance
Permanent change of station requirement
Military members required to involuntarily relocate their households incident to base closings in Japan under Kanto Plain Consolidation Plan, without permanent changes of station, may not be paid dislocation allowance under 37 U.S.C. 407(a), nor may they be paid such allowance pursuant to 37 U.S.C. 405a since the relocations were not evacuations incident to unusual or emergency circumstances ---- 932
Emergency, etc., conditions. (*See* **FAMILY ALLOWANCES, Evacuation**)
Mother
Entitlement to relocation expenses incident to transfer
Mother of Govt. employee who is member of employee's household is dependent parent within meaning of para. 2-1.4d, Federal Travel Regs., for purposes of relocation allowances as she receives only social security payments, which are largely required for medical expenses, and is dependent upon daughter to maintain reasonable standard of living. IRS standards for dependency do not determine entitlement under FTR ---- 462
Travel to attend award cermonies for honor award recipients
There is no authority for the Secretaries concerned to issue regulations authorizing the payment of travel and transportation expenses of de-

TRANSPORTATION—Continued
Dependents—Continued
Travel to attend award ceremonies for honor award recipients—Con. Page
pendents of civilian employees or military members to accompany such employees or members who are receiving honor awards, nor is there authority for the payment of travel and transportation expenses of such dependents to receive awards themselves ---- 1332
Household effects
Actual expenses
Allowance not authorized
Packing by employee
Employee, whose household effects were shipped under "actual expense" method of shipment, seeks allowance for personally packing household goods. Under "actual expense" method, Govt. is shipper and authority to incur packing expenses is vested in agency. Since agency contracted with carrier to pack and transport household goods, employee who, without authority, undertakes to pack household goods does so voluntarily and is not entitled to reimbursement ---- 779
Authorization requirement
Transfer of employee. (*See* **TRANSPORTATION, Household effects, Transfers, Authorization requirement**)
Commutation
More than one movement
Weight limitation
Employee was transferred from Denver to Los Angeles. Before most of his household effects were shipped to Los Angeles, he was retransferred to Sacramento, a location farther from Denver. He is entitled to mileage based on greater distance from original station to final station in determining commuted payment covering transportation of household effects. However, total reimbursement for actual successive transfers may not exceed reimbursement employee would otherwise have been entitled to for each transfer individually. Further, maximum weight which may be transported incident to any one transfer at Govt. expense is subject to 11,000 pound limitation in 5 U.S.C. 5724. 48 Comp. Gen. 651, modified. 634
House trailer shipments, etc.
Damages en route
Mobile home delivered to carrier in good condition, delivered to consignee in damaged condition, and ascertainment of amount of damage establishes prima facie case. *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 138 ---- 1209
Household effects shipment precluded
Employee who moves household goods from old station to new station pursuant to transfer may not later claim expenses for transportation of mobile home under FTR para. 2–7.1(a) ---- 228
Reimbursement
Computation
Incident to transfer to Alaska, employee transported mobile home from Keyser, W. Va., to Seattle, Wash., where it was determined that it did not meet Alaskan specifications. Employee stored trailer in Seattle and completed shipment of household goods to Alaska on GBL. Regarding reimbursement for transportation of mobile home, rule in

TRANSPORTATION—Continued
Household effects—Continued
House trailer shipments, etc.—Continued
Reimbursement—Continued
Computation—Continued Page

39 Comp. Gen. 40 is applicable. Credit should be allowed under FTR para. 2–7.3a for shipmen of mobile home from Keyser to Seattle. Employee is not entitled to further allowance under authorization for shipment of household goods on GBL. Total payment under both authorizations may not exceed cost which would have been incurred by Govt. had either method been used for entire distance 526

Military personnel
Advance shipments
Discharge of member other than honorable

Regulations may be promulgated under 37 U.S.C. 406(h) to authorize transportation of household effects and a private automobile of a member of the uniformed services serving overseas, without dependents, incident to the member's discharge under conditions other than honorable, similar to the transportation authorized members with dependents discharged in such circumstances. 44 Comp. Gen. 574 will no longer be followed; 45 Comp. Gen. 442 and 49 *id.* 695, overruled in part 1183

Evacuation allowances. (*See* **FAMILY ALLOWANCES, Evacuation**)
Permanent change of station requirement

Military members required to involuntarily relocate their households incident to base closings in Japan under Kanto Plain Consolidation Plan, without permanent changes of station, may not be paid dislocation allowance under 37 U.S.C. 407(a), nor may they be paid such allowance pursuant to 37 U.S.C. 405a since the relocations were not evacuations incident to unusual or emergency circumstances 932

Military members required to relocate their households incident to base closings in Japan without permanent changes of station may not be reimbursed personal expenses incurred for purchase of rugs, drapes, curtains, and service charges for items of personal convenience not essential to the occupation of quarters. Also, reimbursement for telephone installation charges is specifically prohibited by 31 U.S.C. 679 932

Release from active duty
To selected home

A Regular Army commissioned officer discharged with readjustment pay in accordance with 10 U.S.C. 3814a may receive travel and transportation allowances provided in 37 U.S.C. 404(c), 406(d) and 406(g) for members involuntarily released from active duty with readjustment pay, since the congressional intent was to treat such officers in the same manner as Reserve officers involuntarily released from active duty with readjustment pay 166

TRANSPORTATION—Continued
Household effects—Continued
Packing by employee
Reimbursement claim Page

Employee, whose household effects were shipped under "actual expense" method of shipment, seeks allowance for personally packing household goods. Under "actual expense" method, Govt. is shipper and authority to incur packing expenses is vested in agency. Since agency contracted with carrier to pack and transport household goods, employee who, without authority, undertakes to pack household goods does so voluntarily and is not entitled to reimbursement 779

Transfers
Successive changes

Employee was tranferred from Denver to Los Angeles. Before most of his household effects were shipped to Los Angeles, he was retransferred to Sacramento, a location farther from Denver. He is entitled to mileage based on greater distance from original station to final station in determining commuted payment covering transportation of household effects. However, total reimbursement for actual successive transfers may not exceed reimbursement employee would otherwise have been entitled to for each transfer individually. Further, maximum weight which may be transported incident to any one transfer at Govt. expense is subject to 11,000 pound limitation in 5 U.S.C. 5724. 48 Comp. Gen. 651, modified 634

Motor carrier shipments
Mobile homes
Carmack Amendment to ICC Act

Mobile home carriers are subject to Carmack Amendment, 49 U.S.C. 20(11) 1209

Payment
Set-off

Disallowance of carrier's amended claim for refund of amount administratively deducted from its account due to damage to floodlight units is sustained where carrier is liable for damage without proof of negligence unless damage is affirmatively shown to be result of one of exceptions to its liability as a common carrier, *Federated Department Stores* v. *Brinke*, 450 F.2d 1223 (5th Cir., 1971), and cases cited. Evidence on carrier's freight bill indicates extent of damage and allegations of faulty packaging without evidence that packaging was sole cause of damage will not rebut presumption of negligence by carrier 611

TRANSPORTATION—Continued
Ocean carriers
Time-barred claims
Joint carrier service. (*See* **STATUTES OF LIMITATION, Claims, Transportation, Joint carrier service**)
Rates
Section 22 quotations
Combination with tariff rates Page
Interpretation of readjustment provisions in contracts for transportation of fuel in pipelines is upheld where carrier's intention is plain on the face of its offer, where carrier receives a reasonable return on investment, and where if offer were ambiguous it would have to be construed strongly against the carrier author ---- 1423
Tariffs
Ambiguous
Carrier's tariff item excluding it from liability is ambiguous, and appears to be rule exempting carrier from own negligence, and therefore is in violation of 49 U.S.C. 20(11) ---- 1209
Construction
Against carrier
Claim against air carrier for damage to shipment moved on Govt. bill of lading is not subject to notice requirements of governing air tariff because use of Govt. bill of lading—which in Condition 7 contains waiver of usual notice requirements—is required by air tariff and creates ambiguity over applicability of notice requirements which is resolved in favor of shipper ---- 958
Filed with Civil Aeronautics Board
Validity
Provisions of tariffs filed with Civil Aeronautics Board are valid unless and until rejected by the Board ---- 958
Tariffs. (*See* **TRANSPORTATION, Rates, Tariffs**)
Vessels
American
Cargo preference
Chittagong Bangladesh shipments
LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to port of Chittagong in Bangladesh contravenes the 1954 Cargo Preference Act because direct service to Chittagong is available by U.S.-flag breakbulk vessels and because special circumstances (here, geographic configuration of port precluding use of normal LASH unloading operations) cannot be used to circumvent the cargo preference laws ---- 1097
Foreign
American vessel availability
While on vacation leave, employee traveled from Victoria, British Columbia, to Prince Rupert, British Columbia, by foreign bottom carrier. Although such travel was not authorized, reimbursement may be made if otherwise proper since route was reasonable and no American vessel was available for travel ---- 1035

TRAVEL ALLOWANCE
Military personnel
Enlistment extension, discharge, reenlistment, etc.
Consecutive overseas tours
Same station Page

Proposed revision of Vol. 1, JTR, granting leave travel entitlements authorized under 37 U.S.C. 411b, to members reassigned to second tours of duty at same overseas station, is contrary to clear language of statutory provision which provides for this entitlement in connection with "change of permanent station to another duty station."---------- 284

Leave travel entitlements
Consecutive overseas tours
Same station

There is no objection to proposed revision of Vol. 1, JTR, to grant leave entitlements under 37 U.S.C. 411b, where because of the critical nature of the member's job he is not authorized leave travel between permanent station assignments provided such travel takes place within reasonable time following the change of station, and entitlements do not exceed those provided if travel had occurred between assignments------ 284

TRAVEL EXPENSES
Accredited rural appraisers. (*See* **OFFICERS AND EMPLOYEES, Accredited rural appraisers, Examination costs, Fees and travel expenses**)
Actual expenses
Predetermined rates in high cost areas

P.L. 94-22 provides express authority to reimburse employees for actual subsistence expenses for travel to high cost areas designated in travel regulations. Accordingly, agencies which believe that other localities should be so designated, should request GSA to add those localities to listing of high cost areas in Federal Travel Regs---------- 609

Reimbursement basis
Criteria

GAO would not object to appropriate changes that GSA might wish to make in criteria for determining when "unusual circumstances" exist to justify actual expense reimbursement to travelers. Also, GSA is not precluded by law or legislative history from modifying the Federal Travel Regs. by citing additional situations involving "unusual circumstances."---------- 609

Air travel
Excursion rates
Ground accommodations package

Employee of National Oceanic and Atmospheric Administration traveling on official business may not be reimbursed for difference between cost of excursion fare and lesser fare actually used which was obtained by purchasing ground accommodations package, as employee received per diem to cover lodging costs. Payment to employee of excursion fare would have effect of double reimbursement for lodging cost. 54 Comp. Gen. 268 distinguished---------- 1241

TRAVEL EXPENSES—Continued
Air travel—Continued
Foreign air carriers
Prohibition
Availability of American carriers Page

HEW employee may use foreign flag air carriers during travel while performing temporary duty because the use of one such carrier saved more than 12 hours from origin airport to destination airport than use of American flag air carrier, and use of other such carrier is essential to accomplish the Dept.'s mission, which would render American flag air carriers "unavailable" under § 5 of International Air Transportation Fair Competitive Practices Act of 1974, Pub. L. 93–623, 88 Stat. 2104 (49 U.S.C. 1517)..... 52

Consistent with the Fly America Guidelines, traveler should use certificated service available at point of origin to furthest practicable interchange point on a usually traveled route. Where origin or interchange point of such route is not serviced by a certificated carrier, noncertificated service should be used to the nearest practicable interchange point to connect with certificated service. Travelers will not be held accountable for nonsubstantial differences in distances between points serviced by certificated carriers. The foregoing principles are not controlling where their application results in use of noncertificated service for actual travel between the United States and another continent..... 1230

Appropriation availability
Return to official station on nonworkdays

Where agency after cost analysis determines that the costs of reimbursing employees who are required to perform extended periods of temporary duty for expense of periodically traveling between the temporary duty point and official station for nonworkdays is outweighed by savings in terms of employee efficiency and productivity, and reduced costs of employment and retention of such employees, the cost of authorized weekend return travel may be considered a necessary travel expense of the agency..... 1291

Automobile hire. (*See* **VEHICLES, Rental**)
Boats
Use of privately owned

Expenses of renting boat and equipment from Govt. employee for purpose of performing acoustical measurements are not reimbursable as travel expenses. Equipment should have been obtained by procurement means with due regard to section 1–1.302–3 of Fed. Procurement Regs. and public policy prohibiting Govt. from contracting with its employees except for most cogent of reasons as where Govt.'s needs cannot otherwise reasonably be met. Payment may, however, be made on *quantum meruit* basis insofar as receipt of goods and services has been ratified by authorized official..... 681

Congressional committees
Overseas travel. (*See* **CONGRESS, Committees, Travel expenses, Overseas**)

TRAVEL EXPENSES—Continued
Constructive travel costs
Computation
Aero Club or private aircraft
Operator (pilot) plus passengers (employees) Page

The determination of the constructive transportation cost ceiling on Air Force travel vouchers involving Aero Club aircraft or private aircraft by including those commercial fares for the operator (pilot) plus corresponding fares for any passengers accompanying the operator who are also in an official travel status does not appear to be improper..... 1247

Military personnel. (*See* **TRAVEL EXPENSES, Military personnel, Constructive travel costs**)

Contributions from private sources
Acceptance by agency
Tax exempt ogranizations

Internal Revenue Service (IRS) proposal that it pay expenses of employee attending meetings and accept reimbursement directly from eligible tax exempt organizations, crediting such reimbursement to its own appropriation, is not authorized by applicable statutes. Provisions of 5 U.S.C. 4111 permit employee only to accept payments from eligible organizations, which payments are to be deducted from amounts otherwise due from employing agency. Moreover, in absence of specific authority to accept voluntary contributions or travel reimbursements, IRS would be required to deposit such funds into miscellaneous receipts of the Treasury by 31 U.S.C. 484 (1970)..... 1293

Conventions, conferences, etc.
Attendees
State officials

Decision B–166506, July 15, 1975, holding payment by EPA of transportation and lodging expenses of State officials attending National Solid Waste Management Association Convention is prohibited by 31 U.S.C. 551, unless otherwise authorized by statute, is affirmed. Provision of Administrative Expenses Act (5 U.S.C. 5703(c)), permitting payment of such expenses for persons serving Govt. without compensation does not provide necessary exception to 31 U.S.C. 551 since attendees at conference are not providing direct service to Govt. and are therefore not covered by 5 U.S.C. 5703(c)..... 750

Incident to acceptance of non-Federally sponsored honor awards

If travel of Department of Defense civilian employees and military members to receive non-Federally sponsored honor awards includes attending meetings or conventions of organizations covered by 37 U.S.C. 412 (1970), 5 U.S.C. 5946 and 4110 (1970), proposed regulations which would authorize such travel at Government expense must be in accord with those statutes..... 1332

Customs employees overtime inspection duty
Party-in-interest liability

Customs Service has authority under User Charges Statute, 31 U.S.C. 483a, to implement recommendation in GAO report that administrative overhead costs be collected from parties-in-interest who benefit by

TRAVEL EXPENSES—Continued
Customs employees overtime inspection duty—Continued
Party-in-interest liability—Continued Page
special reimbursable and overtime services of Customs officers. Various statutes which provide for reimbursement by parties-in-interest of compensation and/or expenses of Customs officers for such services generally do not preempt imposition of additional user charges under 31 U.S.C. 483a 456
Dependents. (*See* **TRANSPORTATION, Dependents**)
Escorts
Contract
Reimbursement
Expenses incurred by international visitors and paid for by contract escort are not reimbursable on voucher form SF 1012 since each traveler is required to sign voucher to claim reimbursement for authorized travel expenses which he personally incurred in performance of his official travel. However, assuming that travel authorizations have been obtained, travel expenses may be claimed and paid on SF 1164 ("Claim for Reimbursement for Expenditures on Official Business") or SF 1034 ("Public Voucher for Purchases and Services other than Personal") 437
Experts and consultants. (*See* **EXPERTS AND CONSULTANTS, Travel expenses**)
Foreign vessel use. (*See* **TRANSPORTATION, Vessels**)
Military personnel
Commercial v. Government transportation
Advantageous to Government
The use of Aero Club-owned or Government-loaned aircraft is considered a Government conveyance when used as a mode of official travel but under current regulations such use will not take precedence over normal Government conveyance irrespective of whether use of the aircraft may be considered advantageous to the Government. See M4406-3 and M4405-2 of 1 JTR 1247
Constructive travel costs
Computation
Aero Club or private aircraft
Operator (pilot) plus passengers (employees)
The determination of the constructive transportation cost ceiling on Air Force travel vouchers involving Aero Club aircraft or private aircraft by including those commercial fares for the operator (pilot) plus corresponding fares for any passengers accompanying the operator who are also in an official travel status does not appear to be improper.. 1247
Ferry fares
Charges assessed for motor vehicle transportation
Although there is no authority in current regulations under which full fare (including that part attributable to transportation of the automobile) for Hovercraft crossing of the English Channel may be paid incident to temporary duty travel of military personnel, it does not appear that payment of such full fare would be objectionable under appropriate regulations if travel by automobile, including transoceanic ferry service, is specifically authorized as advantageous to the Government since the transportation of the automobile may be considered as incident to authorized travel of the member in appropriate circumstances. 1072

TRAVEL EXPENSES—Continued
Military personnel—Continued
Ferry fares—Continued
Hovercraft crossing of English Channel Page

Member who is authorized travel by privately owned vehicle (POV) as advantageous to the Government incident to temporary duty at various places in Switzerland and Germany away from his permanent duty station in London, England, is not entitled to reimbursement of full fare including charge for transportation of an automobile by Hovercraft from Dover to Calais and return; however, he may be reimbursed an amount reasonably representing that part of the fare attributable to personal travel. 49 Comp. Gen. 416, modified 1072

Although there is no authority in current regulations under which full fare (including that part attributable to transportation of the automobile) for Hovercraft crossing of the English Channel may be paid incident to temporary duty travel of military personnel, it does not appear that payment of such full fare would be objectionable under appropriate regulations if travel by automobile, including transoceanic ferry service, is specifically authorized as advantageous to the Government since the transportation of the automobile may be considered as incident to authorized travel of the member in appropriate circumstances. 1072

Leaves of absence
Return to duty station
Rest stopover

Navy member returning from Teheran, Iran, to Washington, D.C., on temporary duty, who departs from Teheran at 5:35 a.m. and completes 7 hours of travel to Rome, Italy, on trip requiring at least 24 hours' total travel if he is to continue on same plane or flight, may be allowed recredit of leave and paid per diem for period of rest stopover since officer's action in utilizing stop for rest appears reasonable under circumstances 513

Official business requirement

The Secretaries concerned may issue regulations authorizing the payment of travel and transportation expenses of civilian employees of the Department of Defense and military members who travel on temporary duty to receive non-Federally sponsored honor awards provided such awards are determined in each case to be reasonably related to the duties of the employee or member and the functions and activities of the agency to which the recipient is attached. Travel to receive awards in which such determination cannot clearly be made is not travel on public (official) business and no authority exists for such travel at Government expense 1332

Personal convenience
Delay en route

Air Force member who traveled on temporary duty using Aero Club aircraft which incurred mechanical difficulties may not be reimbursed for travel to and from San Francisco, his permanent duty station, while waiting for the aircraft to be repaired, since the trip was not a necessary expense pursuant to public business but an expense as a result of a personal choice. See M4406–3 of 1 JTR 1247

TRAVEL EXPENSES—Continued
Military personnel—Continued
Release from active duty
Rights Page

A Regular Army commissioned officer discharged with readjustment pay in accordance with 10 U.S.C. 3814a may receive travel and transportation allowances provided in 37 U.S.C. 404(c), 406(d) and 406(g) for members involuntarily released from active duty with readjustment pay, since the congressional intent was to treat such officers in the same manner as Reserve officers involuntarily released from active duty with readjustment pay 166

Retirement
To selected home
Personal expense requirement

Member, who on retirement traveled to his home of selection in Iran with wife on American flag commercial air carrier chartered by his new employer and who had $950 included in annual statement of earnings by employer as amount paid to third party for travel expenses, is not entitled to reimbursement of air travel expenses since that travel was not performed at personal expense as required by applicable regulations .. 761

Temporary duty
Hovercraft crossing of English Channel

Although there is no authority in current regulations under which full fare (including that part attributable to transportation of the automobile) for Hovercraft crossing of the English Channel may be paid incident to temporary duty travel of military personnel, it does not appear that payment of such full fare would be objectionable under appropriate regulations if travel by automobile, including transoceanic ferry service, is specifically authorized as advantageous to the Government since the transportation of the automobile may be considered as incident to authorized travel of the member in appropriate circumstances 1072

Miscellaneous expenses
Ambulance services

Employee, while on temporary duty, lost consciousness during a high-blood-pressure seizure. Ambulance expense for his transportation to hospital at temporary duty post is not reimbursable under Federal Travel Regulations 1080

Insurance premiums
Trip insurance
Operating vehicles in foreign countries

We are not required to object to reimbursement of Government employees for costs of "trip insurance" purchased while operating Government-owned or privately owned vehicles in foreign countries as "miscellaneous expense" covered by Federal Travel Regulations (FTR) (FPMR 101–7) para. 1–9.1d. However, we believe change in FTR specifically providing for such reimbursement would be desirable because present applicable FTR sections do not provide for payment for any kind of insurance on vehicles operated in foreign countries 1343

Government employee may be partially reimbursed for costs of insurance purchased on vehicle commercially leased on long-term basis to extent necessary for hire and operation of motor vehicles on German roads. Excess coverage not required by statute and regulation or by

TRAVEL EXPENSES—Continued
Miscellanous expenses—Continued
Insurance premiums—Continued
Trip insurace—Continued
Operating vehicles in foreign countries—Continued Page
industrial custom to enable commercial hire of vehicle and operation of vehicle on German roads is considered personal to employee and may not be certified for payment 1397
Official business
Military personnel
Requirement. (*See* **TRAVEL EXPENSES, Military personnel, Official business requirement**)
Participation in private conventions, etc.
Internal Revenue Service (IRS) proposal that it pay expenses of employee attending meetings and accept reimbursement directly from eligible tax exempt organizations, crediting such reimbursement to its own appropriation, is not authorized by applicable statutes. Provisions of 5 U.S.C. 4111 permit employee only to accept payments from eligible organizations, which payments are to be deducted from amounts otherwise due from employing agency. Moreover, in absence of specific authority to accept voluntary contributions or travel reimbursements, IRS would be required to deposit such funds into miscellaneous receipts of the Treasury by 21 U.S.C. 484 (1970) 1293
Overseas
Congressional committees. (*See* **CONGRESS, Committees, Travel expenses, Overseas**)
Overseas employees
Home leave
Dependents
Alternate locations
When dependents of employee are not permitted to accompany him to post of duty outside continental U.S., or in Hawaii or Alaska, and are transported to alternate location under authority of 5 U.S.C. 5725, employee is entitled to transportation expenses for those dependents incident to own entitlement to renewal agreement travel under 5 U.S.C. 5728(a) based on cost of travel between alternate location and employee's place of actual residence at time of appointment or transfer to post of duty 886
Renewal agreement travel
Notwithstanding Federal Travel Regulations (FPMR 101–7) para. 1–7.5, round-trip travel expenses of employee incident to vacation leave may be paid pursuant to FTR para. 2–1.5h(2)(b) because leave provisions of former paragraph, dealing with interruptions of official travel, are inapplicable to overseas tour renewal agreement travel which is governed by latter section 1035
Permanent change of station
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Personal
Official business requirement. (*See* **TRAVEL EXPENSES, Official business, Personal expenses**)

TRAVEL EXPENSES—Continued
Private parties
Attendants for handicapped honor award recipients
Travel to attend award ceremonies Page

Where handicapped employee selected to be honored under Govt. Employees Incentive Awards Program is unable to travel unattended because of his particular handicap and would otherwise be unable to attend award ceremony, travel expenses for attendant to accompany him in traveling to and from award ceremony may be paid by employing agency as "necessary expense" for honorary recognition of that particular employee under 5 U.S.C. 4503. 54 Comp. Gen. 1054, distinguished.. 800

Family members of honor awards recipients
Travel to attend award ceremonies

There is no authority for the Secretaries concerned to issue regulations authorizing the payment of travel and transportation expenses of dependents of civilian employees or military members to accompany such employees or members who are receiving honor awards, nor is there authority for the payment of travel and transportation expenses of such dependents to receive awards themselves..... 1332

Foreign delegations

Expenses incurred by international visitors and paid for by contract escort are not reimbursable on voucher form SF 1012 since each traveler is required to sign voucher to claim reimbursement for authorized travel expenses which he personally incurred in performance of his official travel. However, assuming that travel authorizations have been obtained, travel expenses may be claimed and paid on SF 1164 ("Claim for Reimbursement for Expenditures on Official Business") or SF 1034 ("Public Voucher for Purchases and Services other than Personal")..... 437

If multiple-person travel voucher would serve purpose of paying travel expenses incurred for foreign journalists touring U.S. under arrangements with U.S. Travel Service, Dept. of Commerce should seek approval by Administrator of GSA in accordance with para. 1–11.3a of Federal Travel Regs..... 437

Use of section 5, Administrative Expenses Act of 1946, authority

Decision B–166506, July 15, 1975, holding payment by EPA of transportation and lodging expenses of State officials attending National Solid Waste Management Association Convention is prohibited by 31 U.S.C. 551, unless otherwise authorized by statute, is affirmed. Provision of Administrative Expenses Act (5 U.S.C. 5703(c)), permitting payment of such expenses for persons serving Govt. without compensation does not provide necessary exception to 31 U.S.C. 551 since attendees at conference are not providing direct service to Govt. and are therefore not covered by 5 U.S.C. 5703(c)..... 750

Reemployment after separation
Liability for expenses
Two agencies involved

The relocation expenses prescribed under 5 U.S.C. 5724a(c) and 5724(e) may be paid by the gaining or losing agency to an employee separated by a reduction in force and reemployed within 1 year at another geographical location, as though the employee had been transferred in the interest of the Government without a break in service. However, the losing and gaining agency must agree as to which will be responsible for such costs..... 1338

TRAVEL EXPENSES—Continued
Return to official station on nonworkdays
Cost *v.* increased efficiency and productivity Page
Where agency after cost analysis determines that the costs of reimbursing employees who are required to perform extended periods of temporary duty for expense of periodically traveling between the temporary duty point and official station for nonworkdays is outweighed by savings in terms of employee efficiency and productivity, and reduced costs of employment and retention of such employees, the cost of authorized weekend return travel may be considered a necessary travel expense of the agency ---- 1291
Special conveyance hire
Advantage to Government determination
Since rental cars and taxicabs are considered special conveyances under FTR, constructive cost of local travel by such modes may not be included as constructive cost of common carrier transportation under FTR para. 1–4.3 for purpose of determining maximum reimbursement when for personal reasons privately owned conveyance is used in lieu of common carrier transportation. However, to extent such local travel is authorized, constructive cost of common carrier transportation (bus or streetcar) for such travel may be included or use of privately owned conveyance may be approved as being advantageous to Govt. and reimbursement determined on this basis ---- 192
Insurance
We are not required to object to reimbursement of Government employees for costs of "trip insurance" purchased while operating Government-owned or privately owned vehicles in foreign countries as "miscellaneous expense" covered by Federal Travel Regulations (FTR) (FPMR 101–7) para. 1–9.1d. However, we believe change in FTR specifically providing for such reimbursement would be desirable because present applicable FTR sections do not provide for payment for any kind of insurance on vehicles operated in foreign countries ---- 1343
Government employee may be partially reimbursed for costs of insurance purchased on vehicle commercially leased on long-term basis to extent necessary for hire and operation of motor vehicles on German roads. Excess coverage not required by statute and regulation or by industrial custom to enable commercial hire of vehicle and operation of vehicle on German roads is considered personal to employee and may not be certified for payment ---- 1397
State officials attending conventions, conferences, etc. (*See* **TRAVEL EXPENSES, Conventions, conferences, etc., Attendees, State officials**)
Temporary duty
Ambulance services
Employee, while on temporary duty, lost consciousness during a high-blood-pressure seizure. Ambulance expense for his transportation to hospital at temporary duty post is not reimbursable under Federal Travel Regulations ---- 1080
To receive non-Federally sponsored honor awards
The Secretaries concerned may issue regulations authorizing the payment of travel and transportation expenses of civilian employees of the Department of Defense and military members who travel on temporary duty to receive non-Federally sponsored honor awards provided

TRAVEL EXPENSES—Continued
Temporary duty—Continued
To receive non-Federally sponsored honor awards—Continued Page
such awards are determined in each case to be reasonably related to the duties of the employee or member and the functions and activities of the agency to which the recipient is attached. Travel to receive awards in which such determination cannot clearly be made is not travel on public (official) business and no authority exists for such travel at Government expense 1332
Transfers
Relocation expenses. (*See* OFFICERS AND EMPLOYEES, Transfers, Relocation expenses)
Separation and reappointment
Liability for expenses
Two agencies involved
The relocation expenses prescribed under 5 U.S.C. 5724a(c) and 5724(e) may be paid by the gaining or losing agency to an employee separated by a reduction in force and reemployed within 1 year at another geographical location, as though the employee had been transferred in the interest of the Government without a break in service. However, the losing and gaining agency must agree as to which will be responsible for such costs 1338
Vacation leave
Outside continental U.S.
While on vacation leave, employee traveled from Victoria, British Columbia, to Prince Rupert, British Columbia, by foreign bottom carrier. Althout such travel was not authorized, reimbursement may be made if otherwise proper since route was reasonable and no American vessel was available for travel 1035
Renewal agreement travel
Notwithstanding Federal Travel Regulations (FPMR 101–7) para. 1–7.5, round-trip travel expenses of employee incident to vacation leave may be paid pursuant to FTR para. 2–1.5h(2)(b) because leave provisions of former paragraph, dealing with interruptions of official travel, are inapplicable to overseas tour renewal agreement travel which is governed by latter section 1035
Vehicles
Use of privately owned
Mileage. (*See* MILEAGE, Travel by privately owned automobile)
Vouchers. (*See* VOUCHERS AND INVOICES, Travel)
Weekend return travel. (*See* TRAVEL EXPENSES, Return to official station on nonworkdays)
TREASURY DEPARTMENT
Foreign currency checks exchanged for American dollars
Requirements
Section 492a of 31 U.S. Code and Treasury regulations issued pursuant thereto permit exchange transactions of U.S. and foreign currency or instruments for certain categories of people for accommodation purposes or for official purposes. Employees of Vietnamese-American Association (VAA), a binational organization receiving United States

TREASURY DEPARTMENT—Continued Page

Foreign currency checks exchanged for American dollars—Continued

Requirements—Continued

Information Agency grants, received piaster checks from VAA. Employees were evacuated from Vietnam to the United States before checks could be converted to American dollars. General Accounting Office agrees that Treasury acted in accordance with regulations in now refusing to convert checks to American dollars 1308

Secretary of Treasury

Protection

Holding in 54 Comp. Gen. 624 that funds appropriated to Secret Service are not available for protection of Secretary of Treasury because authorizing legislation, 18 U.S.C. 3056(a), does not include Secretary among those entitled to protection, is reaffirmed. Administrative transfer to Secret Service of function of protecting Secretary does not, without more, make Secret Service appropriations available for that purpose 578

Secret Service agents

Protection for Secretary of Treasury

Reimbursable basis

Since purpose of 54 Comp. Gen. 624, to stop then unauthorized use of Secret Service funds for protection of Secretary of Treasury, has been achieved, Dept. apparently acted in good faith, and Congress has acquiesced in use of fiscal year 1976 Secret Service appropriation for protection of Secretary, no useful purpose would be served by requiring reimbursement of Secret Service appropriation from appropriation for Office of Secretary of Treasury for period from decision in 54 Comp. Gen. 624 until fiscal year 1976 578

UNIONS

Agreements

Wage increases

Wage board employees

Wage survey at Interior installation, commenced in time to be effective Feb. 4, 1973, was not effected until May 7, 1973, because wage board rates were set by labor-management negotiated agreement and there was question of union representation. Wage adjustment may not be effective retroactively since the provisions in 5 U.S.C. 5344 regarding the effective date of wage board pay adjustments are not applicable to labor-management agreements and no tentative agreement as to the effective date of the wage adjustment was made prior to May 7, 1973 ... 162

Arbitrator's award setting effective date for increase in wage rates at Yakima Project Office, Bureau of Reclamation, may be fully implemented where governing collective-bargaining agreement calls for arbitration of unresolved negotiation issues involving wage rates, and record is clear that impasse existed on date collective-bargaining agreement became effective, and that, on same date, it was clear that there would be substantial increase in wage rates. Agencies and unions may negotiate preliminary agreement setting effective date for wage increases before exact amount of increase is known; therefore, arbitrator may resolve same issue 1006

UNIONS—Continued
Agreements—Continued
Wage increases—Continued
Wage board employees—Continued Page

U.S. Information Agency and union negotiate wage rates for Radio Technicians at Voice of America. Agency and union agreed to conduct wage survey and implement wage schedule, but action was delayed while agency sought approval from Civil Service Commission. Agency and union may agree in advance to effective date of new schedule before amount of increase is determined. Thus, new wage rate may be implemented retroactively to date agreed upon 1428

Federal service
Arbitration services
Effect on administrative determinations

Collective-bargaining agreement provides that certain Internal Revenue Service career-ladder employees will be promoted effective the first pay period after 1 year in grade, but promotions of seven employees covered by agreement were erroneously delayed for periods up to several weeks. Since provision relating to effective dates of promotions becomes nondiscretionary agency requirement, if properly includable in bargaining agreement, General Accounting Office will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective dates but for failure to timely process promotions in accordance with the agreement 42

Interested parties
Bid protests

Even if labor union is assumed to be an "interested party," there is no indication that it submitted written comments during the course of protest proceedings. Therefore, its letter submitted after decision was rendered is not for consideration in connection with pending request for reconsideration of protest decision. Modified by 56 Comp. Gen. — (B–185302, Jan. 26, 1977) 1412

UNITED STATES INFORMATION AGENCY
Grant agreement with American-Vietnamese Association
Payments
Vietnam evacuees

Under grant agreement between United States Information Agency (USIA) and VAA, a binational organization operating in Vietnam, United States was to make payments to VAA in four annual installments. VAA employees were evacuated from Vietnam before they could be paid (or in case of 16, before piaster checks issued by VAA could be exchanged for American dollars). USIA may not now pay employees who are in United States directly from its appropriation, except to extent of final unpaid grant installment 1308

VEHICLES
Acquisition by purchase or transfer
For use by grantees

Acquisition by agencies of aircraft and passenger motor vehicles by purchase or transfer is prohibited by 31 U.S.C. 638a, unless specifically authorized by appropriation act or other law, and this prohibition

VEHICLES—Continued
Acquisition by purchase or transfer—Continued
For use by grantees—Continued Page
applies to acquisition by transfer by Law Enforcement Assistance Admin. of aircraft or passenger motor vehicles for use by grantees in their regular law enforcement functions because agency obtains custody and accountability and exception would reduce congressional control over aircraft and vehicles. See 44 Comp. Gen. 117 348
Government
Liability insurance
Foreign Government requirements
General Services Administration (GSA) may provide by regulation for purchase of annual or trip insurance policies on Government vehicles regularly or intermittently driven into foreign countries where requirements of law that insurance be carried or legal procedures which may result in extreme difficulties to Government employees when involved in an accident require such purchase. To the extent inconsistent, 39 Comp. Gen. 145, 19 *id.* 798, and similar cases are overruled 1343
Rental
Credit card use
Rental car agreement stating cost had been charged to personal credit card does evidence that employee incurred rental cost as a personal obligation and will be regarded as satisfying receipt requirements of FTR para. 1–11.3c(5) for purpose of reimbursing employee for cost of rental car. Credit card number need not be shown on invoice. From nature of transaction it must appear that Govt. could not be held liable for the expense in event of nonpayment of the obligation by employee 224
Pursuant to court decisions holding that liability protection of Truth in Lending Act for unauthorized use of credit cards extends to all credit cards, whether used for business or consumer purposes, Government is also protected under Act. *Equal Employment Opportunity Commission*, B–180512, May 17, 1974, 74–1 CPD 264, is overruled 1181
Insurance
We have no legal objection to deletion of restriction in FTR (FPMR 101–7) para. 1–3.2c against reimbursement of Government employees for purchase of additional insurance available on vehicles rented for use in foreign countries if GSA determines this is in best interests of Government. FTR are statutory regulations, and question of whether or not reimbursement for costs of additional insurance on rental vehicles should be permitted, is within discretion of agency authorized to promulgate the particular regulations involved 1343
Government employee may be partially reimbursed for costs of insurance purchased on vehicle commercially leased on long-term basis to extent necessary for hire and operation of motor vehicles on German roads. Excess coverage not required by statute and regulation or by industrial custom to enable commercial hire of vehicle and operation of vehicle on German roads is considered personal to employee and may not be certified for payment 1397

VEHICLES—Continued
Rental—Continued
Long-term basis
Temporary duty
Germany Page

The General Accounting Office will not object to reimbursement of Government employee for costs of vehicle leased by employee on long-term basis for period of temporary duty in Germany, in light of apparent official determination that long-term use of vehicles was necessary due to extensive travel required and that long-term lease of vehicles was more advantageous to Government than rental arrangement, cost and other factors considered 1397

VESSELS
Cargo preference. (*See* **TRANSPORTATION, Vessels, American, Cargo preference**)
Travel. (*See* **TRANSPORTATION, Vessels, Foreign**)

VETERANS
Compensation payments
Retired pay
Waiver

A retired Regular commissioned officer who accepts Federal civilian employment, and who immediately executes a waiver of retired pay pursuant to 38 U.S.C. 3105 in order to receive veterans' disability compensation, which award is administratively delayed but when granted by VA is made effective retroactively to date of waiver, has in effect reduced the legally authorized retired pay by the amount of the veterans' compensation; therefore, retired pay payments received by the member during the retroactive period must be adjusted under the dual compensation formula of 5 U.S.C. 5532 from the effective date of the waiver 1402

VETERANS ADMINISTRATION
Appropriations. (*See* **APPROPRIATIONS, Veterans Administration**)
Employees
Parking facilities. (*See* **VETERANS ADMINISTRATION, Parking facilities, Employees, etc.**)
Parking facilities
Employees, etc.

Where GSA pursuant to 40 U.S.C. 490(j) charges VA for parking space for use of employees, and related services, VA appropriations are available to pay such charges subject to 90 percent limitation contained in VA annual appropriations 897

VIETNAM
Evacuation
Foreign nationals
Propriety of expenditures

Seven funding limitation statutes prohibit use of appropriated funds for combat activity in Indochina. While legislative history of seven acts is not entirely clear respecting President's rescue power, there are some specific statements that such power is not restricted, and the overall intent of seven acts was to curtail bombing and offensive military action in Southeast Asia. Therefore, President's recent evacuation of Americans from Saigon did not conflict with such statutes 1081

VIETNAM—Continued
Evacuation—Continued
Foreign nationals—Continued
Propriety of expenditures—Continued Page

There is no significant support for constitutional presidential authority to rescue foreign nationals as such. However, in the case of Saigon evacuation, since decision to rescue foreign nationals was determined to be incidental to and necessary for rescue of Americans, General Accounting Office cannot say expenditure of fund for such evacuation was improper ---- 1081

Overtime claims by Defense Attache Office personnel in Saigon
Retroactive approval

Overtime performed by Defense Attache Office (DAO) personnel in Saigon during the period of Mar. 30, 1975, through Apr. 30, 1975, immediately prior to the evacuation of American personnel from South Vietnam, was approved by the Defense Attache on June 6, 1975, after the normal procedures for approval and payment of overtime had been modified. The compensation for overtime is mandatory where the work actually performed is officially ordered or approved ---- 402

The retroactive modification of a regulation requiring that overtime performed by DAO civilian personnel be specifically approved by DAO division chiefs or their designated representatives is permissible since the regulation modified was primarily designed to govern internal agency procedures rather than designed to benefit party by entitling him to either substantive benefit or procedural safeguard. Accordingly, if Major General Smith is authorized official to approve payment of overtime, his approval of June 6, 1975, is sufficient to allow payment of overtime as reported on time and attendance reports of DAO civilian personnel ---- 402

Undelivered checks issued to evacuees

Incident to evacuation of U.S. personnel and local national employees from Vietnam, employees turning in Vietnamese piasters were given receipts on the bases of which Treasury checks were subsequently issued. Checks for payees still in Vietnam were placed in special deposit account pursuant to 31 U.S.C. 123–128 for benefit of payees and may not be paid out to relatives in U.S. who claim power of attorney to receive proceeds ---- 1234

Vietnamese-American Association employees
Salaries
Appropriation availability

Under grant agreement between United States Information Agency (USIA) and VAA, a binational organization operating in Vietnam, United States was to make payments to VAA in four annual installments. VAA employees were evacuated from Vietnam before they could be paid (or in case of 16, before piaster checks issued by VAA could be exchanged for American dollars). USIA may not now pay employees who are in United States directly from its appropriation, except to extent of final unpaid grant installment ---- 1308

VOUCHERS AND INVOICES
Credit cards. (*See* **CREDIT CARDS**)
Travel
Expenses of international visitors
Paid by contract escort Page

Expenses incurred by international visitors and paid for by contract escort are not reimbursable on voucher form SF 1012 since each traveler required to sign voucher to claim reimbursement for authorized travel expenses which he personally incurred in performance of his official travel. However, assuming that travel authorizations have been obtained, travel expenses may be claimed and paid on SF 1164 ("Claim for Reimbursement for Expenditures on Official Business") or SF 1034 ("Public Voucher for Purchases and Services other than Personal")---------- 437

Multiple-person travel expenses
Use of authorized form
Waived or modified

If multiple-person travel voucher would serve purpose of paying travel expenses incurred for foreign journalists touring U.S. under arrangements with U.S. Travel Service, Dept. of Commerce should seek approval by Administrator of GSA in accordance with para. 1-11.3a of Federal Travel Regs---------- 437

WAIVERS
Debt collections. (*See* **DEBT COLLECTIONS, Waiver**)
Law Enforcement Assistance Administration guidelines
Efforts to obtain
Costs involved
Not recoverable

Proposal preparation costs claim by offeror, whose award selection was not approved by LEAA because it came under LEAA organizational conflict of interest guideline imposed as limitation on grantee procurements, is denied since rejection of proposal was not arbitrary or capricious. Allocated overhead directly related to offeror's efforts to obtain waiver of LEAA guideline is not recoverable in any case---------- 911

Military retired pay
Survivor Benefit Plan. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)
Regulations. (*See* **REGULATIONS, Waivers**)

WATER
Sale
Excess or surplus

Va hospital which has water filtration plant currently running at half its rated capacity may sell water to town of Perryville, Maryland recreational park, if VA administratively determines plant in ordinary course of business produces excess water and sale is in Govt.'s interest---------- 688

WHITE HOUSE
Executive Protective Service
Compensation
Increases

Under sec. 501 of D.C. Police and Firemen's Salary Act of 1958, as amended, officers and members of U.S. Park Police and Executive Protective Service (formerly White House Police) are entitled to same rates of compensation as those granted under that Act of Metropolitan

WHITE HOUSE—Continued
Executive Protective Service—Continued
Compensation—Continued
Increases—Continued Page
Police Force of D.C. By virtue of sec. 501, enactment of legislation by Council of D.C. increasing salaries of Metropolitan Police under 1958 Act will have effect of granting like increases to U.S. Park Police and Executive Protective Service until Congress otherwise provides..... 965
Police. (*See* **WHITE HOUSE, Executive Protective Service**)

WOMEN
Discrimination. (*See* **NONDISCRIMINATION, Sex discrimination elimination**)
Married
Use of maiden name on payrolls. (*See* **NAMES, Married women, Use of maiden names, Payrolls**)

WORDS AND PHRASES
Acclimatization rest
Granting of administrative leave to employee for acclimatization rest after he completed a full day of duty and traveled over 7 hours by air on return from Guam after crossing international date line is proper exercise of administrative authority. This is so since the CSC has not issued general regulations covering the granting of administrative leave and, therefore, each agency, under general guidance of decisions of Comptroller General, which are discussed in applicable FPM Supplement, has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate..... 510
Aero Club-owned aircraft
Government conveyance
The use of Aero Club-owned or Government-loaned aircraft is considered a Government conveyance when used as a mode of official travel but under current regulations such use will not take precedence over normal Government conveyance irrespective of whether use of the aircraft may be considered advantageous to the Government. See M4406-3 and M4405-2 of 1 JTR..... 1247
Alaska State Ferry System (Alaska Marine Highway)
Incident to permanent change of station Coast Guard member's privately owned vehicle was transported via Alaska State Ferry System from Juneau, Alaska, to Seattle, Washington. Member is entitled to such transportation at Govt. expense since "privately owned American shipping services," as used in 10 U.S.C. 2634 authorizing transportation at Govt. expense of a privately owned motor vehicle of member of armed force ordered to make permanent change of station, includes State-owned vessels..... 672
Alternate location
When dependents of employee are not permitted to accompany him to post of duty outside continental U.S., or in Hawaii or Alaska, and are transported to alternate location under authority of 5 U.S.C. 5725, employee is entitled to transportation expenses for those dependents incident to own entitlement to renewal agreement travel under 5 U.S.C. 5728(a) based on cost of travel between alternate location and employee's place of actual residence at time of appointment or transfer to post of duty..... 886

WORDS AND PHRASES—Continued

Page

Auction technique

If information in initial proposal(s) is improperly disclosed, giving one or more offerors competitive advantage, it is desirable to make award on basis of initial proposals, if possible, because conduct of negotiations and submission of best and final offers may constitute use of prohibited auction technique 1066

Bona fide mistake

In mistake in bid cases involving errors of omission, bidder's sworn affidavit outlining nature of error, its approximate magnitude and manner in which error occurred can constitute substantial evidence thereof. This fact does not, however, detract from agency's obligation to weigh all evidence so as to determine that bona fide mistake was committed 936

Breakout

Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs 1019

"Commercial item"

Use of indefinite delivery type of contract to procure advertising services is not improper since applicable regulations provide only that agencies may use basic ordering agreement for obtaining advertising services but do not preclude use of other contractual vehicles and since advertising services are a "commercial item." 1111

Counterpart funds

In absence of specific authorization in an appropriation act, 22 U.S.C.A. 1754(b) is the sole authority making counterpart funds (foreign currencies) available to members and employees of Congressional committees in connection with overseas travel. Under this provision, such funds are available only to specific committees, not including the House Select Committee on Aging, and to committees performing functions under 2 U.S.C.A. 190(d), which refers to *standing* committees but not *select* committees. Accordingly, members and employees of the House Select Committee on Aging are not authorized to use counterpart funds .. 537

Di minimus

Cases discussing withdrawal of bid due to mistake do not speak to materiality of mistake made but rather to whether mistake was honest one. Thus, where magnitude of mistake is not *de minimis* (between 1.6 percent and 3.2 percent of $11.8 million bid), withdrawal may be permitted 936

"Estimated cost"

Provision in cost-type indefinite quantity contract specifying that fee to be paid on each delivery order will be based on "costs being paid" does not render contract contrary to statutory prohibition against cost-plus-percentage-of-cost contracts since contract itself does not confer entitlement to payment and fee for actual delivery order is being based on "estimated cost" of each order 1111

Executive Protective Service (formerly White House Police)

Under sec. 501 of D.C. Police and Firemen's Salary Act of 1958, as amended, officers and members of U.S. Park Police and Executive

WORDS AND PHRASES—Continued

Executive Protective Service (formerly White House Police)—Continued Page

Protective Service (formerly White House Police) are entitled to same rates of compensation as those granted under that Act to Metropolitan Police Force of D.C. By virtue of sec. 501, enactment of legislation by Council of D.C. increasing salaries of Metropolitan Police under 1958 Act will have effect of granting like increases to U.S. Park Police and Executive Protective Service until Congress otherwise provides..... 965

Financing Institution

Govt. contractor's grant of security interest in accounts receivable to holding company alleged to be intermediary for bank's financing of contractor is not valid assignment under 31 U.S.C. 203, even if properly filed with Govt., since Govt. contract proceeds may be assigned only to financing institutions and holding company does not qualify as proper assignee..... 155

FLASH (Float On/Float Off Feeder LASH Vessel)

LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to port of Chittagong in Bangladesh contravenes the 1954 Cargo Preference Act because direct service to Chittagong is available by U.S.-flag breakbulk vessels and because special circumstances (here, geographic configuration of port precluding use of normal LASH unloading operations) cannot be used to circumvent the cargo preference laws.... 1097

Government-loaned aircraft

Government conveyance

The use of Aero Club-owned or Government-loaned aircraft is considered a Government conveyance when used as a mode of official travel but under current regulations such use will not take precedence over normal Government conveyance irrespective of whether use of the aircraft may be considered advantageous to the Government. See M4406–3 and M4405–2 of 1 JTR..... 1247

Hovercraft

Member who is authorized travel by privately owned vehicle (POV) as advantageous to the Government incident to temporary duty at various places in Switzerland and Germany away from his permanent duty station in London, England, is not entitled to reimbursement of full fare including charge for transportation of an automobile by Hovercraft from Dover to Calais and return; however, he may be reimbursed an amount reasonably representing that part of the fare attributable to personal travel. 49 Comp. Gen. 416, modified..... 1072

Interested party

In determining whether protester satisfies "interested party" requirement of GAO Bid Protest Procedures, consideration is given to nature of issues raised by protest and direct or indirect benefit or relief sought by protester. Accordingly, division of low bidder company whose bid was rejected, which would have corporate responsibility to perform if awarded contract, is "interested party" and may pursue formal protest.. 1467

WORDS AND PHRASES—Continued

Page

Interim financing loan

Transferred employee who obtains "interim financing loan" to be used as down payment on residence at new duty station, because residence at old duty station has not yet been sold, may not be reimbursed for any expenses relating to "interim financing loan." Prohibition in 5 U.S.C. 5724a, FTR and JTR, against reimbursement of any losses on sale of residence due to market conditions is sufficiently broad to preclude reimbursement here, since need for "interim financing loan" arises because of market conditions 679

Key component breakout

Agency's refusal to breakout key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs 1019

LASH (Lighter Aboard Ship)

LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to port of Chittagong in Bangladesh contravenes the 1954 Cargo Preference Act because direct service to Chittagong is available by U.S.-flag breakbulk vessels and because special circumstances (here, geographic configuration of port precluding use of normal LASH unloading operations) cannot be used to circumvent the cargo preference laws 1097

Leasebacks

While GSA proposed leaseback arrangements tentatively are approved, GAO recommends that GSA should continue to seek adequate ADP Fund capitalization to finance ADPE purchases. Furthermore, each proposed leaseback should be approved by GSA (no blanket delegation to agencies) and lease or purchase determinations should be made and documented before leasebacks are used 1012

Legal process

State of Washington sought to garnish pay of Air Force civilian employee to collect child support under authority of sec. 459 of P.L. 93-647 by means of administrative garnishment order served on Air Force Finance Officer. Air Force refused to effect garnishment on ground that administrative order was not "legal process" within meaning of statute. In light of purpose of statute and lack of any limiting language, we believe "legal process" is sufficiently broad to permit garnishment by administrative order under Washington procedure. GAO would not object to Air Force payments under State administrative order 517

Leveling

Series of specification changes and requests for new best and final offers did not cause technical "leveling" of proposals, which refers to unfair practice of helping offeror bring unacceptable proposal up to level of other adequate proposals through successive rounds of negotiations, since only two proposals under consideration were both regarded as acceptable throughout testing and evaluation period and proposal which

WORDS AND PHRASES—Continued
Leveling—Continued Page
protester regards as having been brought up to level of its proposal was regarded by agency as superior proposal---- 244
Mathematically unbalanced bids
As general rule, mathematically unbalanced bid—bid based on enhanced prices for some work and nominal prices for other work—may be accepted if agency, upon examination, believes IFB's estimate of work requirements is reasonably accurate representation of actual anticipated needs. But where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel IFB and resolicit, based upon revised estimate. B-161208, Aug. 8, 1967, modified---- 231
Mayaguez **crew**
Use of funds to make punitive bombing strikes, *i.e.*, those unrelated to protection of *Mayaguez* crew being rescued or forces protecting crew would appear to be in contravention of seven funding limitation statutes. However, Executive branch testimony indicates that bombing strikes were related to the rescue operation---- 1081
Mayaguez **rescue**
Section 3 of War Powers Resolution requires the President to consult with Congress before and during introduction of U.S. Armed Forces into hostilities or situations clearly indicating imminent hostilities. Legislative history of section 3 is clear that requirement is not satisfied by token statement of actions intended to be taken. While evidence in hearings subsequent to *Mayaguez* rescue suggests President merely informed Congress of decisions already made, requirements of section 3 are not sufficiently definitive to establish violation in present circumstances---- 1081
Prima facie **case in support of error**
Where bidder seeks to withdraw its bid based upon alleged error and furnishes evidence to make *prima facie* case in support of error, i.e., substantially establishes error, for Govt. to make award it must virtually show that no error was made or that claim of error was not made in good faith. Therefore, upon ultimate determination that bona fide error was committed, withdrawal is permissible---- 936
Realism of proposed costs
Agency's cost evaluation of proposals is not subject to objection where agency's determination of realism of proposed costs is supported by reasonable basis, even though agency essentially relies on information contained in proposals rather than seeking independent verification of each item of proposed costs, since extent to which proposed costs will be examined is matter for agency---- 1111
Renewal agreement travel
When dependents of employee are not permitted to accompany him to post of duty outside continental U.S., or in Hawaii or Alaska, and are transported to alternate location under authority of 5 U.S.C. 5725, employee is entitled to transportation expenses for those dependents incident to own entitlement to renewal agreement travel under 5 U.S.C. 5728(a) based on cost of travel between alternate location and employee's place of actual residence at time of appointment or transfer to post of duty---- 886

WORDS AND PHRASES—Continued

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Source selection

Source selection authority's conclusion that protester's lower target and ceiling prices for fixed price incentive contract offered little in way of advantages to Government and were not sufficiently significant to overcome selected firm's superiority in technical and operations area is supported by record and is consistent with evaluation criteria which gave more weight to technical and operations area. Protester's contention that negotiations were not conducted in compliance with 10 U.S.C. 2304(g) is denied 1450

Technical leveling

Series of specification changes and requests for new best and final offers did not cause technical "leveling" of proposals, which refers to unfair practice of helping offeror bring unacceptable proposal up to level of other adequate proposals through successive rounds of negotiations, since only two proposals under consideration were both regarded as acceptable throughout testing and evaluation period and proposal which protester regards as having been brought up to level of its proposal was regarded by agency as superior proposal 244

Term appointment

Employee who was separated by RIF by NASA and employed after break in service of less than 1 month by term appointment with HEW, may be reimbursed expenses of selling house at NASA duty station since term appointment with HEW was "nontemporary appointment" and eligibility for relocation expenses arose under that section incident to RIF by NASA and employment by HEW 664

Transoceanic ferry service

Although there is no authority in current regulations under which full fare (including that part attributable to transportation of the automobile) for Hovercraft crossing of the English Channel may be paid incident to temporary duty travel of military personnel, it does not appear that payment of such full fare would be objectionable under appropriate regulations if travel by automobile, including transoceanic ferry service, is specifically authorized as advantageous to the Government since the transportation of the automobile may be considered as incident to authorized travel of the member in appropriate circumstances 1072

Trip insurance

We are not required to object to reimbursement of Government employees for costs of "trip insurance" purchased while operating Government-owned or privately owned vehicles in foreign countries as "miscellaneous expense" covered by Federal Travel Regulations (FTR) (FPMR 101–7) para. 1–9.1d. However, we believe change in FTR specifically providing for such reimbursement would be desirable because present applicable FTR sections do not provide for payment for any kind of insurance on vehicles operated in foreign countries 1343

WORDS AND PHRASES—Continued

Twenty-five mile point Page

Agency may issue regulations limiting the mileage allowable to an employee traveling to and from his residence where his residence is outside the limits of his headquarters to the distance between the origin or destination of his trip and a point not exceeding 25 miles from the corporate limits of his official duty station measured in the direction of his residence (25-mile point). However, where employee maintains residence at headquarters from which he commutes daily to work and another residence 103 miles away which he visits on weekends, when traveling from airport after official trip, he is entitled to mileage from airport to residence at headquarters 1323

Unbalanced bids

As general rule, mathematically unbalanced bid—bid based on enhanced prices for some work and nominal prices for other work—may be accepted if agency, upon examination, believes IFB's estimate of work requirements is reasonably accurate representation of actual anticipated needs. But where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel IFB and resolicit, based upon revised estimate. B–161208, Aug. 8, 1967, modified .. 231

White House Police (changed to Executive Protective Service)

Under sec. 501 of D.C. Police and Firemen's Salary Act of 1958, as amended, officers and members of U.S. Park Police and Executive Protective Service (formerly White House Police) are entitled to same rates of compensation as those granted under that Act to Metropolitan Police Force of D.C. By virtue of sec. 501, enactment of legislation by Council of D.C. increasing salaries of Metropolitan Police under 1958 Act will have effect of granting like increases to U.S. Park Police and Executive Protective Service until Congress otherwise provides 965

"Win" Program

Protests against award of contracts because possible competitive advantages may accrue to competitors availing themselves of "WIN" program (providing for limited wage rate reimbursement and tax benefits for hiring and training of welfare recipients) are denied since matter is conjectural and any competitive advantages would not result from preferential or unfair treatment by Govt. While possible ramification of WIN program might be inconsistent with one purpose of Service Contract Act of 1965, program is not contrary to any provision of Act 656

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