Decisions of
The Comptroller General
of the United States

VOLUME 59 Pages 189 to 236

JANUARY 1980

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300114500

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1980

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price $1.50 (single copy) ; subscription price : $17 a year ; $21.25 for foreign mailing.

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Milton J. Socolar

DEPUTY GENERAL COUNSEL

Harry R. Van Cleve

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Seymour Efros

John J. Higgins*

Richard R. Pierson

*Retired Jan. 11, 1980.

TABLE OF DECISION NUMBERS

	Page
B-92288, Jan. 25	228
B-170675, Jan. 15	209
B-192470, Jan. 24	225
B-193037, Jan. 15	213
B-193552, Jan. 11	195
B-193772, Jan. 22	219
B-194252, Jan. 14	203
B-194375, Jan. 23	223
B-194799, Jan. 14	207
B-195204, Jan. 22	221
B-195272, Jan. 29	232
B-195288, Jan. 29	235
B-195589, Jan. 4	189
B-195691, Jan. 8	192
B-196652, Jan. 11	200
B-196794, Jan. 17	218
B-197292, Jan. 15	215

Cite Decisions as 59 Comp. Gen.—.

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

[B-195589]

Bids — Late — Evidence of Late Receipt — Time/Date Stamp — Conflict With Other Evidence

Bid was not late because evidence clearly shows it arrived by certified mail at the Government office designated in solicitation for receipt of bids (bid opening room) before bid opening but was not time/date stamped until after bid opening. Exemption in late bid clause for bid arriving late because of Government mishandling after receipt of bid at Government installation has no application to case.

Bids — Late — Time of Receipt Determination — Evidence to Establish

Where issue involves whether bid arrived on time in designated office before bid opening, all evidence in the record, aside from that furnished by bidder, may be considered.

Matter of: Lockley Manufacturing Co., Inc., January 4, 1980:

Lockley Manufacturing Co., Inc. (Lockley), protests the consideration of Gayston Corporation's (Gayston) lower bid under invitation for bids (IFB) N00104-79-B-0631, issued by the Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania (SPCC). For the following reason, we deny the protest.

Gayston's bid was stamped as received in the bid opening room at 11:56 a.m. June 25, while bid opening was scheduled for 11:15 a.m. on that date. Lockley argues that, under the Defense Acquisition Regulation (DAR), the time/date stamp is the only acceptable evidence to establish the time of receipt at the installation or bid opening room. Lockley maintains that there is no other documentary evidence establishing that the Gayston bid arrived at the installation before bid opening and, therefore, Gayston's bid is late and cannot be considered for award.

The Navy submits that the evidence in the record conclusively shows that the Gayston bid was physically in the designated office before bid opening and, therefore, is not a late bid. Thus, the Navy maintains that our inquiry is not confined to documentary evidence such as the time/date stamp but that all other evidence may be considered to show that the Gayston bid was not late. We agree.

Defense Acquisition Regulation (DAR) § 7-2002.2 (1976 ed.) delineates the conditions for consideration of late bids. It provides:

(a) Any bid received at the office designated in the solicitation *after* the exact time specified for receipt will not be considered unless it is received before award is made and either:

* * * * * * *

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

* * * * * * *

(c) The only acceptable evidence to establish

* * * * * * *

(ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation. [Italic supplied.]

Where a bid arrives in the office designated in the IFB for receipt *after* bid opening, before we can consider the question of Government mishandling, the time of receipt at the installation must be established. *B. E. Wilson Contracting Corp.*, 55 Comp. Gen. 220 (1975), 75–2 CPD 145. The regulation provides and we have consistently held that the only acceptable evidence of receipt at the Government installation is the time/date stamp or other documentary evidence of receipt maintained by the installation. *See, e.g., B. E. Wilson Contracting Corp., supra; Lambert Construction Company*, B–181794, August 29, 1974, 74–2 CPD 131.

In this case, however, the question is not whether a late bid was mishandled after its receipt at the Government installation. (The Navy states that the Gayston bid was not mishandled prior to its receipt in the bid opening room.) The issue here is whether or not Gayston's bid was received late in the designated office. *See Building Maintenance Corporation*, B–196081, November 27, 1979, 79–2 CPD 374; *Daymar, Inc.*, B–188701, August 8, 1977, 77–2 CPD 88; B–171322, December 23, 1970.

In this situation, therefore, we are not constrained, as the protestor maintains, by the strict evidentiary requirements of the DAR provision quoted above, *i.e.*, "time/date stamp or other documentary evidence." *See Building Maintenance Corporation, supra.* Our primary objective, however, is to maintain the integrity of the competitive bidding system "to prevent opportunities for fraud or undue advantage which might be obtained if bidders could submit their bids after the time set for bid opening." 40 Comp. Gen. 709, 710–711 (1961). We believe, therefore, that we may consider all of the evidence in the record, aside from that furnished by the bidder, to establish whether the Gayston bid was in the designated office before bid opening. *See Building Maintenance Corporation, supra; Adrian L. Merton, Inc.*, B–190982, May 9, 1978, 78–1 CPD 351; *Free State Builders, Inc.*, B–184155, February 26, 1976, 76–1 CPD 133.

In *Adrian L. Merton, Inc., supra*, a case analogous to the situation here, a mailed bid not sent registered or certified was discovered in the *designated office* one-half hour after bid opening. We concluded that the evidence failed to show conclusively *how* and *when* the bid was placed in the unsorted mail delivered prior to bid opening, because no individual at the installation could personally attest to these facts. The clerk who sorted this mail left the designated office (procurement branch) shortly before bid opening, leaving the mail unattended until she returned from the bid opening. Thus, we held that the bid was late and could not be considered for award under the DAR mishandling exception.

In this case, the IFB designated the bid opening room at the place for receipt of bids. In a sworn affidavit, the bid opening clerk states that she was in the bid room (office designated in the IFB) from the time it opened until the close of business, the registered and certified mail was delivered to the bid opening room at approximately 11 a.m., that no other registered or certified mail was delivered to the bid room on June 25, that she signed the mail receipt form and began to time/stamp the mail. At 11:15 a.m., the time scheduled for bid opening, the clerk put this mail aside in order to conduct formal bid opening. Subsequent to the bid opening, the remaining registered and certified mail, including the Gayston bid and the protester's acknowledgment of amendment 3 was time/date stamped as received at 11:56 a.m. The clerk affirmatively states that the Gayston bid was in the bid room before bid opening.

We believe that the facts of this case are distinguishable from those in *Adrian L. Merton, Inc.*, *supra*, and clearly establish that Gayston's bid arrived in the designated office/bid opening room before bid opening with other mail and remained in the exclusive control of the Government.

Gayston's bid was sent by certified mail only 4 rather than 5 days before big opening and therefore could not, in any event, be considered under an exemption in the late bid clause for certified mail sent 5 days prior to bid opening. The statement of the bid opening clerk establishes that all certified and registered mail received on June 25, including the Gayston bid, was delivered to the bid/designated office before the 11:15 bid opening and that no other delivery of such mail was made after that time on that date. In this connection, a record and receipt form prepared by the installation mail clerk prior to delivery to the bid room was signed by the bid opening clerk. This log lists the registered number of each piece of mail received and the sender. In this case, it shows the certified mail number of the Gayston bid and therefore proves that the bid was received along with other mail delivered to the bid room on the bid opening date. Precisely at 11:15 a.m. the door to the bid opening room was locked and access to the bid room was restricted. The mail in the bid room was not removed from the clerk's sight, although Gayston's bid was not identified as such before 11:15

because the clerk had to stop sorting and stamping the mail in order to proceed with the 11:15 bid opening. As a result, Gayston's bid and the protester's acknowledgement of an amendment were time/date stamped in the bid room at 11:56 a.m.

It is clear that Gayston's bid was received in the bid room prior to bid opening time and that the time/date stamp on the bid envelope as well as the time/date stamp on the protester's amendment acknowledgment do not reflect the time of actual receipt in the bid room.

The protest is therefore denied.

[B-195691]

Quarters Allowance — Basic Allowance for Quarters (BAQ) — Assigned to Government Quarters — Member On Sea Duty— Regulation Requirements — Coast Guard

An amendment to Executive Order 11157 by Executive Order 12094 redefined sea duty for basic allowance for quarters (BAQ) purposes; however, the amendment did not affect the Secretaries of the armed services' authority to issue supplemental regulations not inconsistent with the Executive orders. A Coast Guard member contends that he is entitled to receive BAQ in light of the new definition, while on sea duty for over 3 months, during which he spent a few days on shore. Since the claimant would not be entitled to receive BAQ under the supplemental regulations issued by the Coast Guard and since those regulations rationally effectuate 37 U.S.C. 403(c), which prohibits payment of BAQ to member without dpendents who is on sea duty for 3 months or more, and the Executive orders, the claim is denied.

Matter of: Lieutenant William R. Miller, USCGR, January 8, 1980:

The issue is whether a member of the United States Coast Guard is entitled to receive payment of basic allowance for quarters (BAQ) as a member without dependents for the period he was deployed from his permanent duty station and was assigned to temporary additional duty (TAD) on board a United States vessel. For the reasons stated below BAQ at the without dependent rate may not be authorized for the period in question.

The question was presented by letter from Mr. E. J. Rowe, Authorized Certifying Officer, United States Coast Guard, and was assigned Control No. ACO-CG-1330, by the Department of Defense Military Pay and Allowance Committee.

Lieutenant William R. Miller, United States Coast Guard Reserve, is attached to the Polar Operations Division permanently stationed at the Coast Guard Aviation Training Center, Mobile, Alabama. As part of his duties with the Polar Operations Division he is routinely deployed on TAD to a vessel for extended periods of time. In the present situation, he was deployed, as a member of a helicopter detachment, on TAD to the United States Coast Guard Cutter Glacier and any such place as directed by the Commanding Officer of the Glacier. The approximate duration of this duty was 150 days. While the Glacier was operating in Antarctica, Lieutenant Miller received further TAD orders to McMurdo Station, Antarctica. Except for the travel time to and from Mobile, during the period in question (November 8, 1978—April 11, 1979) Lieutenant Miller served on board the *Glacier* except for three short periods of 2 to 4 days at McMurdo Station. During the period of his duty on board the *Glacier* and at McMurdo station he was furnished Government quarters.

While Lieutenant Miller is at his permanent duty station, Mobile, he is entitled to receive BAQ at the without dependent rate since suitable Government quarters are not available for him there. 37 U.S.C. 403 (1976). Every time he leaves Mobile on this type of TAD assignment, however, his BAQ is terminated pursuant to 37 U.S.C. 403(c), since he is then considered to be on sea duty for a period of 3 months or more.

Lieutenant Miller argues that this is a hardship on him, a member without dependents, since he is purchasing a house at his permanent station which he bears the expense of maintaining whether or not he is on TAD. The financial burden on him increases when his BAQ is reduced to the partial rate during his TAD (sea duty) periods.

However that may be, BAQ is an allowance which is ordinarily only paid in lieu of furnishing a member Government quarters and may not be paid to a member without dependents who is on sea duty for 3 months or more.

Section 403(c) of title 37, United States Code, provides in part that a member of a uniformed service without dependents is not entitled to BAQ while he is on sea duty. It further provides that duty for a period of less than 3 months is not considered to be sea duty. Section 403(g) of that title authorizes the President to prescribe regulations for the administration of section 403, including definition of the words "sea duty." Pursuant to that authority, the President, in section 401(c) of Executive Order No. 12094, 3 C.F.R. 251, 252 (1979), amending section 401(c) of Executive Order No. 11157, 29 Fed. Reg. 973 (1964), defined the term sea duty for BAQ purposes as meaning service performed by either an officer or enlisted member in a self-propelled vessel that is in active status, in commission or in service and is equipped with berthing and messing facilities.

Thus, the underlying issue is whether Lieutenant Miller was on sea duty during the entire time period in question. Lieutenant Miller contends that he was not and is therefore entitled to receive BAQ for this time period. His argument is based on the reasoning that he was not on sea duty, as defined in the above Executive order, for more than 3 continuous months. In other words, he contends every time he left the *Glacier* to perform duty ashore at McMurdo station the 3-month period in 37 U.S.C. 403(c) was broken since he was no longer performing service in a self-propelled vessel. To complete the argument, Lieutenant Miller contends that a new 3-month period commenced every time he returned to temporary duty aboard the vessel.

As indicated above, Executive Order No. 12094 amended Executive Order No. 11157 with regard to the payment of BAQ and the definition of sea duty. Section 407 of Executive Order No. 11157, however, authorizes the Secretaries of the uniformed services to prescribe such supplementary regulations not inconsistent with the Executive order as may be deemed desirable and necessary for carrying out the regulations. While Executive Order No. 12094 amended Executive Order No. 11157, it did not affect the Secretaries' authority to issue regulations.

Supplemental regulations of the Coast Guard are contained in Volume 2, Section B, of the Coast Guard Comptroller Manual. Table 2B0130–2, rule 5 of the Manual, provides that when a member is on sea duty and during such period his permanent duty station remains unchanged then BAQ accrues if such duty is TAD of less than 3 months and the member was entitled to BAQ at his permanent station prior to departure for such duty. Note 4 to rule 5 provides, however, that if the TAD extends for a period of 3 months or more then BAQ is not payable for any portion of such period. Under the above regulation Lieutenant Miller would not be entitled to BAQ since he was on sea duty and such duty was TAD which extended for a period of more than 3 months.

In order for Lieutenant Miller to be entitled to receive BAQ, therefore, it must be found that the above regulation is inconsistent with either 37 U.S.C. 403(c) or Executive Order No. 12094. The regulation cannot be said to be inconsistent with the statute since it is implementing the 3-month rule laid down by the statute. Nor is the regulation inconsistent with the new definition of sea duty found in Executive Order No. 12094, which no longer ties sea duty for BAQ purposes to payment of sea duty pay. See: Executive Order No. 11157, section 401(c). Absent any indication to the contrary, it cannot be said that the amendment was intended to allow the payment of BAQ in the present situation. This is especially true in light of the fact that Congress, in passing 37 U.S.C. 403(c), intended that BAQ not be paid to any member assigned to sea duty for more than 3 months. While during his approximately 5-month assignment to the *Glacier* Lieutenant Miller performed duties for a few days on shore, the vast preponderance of his duty was performed in the *Glacier*. We believe the Coast Guard has properly classified his TAD during this period as sea duty for over 3 months. Compare 27 Comp. Gen. 432, 436 (1948).

In our view the Coast Guard regulation is in accord with the language of and rationally effectuates 37 U.S.C. 403(c) and Executive Orders Nos. 11157 and 12094. Accordingly, we conclude that Lieutenant Miller is not entitled to BAQ for the time period he claims.

If payment of BAQ to members in the described situation is considered desirable by the Coast Guard, the matter should be presented to Congress for enactment of authorizing legislation.

[B-193552]

Contracts—Mistakes—Subcontractor's Error

Relief for mistake in bid alleged after award can be granted where supplier quoted bidder erroneous price if contracting officer should have been on notice of possibility of mistake in bid.

Contracts—Awards—Validity—Failure to Verify Bid Mistake

Contracting officer is on constructive notice of probability of error in bid which is more than 25 percent below next lowest bid, 42 percent below average of the next three bids which are within close range, and more than 28 percent below Government estimate. Therefore, contracting officer's acceptance of bid without seeking verification in bid does not result in valid and binding contract.

Contracts—Default—Reprocurement—Defaulted Contractor Low Bidder—Price Higher Than on Defaulted Contract

Where agency rejects bid from defaulted contractor on reprocurement contract because bid price exceeds defaulted contract price, subsequent finding by General Accounting Office that initial contract was not binding on contractor because of contracting officer's failure to seek verification of bid price does not render improper rejection of reprocurement bid since at time of rejection agency had reasonable basis for its action.

Matter of: MKB Manufacturing Corporation, January 11, 1980:

MKB Manufacturing Corporation (MKB), a defaulted contractor under contract number N60921–77–C–0206 (–0206) issued by the Naval Surface Weapons Center, White Oak (Weapons Center), protests the award of a reprocurement contract to any other bidder under invitation for bids (IFB) number N60921–79–B–0002 (–0002). The procurements involve the purchase of base couplings which are essential components of a firing device. MKB also claims a mistake in bid under the defaulted contract. We allow MKB's mistake in bid claim and deny its protest for the reasons stated below.

BACKGROUND

The solicitations for both contracts provided that a single award would be made for the entire quantity being procured. For contract -0206, MKB submitted a bid of $50,037.70. In addition to an amount for item 1 (10 first articles), MKB bid $8.23 for each of the 5,990 production units. The other bids, in total and for the production quantity, were as follows:

	Total bid	Unit price item 2
Eastern Manufacturing Corp	$66, 689. 50	$11. 05
Hamilton Associates, Inc	69, 180. 00	11. 53
Ram Enterprises, Inc	77, 844. 50	12. 96
Alton Iron Works	120, 500. 50	19. 95
Sentinel Manufacturing Corp	321, 465. 00	53. 50

The Government estimate for the entire quantity was $70,000. On September 9, 1977, the contracting officer awarded contract -0206 to MKB without requesting verification of MKB's bid.

MKB, through counsel, first alleged a mistake in bid in a telephone conversation with the contracting officer on September 26, 1977, confirmed by a letter dated October 20, 1977. MKB alleged that prior to submitting its bid it received from a subcontractor an erroneous oral quotation. MKB used the quote, $0.175 per unit for gold plating, in calculating its price for item 2. After the award, the subcontractor sent MKB a written confirmation of its oral quotation dated September 14, 1977, indicating a unit price of $1.75, not $0.175. Pursuant to Defense Acquisition Regulation (DAR) § 2-406.4(b) (1976 ed.), pertaining to corrections of mistakes in bids, MKB requested that the contract be reformed and the contract price increased by $9,420.00 to reflect MKB's increased costs.

Because MKB encountered difficulties in performing the contract, the contracting officer, under the default provisions of the contract, sent MKB a show cause letter on October 18, 1977. See DAR § 7-103.11. Therefore, on October 28, 1977, MKB withdrew its request for reformation and requested rescission under DAR § 2-406.4. MKB later indicated its willingness to withdraw the request for rescission if the Navy would agree to reform the contract.

The contracting officer recommended reformation of the contract based upon the contractor's mistake in bid and the contracting officer's failure to notice a significant deviation between MKB's bid and the prices offered by other bidders. However, the final determination reached by the Deputy Commander, Procurement Management, Naval Supply Systems Command, on July 28, 1978, denied MKB's mistake in bid claim on the basis that the disparity between oral and written quotations discovered after award is outside the scope of existing remedies for mistakes in bids.

On three occasions, MKB delivered first articles which failed to meet first article approval under the contract, and on October 5, 1978, its contract was terminated for default. MKB appealed the default termination to the Armed Services Board of Contract Appeals (ASBCA) and claimed the costs of constructive changes in the contract resulting from allegedly defective specifications. The appeal is still before the ASBCA.

After the default determination, the contracting officer decided to formally advertise the reprocurement and issued IFB -0002 on October 26, 1978. Although MKB was the low bidder, at $77,091.30, the contracting officer determined that award to MKB would be improper. This determination was based on our decision in *PRB Uniforms, Inc.*, 56 Comp. Gen. 976 (1977), 77-2 CPD 213, in which we held that:

> * * * a repurchase contract may not be awarded to the defaulted contractor at a price greater than the terminated contract price, because this would be tantamount to modification of the existing contract without consideration. 56 Comp. Gen. at 978.

The Navy awarded a contract to the second low bidder, Hamilton Associates, Inc. (Hamilton), on March 23, 1979.

MISTAKE IN BID CLAIM

MKB requests that we "* * * review a determination by the Naval Supply Systems Command regarding a mistake in bid claimed by MKB in the previously terminated contract." MKB's attempt to recover the cost of changes due to allegedly defective specifications does not preclude it from filing this mistake in bid claim. *Bromley Contracting Co., Inc.*, B-189972, February 8, 1978, 78-1 CPD 106. Neither does the pendency of the appeal before the ASBCA. 53 Comp. Gen. 167 (1973).

In denying MKB's request for relief, the Navy concluded that there was not clear and convincing evidence of a mistake for which relief could be granted under the mistake in bid rules. The Navy found "that MKB [did not intend] to bid anything other than what was bid" and that MKB would have confirmed its bid had it been requested to do so, so that MKB "cannot reasonably contend that the contracting officer should have been on notice of a possible mistake." We do not agree.

Errors made by a bidder's supplier or subcontractor are cognizable under the mistake in bid procedures even though, in a technical sense, the bid initially submitted to the contracting agency is what the bidder intended to submit since at the time the bidder was unaware of the supplier's error. *See Finast Metal Products, Inc.*, B-179915, May 3, 1974, 74-1 CPD 224; *see also Robert E. McKee, Inc.*, B-181872, November 5, 1974, 74-2 CPD 237; B-169901, June 19, 1970. As we said in *Robert E. McKee, Inc.*, *supra*, "the fact that the mistake in bid is found in erroneous quotations from suppliers is not a bar to relief." Recognizing this, we believe there is clear and convincing evidence that the claimed mistake was made, since MKB's bid worksheet shows gold plating computed at $0.175 unit while the confirming written subcontractor quotation was $1.75 per unit.

The general rule, of course, is that the responsibility for the preparation of a bid rests with the bidder. Therefore, a bidder who makes a mistake in a bid which has been accepted in good faith by the Government must bear the consequences of it unless the mistake was mutual or the contracting officer had either actual or constructive notice (the contracting officer either knew or should have known) of the mistake prior to award. *J.B.L. Construction Co., Inc.*, B-191011, April 18, 1978, 78-1 CPD 301.

Since in this case the mistake was not mutual and the contracting officer did not have actual knowledge of it prior to award, the question is whether the contracting officer was on constructive notice of the mistake prior to award. DAR § 2-406.1 provides that where the contracting officer has reason to believe a mistake may have been made, he must request vertification of the bid from the bidder. Our Office has held that no valid and binding contract is consummated if the contracting officer should have known of the probability of error, and neglected to seek verification of the bid prior to award. *Cargill, Inc.*, B-190924, January 17, 1978, 78-1 CPD 43.

The contracting officer believes that she was on constructive notice of MKB's mistake because of the more than a 25 percent difference between MKB's low bid and the next lowest bid. Her superiors do not agree, arguing that bids 25 percent lower than the next low bids are often accepted without verification and that the resulting contracts are not legally objectionable on that basis.

It is true that bid disparities ranging from 5 to 38 percent may be insufficient, *standing alone*, to charge a contracting officer with constructive notice of a possible mistake. *See*, *e.g.*, *Paul Holm Co.*, B-193911, May 2, 1979, 79-1 CPD 306. Here, however, there are additional factors which when considered with the 25 percent difference, should have placed the contracting officer on notice of a possible error in MKB's bid. Those factors include an approximately 42 percent difference between MKB's bid and the average of the next three low bids which were within a narrow range. The second and third bids were within a very narrow range of less than 4 percent, and the second through fourth bids were in a range of less than 14 percent. (After the fourth bid there was a sharp departure from the reasonable progression of bids.) We have recognized that such a bidding range is a factor in determining whether a contracting officer was on constructive notice of an error. *Philadelphia Corrugated Container Co.*, B-194662, May 24, 1979, 79-1 CPD 375.

In addition, there was a significant disparity between the Government estimate and the prices bid. MKB's bid was 28 percent below the Government estimate while all other bids were within 5 percent of the estimate or exceeded it. This too is indicative of constructive notice. *See Williams & Co.*, 57 Comp. Gen. 159 (1977), 77-2 CPD 506; *Charles E. Weber & Assoc.*, B-186267, May 12, 1976, 76-1 CPD 319.

Although the Navy suggests that even if the contracting officer had asked MKB to verify its bid, the mistake would not have been detected and MKB would have verified its bid, this possibility does not excuse the contracting officer's duty to seek verification of the bid once she was on notice of a possible error. *See, e.g., Y. T. Huang and Associates, Inc.*, B-192169, December 22, 1978, 78-2 CPD 430 (where we allowed a post-award mistake claim even though it appears that the bid there too might well have been verified had the contracting officer made a proper verification request). Moreover, while here MKB might have verified its bid had it been asked, it also might have checked with its supplier and learned of the error. In short, the validity of a post-award mistake in bid claim is based not on what the bidder might have done upon receipt of a verification request, but on whether the contracting officer adequately discharged the verification duty.

Here, we agree with the contracting officer that she failed in her verification duty. Consequently, MKB is entitled to appropriate relief. *See Vogard Printing Corp.*, B-186126, April 20, 1976, 76-1 CPD 268.

BID PROTEST

MKB protests rejection of its bid on the reprocurement contract on the basis that defective specifications in the defaulted contract should excuse its nonperformance. The Navy rejected MKB's bid because it was higher than the defaulted contract price. Although we hold that MKB is entitled to relief in light of the contracting officer's error, we believe that at the time the reprocurement contract was awarded the Navy had a reasonable basis to consider MKB's bid ineligible for award under *PRB Uniforms, supra.* Therefore, we will not legally object to the rejection of MKB's bid.

[B-196652]

National Guard — Civilian Employees — Technicians — Extended Details — Retroactive Promotion

National Guard technicians, whose positions as Aircraft Mechanics, WG-10, were prevailing rate positions in excepted service, filed claims for retroactive temporary promotion and backpay under *Turner-Caldwell* line of decisions alleging improperly extended details to positions as Aircraft Mechanics (Crew Chief), WG-12. Although the positions in question are beyond the scope of coverage set forth in section 8-2, subchapter 8, chapter 300, Federal Personnel Manual, claims may be independently evaluated and adjudicated where nondiscretionary agency regulation extends coverage of FPM detail provisions to National Guard technicians in hourly wage pay plan positions.

Matter of: Jose Lujan, et al. — retroactive temporary promotion and backpay, January 11, 1980:

This decision is in response to the request of Mr. Jose Lujan, and 17 additional claimants who are similarly situated, for reconsideration of their claims for retroactive temporary promotion and backpay which were disallowed by our Claims Division on November 22, 1978.

Although the specifics of individual claims vary, in general the 17 technicians claim that while occupying the positions of Aircraft Mechanic, WG-10, in the New Mexico Air National Guard, they were detailed to positions as Aircraft Mechanic (Crew Chief), WG-12, without prior approval of the Civil Service Commission (CSC) (now Office of Personnel Management) for an extended period in excess of 120 days. Thus they contend that they are entitled to retroactive temportary promotions with backpay under our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975), affirmed at 56 *id.* 427 (1977).

Our Claims Division found that the position of Aircraft Mechanic, WG-10, was a prevailing rate position in the excepted service. Since the position was neither in the competitive service nor under the General Schedule, the Settlement Certificate issued to the individual claimants typically concluded as follows:

> Decisions authorizing retroactive temporary promotions for employees detailed in excess of 120 days are based on the requirement, found in the Federal Personnel Manual, chapter 300, subchapter 8, paragraph 8-4f, that agencies must obtain prior approval from the CSC for any detail that will exceed 120 days. An agency's failure to follow this nondiscretionary regulation is considered an unjustified or unwarranted personnel action under the Back Pay Act (5 U.S.C. 5596), and thus warrants the remedy of a retroactive temporary promotion. However, section 8-2 of subchapter 8 specifies that the material in that subchapter applies only to details within the same agency of employees serving in competitive positions or in positions under the General Schedule.
>
> Since the position in which you were serving was neither in the competitive service nor under the General Schedule, the provisions of subchapter 8 do not apply to your situation, and we may not grant the remedy of a retroactive temporary promotion.

The claimants base their requests for reconsideration on the following provision in para. 300.8-2 of the National Guard Bureau's Technician Personnel Manual as amended September 18, 1972:

The material covered in this subchapter will apply to all National Guard technicians in positions under the General Schedule and hourly wage pay plans.

They contend that this provision expands the applicable authority of section 8–2 of subchapter 8, chapter 300, of the Federal Personnel Manual (FPM) to include National Guard technicians in positions under hourly wage pay plans, notwithstanding that those positions may be excepted from the competitive service. On this basis they argue that their claims for retroactive temporary promotion and backpay should have been considered on their merits by our Claims Division. In accordance with the following analysis we concur with this view.

The Technician Personnel Manual (TPM) is the National Guard Bureau's official publication on matters of National Guard technician personnel management. Pursuant to authority provided in the National Guard Technicians Act of 1968, Public Law 90–486, August 13, 1968, 82 Stat. 755 (32 U.S.C. § 709), this publication is prescribed by the Secretary of the Army and the Secretary of the Air Force and approved by the Secretary of Defense for the administration of National Guard technicians. The purpose of the directive is to supplement the FPM in lieu of Army and Air Force civilian personnel regulations that are generally not applicable to National Guard technicians. Thus, as Federal employees, technicians are subject to Civil Service laws and CSC and Department of Defense civilian personnel rules and regulations, *except* as modified by the Technician Personnel Manual.

Although the remedy of retroactive temporary promotion recognized by the *Turner-Caldwell* line of decisions is based on the CSC's instructions at FPM chapter 300, subchapter 8 requiring the Commission's approval of certain details in excess of 120 days, an agency, by its own regulation or by the terms of a collective-bargaining agreement may establish more restrictive circumstances under which it becomes mandatory to promote an employee detailed to a higher-grade position. In *Kenneth Fenner*, B–182937, June 23, 1977, we noted that under 5 U.S.C. 301 and as specifically provided for at FPM chapter 171 an agency may promulgate supplemental personnel regulations and policies for its employees within the general framework of and consistent with CSC regulations. That case involved a Customs Service regulation requiring the temporary promotion of an employee detailed beyond 60 rather than 120 days. Also see 56 Comp. Gen. 786 (1977) and 57 *id*. 536 (1979).

As indicated by the above-quoted statement from our Claims Division's settlements, the CSC's instructions at FPM chapter 300, subchapter 8 are not applicable to employees who, like the 18 claimants, were detailed between prevailing rate positions in the excepted service. See *Israel Warshaw*, B–194484, September 21, 1979. However, as the claimants have pointed out, para. 300.8–2 of the TPM was amended

September 18, 1972, to extend the detail provisions of that subchapter of the FPM to National Guard technicians employed under hourly wage pay plans, including those in the excepted service. As to technicians under the General Schedule as well as those under hourly wage plans, TPM para. 300.8–4 requires the preparation and submission of a Standard Form 59 to the Chief of the National Guard Bureau requesting extension of the detail beyond 120 days and provides insofar as required, that the request wil be forwarded to the appropriate Area Office of the CSC. Thus, the National Guard Bureau's instructions recognize that requests to extend the details of individuals not covered by the FPM provisions need not be forwarded to the CSC for approval, but contemplate, subject to the National Guard Bureau's own authority to approve extensions, that technicians employed in the excepted service under hourly wage plans not be detailed for periods in excess of 120 days.

In view of these findings we conclude that effective September 18, 1972, the provisions of para. 300.8–2 of the TPM extended the scope of section 8–2 of subchapter 8, chapter 300 of the FPM to include all National Guard technicians in hourly wage pay plan positions. This nondiscretionary agency policy is binding upon the agency in the evaluation of claims for retroactive temporary promotion and backpay.

However, in concluding that the 18 claims for retroactive temporary promotion and backpay for specified periods subsequent to September 18, 1972, are properly subject to adjudication on their merits by our Claims Division, we are not rendering a decision on the actual settlement of any individual claim. Our *Turner-Caldwell* line of decisions holds that employees detailed to higher-grade positions for more than 120 days, without Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. As our Claims Division noted in the Settlement Certificate, the rationale of those decisions is that an agency has no discretion to continue employees' details beyond 120 days without the Civil Service Commission's approval. In the cases of the 18 National Guard Bureau technicians, discretion to extend details beyond 120 days was constrained by the requirement to obtain approval within the Bureau. When an agency continues a detail without authority, corrective action in the form of a retroactive temporary promotion with backpay is required as of the 121st day of the detail, for the employee, provided the employee was otherwise qualified and could have been temporarily promoted into the position at that time. 56 Comp. Gen. 982 (1977).

As a result, our decisions following *Turner-Caldwell* have held that the employee must first satisfy the statutory and regulatory requirements for a temporary promotion or there will be no remedy for an improperly extended detail. See 58 Comp. Gen. 88 (1978) and 56 *id.* 432 (1977). Among these requirements are time-in-grade specifications and the qualification standards for the position to which the employee is detailed. See FPM Bulletin 300–40, paragraph 8C, May 25, 1977. In addition, as in all claims adjudications, the burden of proof is on the claimant to establish the liability of the United States and the claimant's right to payment. 4 C.F.R. § 31.7 (1979). Thus, before any settlement awarding retroactive temporary promotion and backpay may be certified, the claimant must present competent evidence establishing that he was officially detailed to an existing, classified, higher-grade position, and that he did in fact perform the full range of duties of the higher-grade position during those periods specified in his claim which are not barred and which are subsequent to September 18, 1972. See *John R. Figard*, B–181700, January 18, 1978.

Accordingly, we are returning Mr. Lujan's claim, along with the claims of the 17 similarly situated individuals, to our Claims Division with instructions to evaluate and adjudicate each claim on a case-by-case basis consistent with this decision.

[B–194252]

Travel Expenses—Air Travel—Reservation Penalties *v.* Voluntary Space Release—Compensation—Employee *v.* Government's Entitlement

Employee, while traveling on official business, received $150 from airline for voluntarily vacating his seat on overbooked flight and taking next scheduled flight. Airline payments to volunteers are distinguishable from denied boarding compensation which is due the Government. Employee may retain payment received as volunteer reduced by any additional expense incurred by Government.

Matter of: Charles E. Armer—Payment to Employee for Voluntarily Vacating Seat on Overbooked Airplane, January 14, 1980:

This decision is in response to a request from the National Association of Government Employees (union) concerning the entitlement of Mr. Charles E. Armer, an employee of the Department of the Army, to retain a $150 payment he received from an airline in consideration of his vacating his seat on an overbooked flight and taking a later flight. The issue presented for our decision is whether this payment may be distinguished from denied boarding compensation which, when paid by the airline to a Federal employee traveling on official business, must be turned over to the Government.

Mr. Armer performed temporary duty in Chicago, Illinois, and was scheduled to return to his official duty station in Watervliet, New York, on the evening of September 14, 1978. Mr. Armer was seated on board American Airlines Flight 402 on that date when the airline asked for volunteers who would vacate their seats in return for meals, overnight lodgings, and guaranteed reservations the next morning. The airline first offered $87.50, then $100, and finally $150 as an incentive to such volunteers, and Mr. Armer accepted the airline's offer of $150. Mr. Armer returned to his duty station the following morning at the same time he had originally planned, and he did not claim any additional per diem incident to the delay in his return travel. The Army ordered the employee to pay the $150 to the Government on the basis of provisions in the Federal Travel Regulations and decisions of our Office holding that denied boarding compensation must be paid to the Government. See FTR para. 1–3.5b; 41 Comp. Gen. 806 (1962); *John B. Currier*, 59 Comp. Gen. 95 (1979); and *Tyrone Brown*, B–192841, February 5, 1979.

The union contends that this type of payment differs from denied boarding compensation and should be retained by the employee. The union argues that the Government suffered no harm in this situation, that the employee entered into a bilateral contract with the airline which was outside the scope of his relationship to the Government, and that the Government would receive a financial windfall by claiming this payment from the airline. In addition, the union argues that turning over this payment to the Government would frustrate the intent of the Civil Aeronautics Board (CAB) regulation governing such payments.

We requested comments from the CAB on this matter, and we received a report from Mr. Gary J. Edles, Deputy General Counsel of the CAB, stating that, in an effort to minimize the involuntary bumping of passengers on overbooking flights, the CAB had increased the amount of denied boarding compensation and required the airlines to ask for volunteers to give up their reserved seats before the airline denied boarding to any passenger with a reservation. See 14 C.F.R. Part 250 (1979). The airlines are free to determine the amount to be paid to the volunteers, but the CAB made no determination whether the employer or the employee should retain this payment. Mr. Edles' letter also states: "If the Government employee is not permitted to keep the voluntary payment, though, the incentive to volunteer would plainly be decreased. If a sufficient number of volunteers is not available, the carrier must use alternate means to minimize involuntary denied boarding, or resort to involuntary bumping. Purely from the perspective of the Board's regulatory program, therefore, allowing the empolyee to accept the denied boarding payment would seem to further the overall goal of reducing the number of travelers involuntarily denied boarding."

We also requested comments from the General Services Administration (GSA), the agency vested with the authority to issue regulations governing the travel of Federal employees (5 U.S.C. § 5707), and GSA responded that they would not distinguish this payment from denied boarding compensation which, under the Federal Travel Regulations (FTR) (FPMR 101–7), para. 1–3.5b, is due the Government. GSA argues that the employee would receive a "windfall" in accepting this payment due to circumstances within his control. In addition, GSA points out that official travel is to be performed by the most expeditious means of transportation practicable. See 5 U.S.C. § 5733. The only exception to this policy which GSA would recognize would be instances where the employee is on leave and traveling at personal expense.

Our Office has long held that where a Federal employee travels on official business and is denied boarding on a scheduled airline flight, it is the Government that stands to be damaged by the airline's default in overbooking the flight and this payment must be turned over to the Government. See 41 Comp. Gen. 806, *supra; John B. Currier, supra; Tyrone Brown, supra;* B–148879, August 28 and July 20, 1970; and B–151525, June 18, 1963. See also FTR para. 1–3.5b. No distinctions have been made under the FTR provision or our decisions where the employee has been denied boarding during official duty hours, on a nonworkday, or during a period of leave. Likewise, no exceptions have been permitted where the Government incurs no additional subsistence expense or the employee reports for duty at the same time as originally intended.

The Federal Travel Regulations, however, are silent on the question of employees receiving payments in consideration for voluntarily vacating their reserved airline seats. Although GSA believes such payments should be treated the same as denied boarding compensation, we believe these payments to volunteers are distinguishable from denied boarding compensation and, therefore, may be retained by the employee under the following circumstances.

As noted by the letter from CAB, the purpose of seeking volunteers to give up their seats is to reduce to the smallest number possible those who would be denied boarding on an oversold airline flight. It is obvious that if Government employees are not permitted to retain voluntary payments, there will be no incentive for them to give up their seats under circumstances where to do so would not unduly inconvenience the employee or the Government. Thus, the purpose of the CAB regulation would be partly frustrated by denying this voluntary payment to Government employees.

322-165 O - 80 - 4

We believe voluntary payments are distinguishable from denied boarding compensation, the latter being liquidated damages for the airline's failure to furnish accommodations for confirmed reserved space due the Government. Where an airline denies accommodations to an employee traveling on official business, the employee has no choice but to wait for the next available flight. However, where the airline asks for volunteers to give up their reserved seats, a Government employee need not volunteer if to do so would impinge upon the performance of official business or cause the employee to suffer an unreasonable delay in his travel.

Our decisions holding that denied boarding compensation must be remitted to the Government are also based upon the principle that Federal employees may not be reimbursed from private sources for expenses incident to the performance of official duty, and any payments tendered to the employee are viewed as having been received on behalf of the Government. See 46 Comp. Gen. 689 (1967); 41 *id.* 806, *supra;* 36 *id.* 268 (1956); *Currier*, *supra;* and *Brown*, *supra.* This prohibition is intended to prevent double reimbursement to the employee for the same travel as well as avoid any conflict of interest. We do not believe the acceptance of voluntary payments under the circumstances set forth below would involve double reimbursement or a conflict of interest.

Payments to volunteers are also distinguishable from half-fare coupons or other gifts distributed by the airlines as incentives to the public. These bonuses or gifts are issued incident to the Government's purchase of the ticket and are not dependent upon the traveler taking any action for the benefit of the airlines. Therefore, such bonuses or gifts are properly considered to be due the Government and may not be retained by the employee.

Employees who voluntarily give up their seats may retain these payments only under the following conditions. If the employee voluntarily gives up his seat and thereby incurs additional travel expenses beyond that which he would have normally incurred, these additional expenses must be offset against the payment received by the employee. Also, Government employees are not expected to voluntarily give up their reserved seats if it would impinge upon the performance of official duties. Finally, to the extent the employee's travel is delayed during official duty hours, the employee would be charged annual leave for the additional hours. See also our decision of today, *Edmundo Rede, Jr.*, B-196145.

Accordingly, we conclude that under the circumstances present Mr. Armer may retain the $150 payment he received from the airline in consideration for his vacating his reserved seat.

[B-194799]

Highways — Forest — State, etc. Roads in National Forests — Cooperative Agreements — Provisions for cost, etc. Reimbursement — Absence Effect

No basis is seen to conclude that one Government agency is liable to second agency for cost of latter's disputes clause claim settlement with contractor, even where first agency's error was basis for settlement, since record does not disclose any agreement or mutual understanding between agencies covering situation.

Matter of: Department of Transportation, Federal Highway Administration—request for opinion, January 14, 1980:

The Department of Transportation, Federal Highway Administration (FHWA), requests our opinion on the propriety of the Department of Agriculture, United States Forest Service (Forest Service), reimbursing FHWA for costs ($53,925.49) incurred by FHWA in settling the highway construction claim of the Fred H. Slate Company (Slate). Since a Forest Service error generated the Slate claim, FHWA believes the Forest Service should bear the cost of the settlement. On the other hand, the Forest Service takes the position that FHWA improperly settled the claim and that it should not have to reimburse FHWA for the erroneous settlement.

We are presented with two issues: (1) whether the Forest Service should reimburse FHWA; and (2) whether FHWA properly settled Slate's claim. Regarding the first issue, we see no basis on this record for concluding that the Forest Service is required to reimburse FHWA. This renders moot the second issue.

FHWA's request involved the FHWA/Forest Service practice of cooperating in the construction of forest highways. 23 U.S.C. § 204 (1976). Under this practice, road contractors operating within national forests are contractually required to purchase, for a fixed sum, the merchantable timber found on the road right-of-ways. The fixed sum the contractor must pay is determined by a Forest Service appraisal of the right-of-way timber. The collateral details of the timber sale are covered by a separate timber settlement agreement (TSA) between the Forest Service and the road contractor. The practice embodies a longstanding Government policy of disposing of Government timber at its appraised value. See 16 U.S.C. § 476 (1976). Forest Service regulations, 36 C.F.R. § 223.1(h) (1978), require payment for right-of-way timber, except in certain circumstances not applicable here, at its appraised value.

The Slate claim arose when Slate discovered that it had paid more for the timber than it was currently worth. The discrepancy between purchase price and the resale value of the timber is attributable to the Forest Service's inclusion of an "overbid factor" in its appraisal. The factor inflates the current appraisal value for the purpose of reflecting the future estimated worth of the timber. Use of the factor is normally restricted to long duration timber sales (2 to 6 years) where it increases the probability that the Government will receive full market value for its timber in an inflationary market. The Forest Service reports that it does not normally apply the factor where, as here, Federal funds are paying for the road construction since contractors include the fixed cost of purchasing the timber in the price bid for the total project.

Slate's claim was submitted to FHWA under the disputes clause of the construction contract. We have sanctioned this approach since, in our view, the TSA is not an independent instrument, but merely an adjunct to the construction contract. B-171131, March 17, 1971.

FHWA took the view that the inflated appraisal constituted a mutual mistake of fact justifying reformation of Slate's contract to reflect the true intent of the parties. Underlying the FHWA position is its admitted lack of expertise in timber appraisals. FHWA contends that both Slate and FHWA relied upon the Forest Service to use its timber appraisal expertise to establish the lump-sum price of the right-of-way timber. FHWA therefore effectively reformed the erroneous payment made to the Forest Service to the intent of both Slate and FHWA that the contractor not pay the amount included in the appraisal for the "overbid factor."

The Forest Service, which advised FHWA that the claim should not be paid, contends: (1) that the claim should not have been honored, and (2) that, even if it is assumed that it should have been, the claimant was overpaid. Because of this, the Forest Service believes that it should not have to reimburse FHWA for the cost of settling Slate's claim. The Forest Service reports that the proceeds of the timber sale have been deposited in the United States Treasury's National Forest Fund Account.

In reviewing the claims of one Federal agency against another, we examine the record for evidence that the Federal agencies have arrived at a mutual understanding which governs the subject matter of the claim. For example, in *Soil Conservation Service and Small Business Administration Contract No. AG18scs-00100*, B-185427, September 21, 1977, 77-2 CPD 208, where one Federal agency was asserting a claim for excess costs of reprocurement against another, the mutual understanding was expressed in a "section 8(a)" contract. Because the contract contained a disputes clause, we deferred consideration of the claim until the agencies had attempted to resolve the claim under the clause. When that was accomplished, we reviewed the terms of the "section 8(a)" contract and determined that the one agency was not liable to the other since it had met its obligations under the contract. Similarly, in *Transfer of Power Plant by Department of the Army to Panama Canal Company*, B-114839, April 27, 1979, we examined the terms of a use agreement between the Army and the company in order to determine whether there was a basis for the Army's reimbursement of the company for certain costs it had incurred. Since the company had incurred the costs in order to meet third-party contractual obligations and not to meet its obligations under the use agreement, we decided that there was no basis for Army reimbursement of the company.

We do not believe that the Forest Service is required to reimburse FHWA for the cost of settling Slate s claim. The record does not indicate the existence of any agreement or mutual understanding between FHWA and the Forest Service concerning what occurred here. Both the FHWA and the Forest Service appear to have performed their respective statutory duties. Therefore, despite the Forest Service error, in the absence of any understanding on this matter there is no basis for FHWA's claim against the Forest Service.

[B-170675]

Compensation — Wage Board Employees — Conversion *v.* Promotion/Transfer to Classified Positions — Highest Previous Rate

Federal Aviation Administration and Federal Aviation Science and Technological Association seek our approval of averaging method for computation of highest previous rate upon promotion from Wage Grade position to General Schedule position where employee has worked rotating shifts and has received night differential. The averaging method was arrived at in order to complete action on United States District Court's Consent Order of Remand requiring the agency to include night differential in computing the highest previous rate. We have no objection to proposed method since pay rates under that method would not exceed those authorized under 5 C.F.R. Part 531.

Matter of: Ralph G. Nail, et al.—Computation of Highest Previous Rate, January 15, 1980:

The Federal Aviation Administration (FAA) requests our guidance in the implementation of our decision in *Ralph G. Nail*, et al., B-170675, August 8, 1979. That decision authorized the FAA to recompute certain employees' pay rates in the General Schedule positions to which they were promoted on the basis of their highest previous rates, determined by their wage board rates of pay, including night differential.

The FAA says that our decision in the *Nail* case does not address situations where the employees received night differential while working on rotating shifts. The agency refers to its letter to us dated September 15, 1977, requesting an advance decision on several questions pertaining to promotions under 5 C.F.R. Part 531 when night differentials are involved. This Office did not answer the questions presented by the FAA at that time due to ongoing litigation instituted by certain FAA employees, including Mr. Nail, in the United States District Court for the Northern District of Georgia. See *Ralph G. Nail* v. *United States*, CA No. C77–1497A and related cases. The employees' cases were remanded by the District Court to our Office for a decision authorizing administrative settlement. Our decision of August 8, 1979, was then issued. The FAA now asks how to compute the rate of basic pay pursuant to Part 531 for employees who received night differential while working rotating shifts in Wage Grade positions.

The background of the case is as follows. During the period from 1969 to 1977, a number of FAA employees moved from Wage Grade positions to General Schedule positions under merit promotion plan announcements. Although all of the actions were governed by 5 C.F.R. Part 531, entitled "Pay under the General Schedule," the various FAA regional personnel offices did not treat the actions uniformly. While the majority of the regions excluded the night differential from the computation of basic pay, a few regions included the night differential based on an averaging method. Eventually, several FAA employees filed the Court cases involved herein. The District Court issued a Consent Order of Remand on May 10, 1979, to our Office. We then issued our decision holding that the FAA may administratively settle claims not barred by the statute of limitations consistent with our decision in *Matter of Terry Ray Ashbaugh*, B–189852, February 14, 1979.

In *Ashbaugh*, we referred to B–175430, June 1, 1972, and December 19, 1973, in which we held that night differential should be included as part of the rate of basic pay of a former Wage Board employee for the purpose of determining his highest previous rate in setting his rate of pay upon transfer to a General Schedule position. Neither our *Ashbaugh* nor our *Nail* decision specifically addressed the problems that arise in situations involving night differential earned on rotating shifts. Accordingly, prior to administratively settling these claims, the FAA has requested our decision concerning the method to be used in computing these employees' rates of basic pay.

The FAA reports that it prefers a method whereby the night differential earned over a period of time is averaged and added to an employee's scheduled rate to arrive at his rate of basic pay for the purpose of Part 531. The FAA further states that it does not favor the method used in conversion actions under 5 C.F.R. Part 539 where the employee's rate earned in the last hour in a pay status is used to determine his rate of basic pay. In this connection the FAA refers to its letter of September 15, 1977. In that letter it points out that in a situation involving a promotion from a Wage Grade to a General Schedule position under 5 C.R.R. Part 531 and a retroactive pay adjustment, it could not determine an employee's highest previous rate if it had to be based on the rate that he was receiving immediately prior to the effective date of the personnel action. This inability would arise because the FAA has no records showing the shifts on which employees served in prior years when they were promoted. We believe that it is necessary to distinguish between the situation where an employee's *position* is converted from the Wage Grade to the General Schedule and the situation where a Wage Grade *employee* is transferred or promoted to a position in the General Schedule. The former action is controlled by 5 C.F.R. Part 539 and the latter is controlled by 5 C.F.R. Part 531. Because of the particular language of 5 C.F.R. § 539.203, this Office has held that under Part 539 an employee's rate of basic pay is determined at the time of conversion. See 51 Comp. Gen. 641 at 643 (1972). Part 531 does not contain similar language. Rather, section 531.203 clearly does not contemplate computing the highest previous rate on the basis of the rate of basic pay received immediately prior to the personnel action. Thus, in 26 Comp. Gen. 601 (1947), we stated that the highest previous rate rule permits:

> An initial salary rate to be based upon the salary rate attained in any prior Government position rather than being limited to the maximum salary rate attained in the position last occupied.

The record contains many arguments on behalf of both the employees and the FAA arguing against the use of Part 539 or the "last hour in a pay status" rule. In view of the above discussion concerning the inapplicability of that rule, we will not specifically address those arguments or the questions presented in the September 15, 1977, letter from the FAA.

The issue remaining is whether the averaging method is a proper method for setting these employees' rates of basic pay under 5 C.F.R. Part 531. Mr. Paul E. Trayers, Assistant General Counsel, Federal Aviation Science and Technological Association (FASTA), has submitted a proposed averaging method. The FAA has concurred in the proposed method. That method submitted by FASTA is as follows:

> * * * when a wage grade employee works a rotating shift and his shift cannot be administratively discerned, * * * [the FAA] used an averaging basis utilizing 75 midnight shifts (0000–0800 A.M.) and 75 evening shifts (1600–2400 A.M.) per year.
>
> Wage grade employees are paid a night differential of 7½% of their scheduled rate (per hour) for 8 hours of work during the evening shift. They are also paid a night differential of 10% of their scheduled rate (per hour) for 8 hours of work during the midnight shift. (5 USC, 5343, (f)).
>
> * * * * * * *

Example: an employee with a scheduled rate of $9.00 per hour would make $18,720 per year ($9 x 2080 hrs.)

this employee works a rotating shift of 75 midshifts (75 x 8 hours= 600 hrs.) and 75 evening shifts.

for the evening shifts he is entitled to a 7½% night differential (7½ of $9=$.675). Therefore, his evening shift differential can be determined as 600 hours x $.675 or $405.00.

for the midshifts he is entitled to a 10% night differential (10% of $9.=$.90). Therefore, his midshift differential can be determined as 600 hours x $.90 or $540.00.

the rate of basic pay would then be the scheduled rate of pay ($9 per hour/$18,720 per year) plus night differentials.

$18,720.00	scheduled rate
405.00	evening shift differential
540.00	midshift differential
$19,665.00	rate of basic pay

This rate of basic pay would be the rate used in determining the new step rate when that employee was promoted to the General Schedule.

The figures representing the number of shifts worked in the above example are estimates that will vary with the particular facts of each employee's work schedule.

The regulations contained in 5 C.F.R. Part 531 govern the determination of an employee's rate of basic pay for certain specified personnel actions. Section 531.203(c) states that:

* * * when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate * * *.

While we have been unable to find any decisions dealing with the legality of permitting averaging to arrive at a rate of basic pay for the purposes of Part 531, in interpreting the regulations governing the highest previous rate rule we have held that an employee's salary:

could be fixed at *any rate in the salary range of the grade* in which the position to which transferred or reappointed has been allocated not to exceed the maximum rate of compensation attained * * *. [Italic supplied.] 26 Comp. Gen. 601, 603 (1947).

Thus, agencies have authority under 531.203(c) to set an employee's salary at *any* step in the grade which does not exceed the employee's highest previous rate. There is no requirement that it be set at the highest previous rate attained. It is self evident that any rate attained by means of an averaging formula would not exceed the maximum rate authorized under Part 531. Accordingly, for the purposes of permitting the FAA to implement the Consent Order of Remand issued by the District Court in the *Nail* case, we have no objection to the averaging method agreed to by both parties.

[B-193037]

Miscellaneous Receipts—Telephone Commissions

Commissions received by the Bureau of Prisons, based on collections from pay telephones provided for the exclusive use of inmates at penal and correctional institutions of the Bureau must be deposited into the general fund of the Treasury as miscellaneous receipts. No substantial outlay from Bureau appropriations is made for installation and provisions of pay telephone service. Therefore, 18 U.S.C. 4011, providing an exception to 31 U.S.C. 484, is not applicable.

Matter of: Disposition of Commissions From Pay Telephones at Federal Prisons, January 15, 1980:

This decision is in response to a request for an opinion from the Assistant Attorney General for Administration (AAGA), Department of Justice, on whether commissions received from telephone companies based on their receipts from pay telephones provided for the exclusive use of inmates at institutions of the Bureau of Prisons (Bureau) must continue to be deposited in the miscellaneous receipts account of the United States Treasury (Treasury), or whether they may be used by the Bureau for any of the following alternative dispositions:

(1) For deposit in the various prison Inmate Welfare Funds;

(2) For credit against Bureau telephone bills, to offset maintenance and operating costs incurred in providing telephones for inmates; or

(3) For reimbursement to Bureau appropriations for the care and well-being of prisoners.

For the reasons discussed below, we believe that the Bureau must continue to deposit the commissions into the miscellaneous receipts account of the Treasury. The Bureau has arranged for the provision of telephone services to inmates pursuant to its general responsibility to provide suitable quarters and to provide for the care and subsistence of all inmates in Federal penal and correctional institutions. 18 U.S.C. §§ 4001, 4042 (1976). Bureau Policy Statement 7300.79A (August 4, 1978), setting forth telephone regulations for inmates, states that "Constructive, wholesome contact with the community, particularly with family members, is a valuable tool in the overall correctional process," and provides that "Ordinarily, an inmate shall make collect calls or, where pay telephones are available, shall assume the cost of all calls."

The pay telephones are designated for local calls only. Inmates pay for their own calls at the same rate as with any other pay telephone. The Bureau does not pay a service charge to the telephone company for the installation or use of the pay telephones. Commissions are paid to the Bureau by the telephone company, based on receipts from pay telephone calls.

Bureau expenses for telephone services arise from the installation and maintenance within each institution of lines which connect with the pay phones and which also connect with separate phones that provide inmates with long distance telephone service. There are additional costs associated with the provision of long distance telephone service (such as maintenance of a switchboard, a monthly service charge, administrative expenses, etc.) which are paid from Bureau appropriations. However, no commissions are paid by the telephone company for long distance calls and it is therefore not appropriate to consider the local pay phone commissions as reimbursements for expenses incurred in providing long distance service.

Where monies are paid to a Government agency or department for the use of the United States, the disposition of such monies—from whatever source they are received—is governed by 31 U.S.C. § 484 (1976), which provides, in essence, that such receipts shall be paid into the United States Treasury as miscellaneous receipts, with an exception not relevant here.

The applicability of this statute to commissions from pay telephones in public buildings has been considered in the past. Since such commissions are received "in return for a privilege incident to the operation of a public building," the funds must be deposited "into the general fund of the Treasury as miscellaneous receipts, unless otherwise specifically provided by law." 14 Comp. Gen. 203, 204 (1934); 5 *id.* 354 (1925). Accord, 44 *id.* 449 (1965); 23 *id.* 873, 874 (1944).

In his letter to us, the AAGA recognized the general rule but suggets that an exception may exist for the particular commissions at issue here:

> In the case of the Bureau of Prisons, the operation of pay phone stations for inmates is an integral part of the Bureau's mission. * * * It is the position of the Attorney General that providing telephone service to inmates is a bonafide responsibility and function of the Bureau of Prisons in accordance with 18 U.S.C. 4001.

Our decision at 44 Comp. Gen. 449, *supra*, enunciated an exception to the general rule in terms similar to this but that case is easily distinguished. The Bureau of Old Age and Survivors Insurance, a division of the Department of Health. Education, and Welfare, occupied a building, the construction of which was financed solely with monies derived from a trust fund. The cost of operating the building, including electricity for lighting the pay telephone stations and maintenance costs, was also being financed by trust fund monies. At issue was whether the pay telephone commissions could be deposited to the credit of the trust fund. We stated:

The test as to whether such commissions may be otherwise deposited [i.e. not in miscellaneous receipts] is * * * whether the operation of telephone pay stations may be considered as an activity prescribed by statute for the agency involved. 44 Comp. Gen. at 450.

This test, however, must be read in light of the fact that the expenses were financed by a trust fund which, by virtue of its organic legislation, was authorized to retain revenues arising from its prescribed statutory activities. Similarily, in 14 Comp. Gen. 203, *supra*, the argument for retaining the telephone commissions was that they were postal revenues which the Post Office Department was authorized by law to retain. The same test does not apply when the agency does not operate on a trust or revolving fund basis and lacks any other authority to retain receipts from its operations. Hence, even if operation of pay telephones was considered an activity prescribed by statute for the Bureau, the commissions could not be deposited into Bureau appropriations since we are not aware of any provision in the Bureau's authorizing legislation that permits it to credit to its appropriation revenues resulting from such services for inmates.

We are aware that section 4011 of title 18, United States Code, allows deposit to the credit of the Bureau's appropriation of "[c]ollections in cash for meals, laundry, barber service, uniform equipment, and other items for which payment is made originally from appropriations * * *." However, this covers reimbursements for outlays by the Bureau. As noted earlier, most of the expenses paid from Bureau appropriations were incurred for provision of long distance telephone services on separate phones. The costs for the pay phone service, according to informal advice from the Bureau, consists of bringing trunk lines (which the telephone company has brought to the institution) inside the institution walls, after which the telephone company completes all the hookups at no charge to the Government. Therefore, the outlays are negligible and the commissions in question should not be considered to be reimbursements but rather as fees for the privilege of installing a profitable device on Government property.

We conclude that commissions received by the Bureau from telephone companies based on inmate payments for pay telephone calls must continue to be deposited into the general fund of the Treasury as miscellaneous receipts.

[B-197292]

Appropriations—Permanent Indefinite—Mobile Home Inspection Program

Section 620 of National Mobile Home Construction and Safety Standards Act of 1974, as amended by Housing and Community Development Act of 1979, constitutes permanent indefinite appropriation of mobile home inspection fees collected by Secretary of Housing and Urban Development. Funds will be available to pay costs of inspection program without any further action by Congress. B-114808, August 7, 1979, distinguished.

Matter of: Permanent Appropriation of Mobile Home Inspection Fees, January 15, 1980:

The Assistant Director, Accounting Operations, Bureau of Government Financial Operations, Department of the Treasury, has requested our decision on whether language in the Housing and Community Development Act of 1979, Pub. L. No. 96–153, 93 Stat. 1011, 42 U.S. Code 5301 note, constitutes a permanent indefinite appropriation of fees collected by the Secretary of Housing and Urban Development (HUD) under a mobile home inspection program. The legislation authorizes the Secretary of HUD to use the inspection fees to pay the expenses incurred in carrying out the inspections. Specifically, the Treasury letter asks whether this language can be interpreted as providing a permanent indefinite appropriation in light of our recent decision, B-114808, August 7, 1979, in which we stated that a statute cannot be interpreted as a permanent appropriation unless the intent of the Congress to make an appropriation is clear in the language of the legislation.

For the reasons indicated below, it is our opinion that the language in question does constitute a permanent indefinite appropriation of the fees, to be used for offsetting the costs of the mobile home inspection program.

The program of inspection of mobile homes is mandated by the National Mobile Home Construction and Safety Standards Act of 1974, 42 U.S.C. § 5401 *et seq.* (1976). The authority for the Secretary of Housing and Urban Development to charge fees for these inspections is contained in section 620 of the act, 42 U.S.C. § 5419, which provides:

> In carrying out the inspections required under this chapter, the Secretary may establish and impose on mobile home manufacturers, distributors, and dealers such reasonable fees as may be necessary to offset the expenses incurred by him in conducting such inspections.* * *

The 1979 amendment adds the following language to this authorization:

> and the Secretary may use any fees so collected to pay expenses incurred in connection with such inspections.

Section 620 of the act, as amended, therefore authorizes the Secretary to impose fees for inspections and to use these fees to pay the expenses of the inspections. The question posed by the Treasury inquiry is whether section 620 as amended constitutes a permanent indefinite appropriation.

This Office has consistently viewed statutes which authorize the collection of fees and their deposit into a particular fund, and which make the fund available for expenditure for a specified purpose, as constituting continuing or permanent appropriations without further action by the Congress. *See*, *e.g.*, 57 Comp. Gen. 311, 313 (1978); 50 *id.* 323, 324 (1970); 35 *id.* 615, 618 (1956).

In the present case, amended section 620 authorizes the Secretary to collect fees and to use them for a specific purpose. Although the statute does not expressly authorize the establishment of a special fund or the deposit of the receipts into such a fund, we interpret it as authorizing such a fund as a necessary implementation procedure.

We conclude that the statute, which authorizes the collection of fees, their deposit in a special fund, and their availability for a specific purpose, constitutes a permanent indefinite appropriation of these fees.

Our decision in B–114808, August 7, 1979, referred to in the Treasury letter, is distinguishable from the current case. In that decision we were interpreting a statute which directed the Secretary of the Treasury, at the beginning of a fiscal year, to remit to the government of Guam an amount equal to the duties, taxes, and fees estimated to be collected in Guam during the coming year. The statute did not specify the source of the funds for these prepayments, but it was clear that at least the payment for the first year would have to come from the general fund of the United States Treasury. Under these circumstances, we looked at Article I, section 9, clause 7 of the United States Constitution, which requires "appropriations made by law" before money can be drawn from the Treasury, and 31 U.S.C. § 627, which states that an act of Congress shall not be interpreted as making an appropriation out of the United States Treasury "unless such Act shall in specific terms declare an appropriation to be made." Applying these standards to the statutory language in question, we determined that although the statute constituted a permanent *authorization*, it did not establish a permanent indefinite *appropriation*.

In the present case, we are not concerned with the payment of monies out of the general fund of the Treasury. Rather, the statute authorizes the Secretary of HUD to assess fees, to retain those fees, and to expend those fees for a specific purpose. In this instance, where it is clear from the statute that the Congress intended to make these fees available for expenditure, and where the legislative history indicates that the very purpose of the 1979 amendment was to make it clear that these funds were to be available without further action of the Congress (*see* 125 Cong. Rec. S9383 (daily ed., July 13, 1979)), our rationale in B–114808 does not apply.

We therefore conclude that section 620 of the National Mobile Home Construction and Safety Standards Act of 1974, as amended by the language in Public Law 96–153, constitutes a permanent indefinite appropriation of the mobile home inspection fees collected by the Secretary of HUD, and that these funds are available to pay the costs of the inspections without any further action by the Congress.

[B-196794]

States — Federal Aid, Grants, etc. — Interest on Federal Funds — Intergovernmental Cooperation Act of 1968 Effect—Applicability to Non-Governmental Subgrantees

Non-governmental subgrantees of Federal grants to States are entitled to keep interest earned on advances from the States. Section 203 of the Intergovernmental Cooperation Act, 42 U.S.C. 4213, which exempts State grantees from accounting to the Federal Government for interest earned on grant advances, serves to exempt subgrantees as well.

Matter of: Department of Labor—Interest on State Advances to Subgrantees, January 17, 1980:

This decision responds to an inquiry from the Acting Director of the Office of Grants, Procurement and ADP Management Policy, Department of Labor (DOL) on whether non-governmental subgrantees of State recipients of Federal grants are accountable to the Federal Government for interest earned on advances made by the States from grant funds. The inquiry grows out of questions raised by non-governmental subgrantees concerning the application of DOL regulations, 41 C.F.R. § 29–70.205–2. We conclude, for the reasons given below, that the same rationale that justifies exempting governmental subgrantees from remitting to the Federal grantor agency interest earned on Federal grant funds received from the States, applies equally to non-governmental subgrantees.

As a general rule, interest earned by grantees on grant funds advanced by the Federal Government must be paid over to the United States unless earned as part of the authorized program or otherwise specifically excepted. 42 Comp. Gen. 289 (1962) and cases cited therein. The major exception to this long established rule is contained in section 203 of the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4213 (1976). That section provides:

> Heads of Federal departments and agencies responsible for administering grant-in-aid programs shall schedule the transfer of grant-in-aid funds consistent with program purposes and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by a State, whether such disbursement occurs prior to or subsequent to such transfer of funds, or subsequent to such transfer of funds.[1] *States shall not be held accountable for interest earned on grant-in-aid funds, pending their disbursement for program purposes.* [Italic supplied.]

[1] So in original.

As recognized in the DOL inquiry, our decision, B–171019, October 16, 1973, concluded that:

Section 203 exempts States from accountability for interest earned on grant-in-aid funds received by them and makes no differentiation between grants which the States will disburse themselves and grants involving funds which will be subgranted by the States. Moreover, we have found nothing in the legislative history of Section 203 or in subsequent hearings which makes such a differentiation. Thus, it seems clear to us that States are not to be held accountable for interest earned on any grant-in-aid funds pending their disbursement, whether or not the States intend, or are required by the terms of the grant, to subgrant these funds. To hold otherwise would, of course, require the States to assume the burden of accounting for the presumably relatively small amounts of interest which would be earned on these funds in contravention of the legislative intent behind the last sentence in Section 203. Accordingly, we believe political subdivisions receiving Federal grants-in-aid through State governments are entitled to retain monies received as interest earned on such Federal funds.

A governmental grantee must qualify as a State or State instrumentality in order to qualify directly for the section 203 exception. All other grantees, including local governments, remain subject to the general rule requiring the return of interest earned on advances of grant funds by the Federal Government. As indicated in our 1973 decision, the question of subgrantees is not addressed in the legislation and was not expressly considered in the legislative history. However, in that decision, we concluded that the subgrantee of a State grantee was exempt. We are unable to see any basis for distinguishing between governmental and non-governmental subgrantees in this regard.

Accordingly, we conclude that non-governmental subgrantees of Federal grants to the States are entitled to keep any interest they may earn on advances from the States. We note that under section 203 of the Intergovernmental Cooperation Act of 1968 and Treasury Circular No. 1075, Federal Departments and Agencies must control the flow of advances to the States at the State level in order to prevent grant funds from being advanced before they are needed.

[B–193772]

Pay—Retired—Advance Payment

Retired pay is included within the definition of pay in 37 U.S.C. 101(21). Therefore, authority in 37 U.S.C. 1006(h) to make payments up to 3 days in advance of a regular payday, of pay and allowances to individuals under the jurisdiction of the Secretaries of the military departments includes payments of retired pay.

Payments—Advance—Survivor Annuities—Prohibition

Payments such as survivor annuities to dependents not included within the definitions of pay and allowances contained in title 37, United States Code, may not be made in advance under the authority of 37 U.S.C. 1006(h).

Matter of: Advance payments of retired pay and survivor annuities, January 22, 1980:

The question presented in this case is:

Can advance payments authorized by 37 U.S.C. § 1006(h) (1970) be made to military retirees and surviving military dependent annuitants on the same basis as is now done for active duty members under the provisions of 37 U.S.C. § 1006(h)?

Advance payments to military retirees may be made under the authority of 37 U.S.C. 1006(h) (1976). However, advance survivor annuity payments may not be made under this authority.

The question and discussion thereof are contained in Department of Defense Military Pay and Allowance Committee Action Number 543, transmitted to this Office by the Assistant Secretary of Defense (Comptroller).

Subsection 1006(h) of title 37, United States Code, provides as follows:

Notwithstanding section 529 of title 31, the Secretary concerned may, when the last day of the pay period falls on a Saturday, Sunday, or legal holiday, authorize the payment of pay and allowances to members of an armed force under his jurisdiction on the preceding workday but not more than three days before the last day of that pay period. If a member dies after he has received an advance payment under this subsection, but before the last day of the pay period for which the payment is made, no part of the amount so advanced is recoverable by the United States.

Section 529 of title 31, United States Code, prohibits the advance of public money unless authorized by appropriation or other law. Subsection 1006(h) provides an exception.

In the Committee Action, it is noted that monthly annuity payments to military retirees and surviving military dependents are mailed or otherwise transmitted to arrive at their destination on the last day of the month. When the regular delivery date falls on a Saturday, the check is difficult to cash or deposit; and if it falls on a Sunday, or on a Monday holiday, the payment is delivered on the next business day. In extreme cases this means a delay of 3 days in cashing or depositing the payment. In many cases the delay constitutes an inconvenience and hardship to retired members or annuitants and their dependents.

The Department of Defense Military Pay and Allowance Committee is of the view that the language of 37 U.S.C. 1006(h) is sufficient to authorize advance payment to retirees and that as a matter of equity this policy should be extended to survivor annuities paid to dependents since both types of payments come within the jurisdiction of the Secretary concerned as provided in the statute.

The question, however, has been presented to this Office since the legislative history indicates that 37 U.S.C. 1006(h) was probably intended to apply to pay and allowances of active duty personnel.

The legislative history of 37 U.S.C. 1006(h) does indeed indicate that at the time the Senate was considering the legislation it seemed to be referring to only pay and allowances of active duty personnel. See S. Rep. No. 685, 89th Cong., 1st Sess. (1965). However, 37 U.S.C. 101(21) includes in the definitions of terms used in title 37, the following:

> (21) "pay" includes basic pay, special pay, retainer pay, incentive pay, *retired pay*, and equivalent pay, but does not include allowances; [Italic supplied.]

In view of this, we must assume that in using the term "pay" in 37 U.S.C. 1006(h) the Congress was aware that such term included retired pay. Accordingly, it is our view that payments of retired pay may be included within the advance payment authorization of 37 U.S.C. 1006(h). Thus, as to retired pay, the question presented is answered yes.

Survivor annuities paid to dependents of members of the uniformed services are paid under chapter 73, title 10, United States Code. Neither 37 U.S.C. 101(21) nor the similar definition in 10 U.S.C. 101(27) (1976) includes such annuities in the definition of "pay," nor are such annuities defined as "allowances." In addition we are not aware of any other authority for the advance payment of survivor annuity payments to dependents or any other payments not defined in title 37, United States Code. Therefore, as to such payments, the question presented is answered no.

[B-195204]

Vessels — Crews — Two-Crew Nuclear-Powered Submarines — Dislocation Allowance — Initial Unavailability of Assigned Quarters

A dislocation allowance may be paid to members without dependents of both the on-ship and off-ship crews of nuclear submarines incident to a change of home port of the submarine, when they initially occupy permanent non-Government quarters at the new home port although the submarine is the permanent station for both crews. This is based on the view that Congress did not intend to preclude payment of the allowance when a member is not able to occupy quarters assigned to him and does incur the expense of moving into non-Government quarters. 57 Comp. Gen. 178 modified (extended).

Matter of: Dislocation allowance — Two-crew nuclear submarines, January 22, 1980:

May a dislocation allowance be paid members without dependents of both the on-crew and off-crew of a two-crew nuclear submarine when the home port of the vessel is changed? As will be explained, the answer is yes.

This question was presented by the Officer in Charge, Navy Finance Office, New London, and has been assigned PDTATAC Control No.

79–18, by the Per Diem, Travel and Transportation Allowance Committee.

Two-crew nuclear powered submarines are assigned two autonomous crews. While one crew is on the submarine, the other crew is ashore performing training and rehabilitation duty. Thus, while the submarine, itself, is the permanent station for both crews, only one crew can occupy the quarters aboard the submarine and the other crew must occupy quarters ashore. In our decision 57 Comp. Gen. 178 (1977), we concluded that a member without dependents who is ordered to make a permanent change of station and is assigned to a two-crew submarine is entitled to a dislocation allowance on reporting to the home port of the vessel when he occupies permanent non-Government quarters. Doubt has arisen in this case, since the members involved have already been assigned to the vessel prior to the change of home port. As a result the finance officer requests a decision as to whether the allowance may be paid to members without dependents assigned to the submarine, when they occupy permanent non-Government quarters at the new home port of the submarine.

Under the provisions of 37 U.S.C. 407(a)(3) a member without dependents who is transferred to a permanent station where he is not assigned to quarters of the United States is entitled to a dislocation allowance. Thus, a member without dependents assigned to a vessel is ordinarily not entitled to a basic allowance for quarters or a dislocation allowance since he is assigned quarters on the ship. Due to the unusual circumstances involved in duty on two-crew submarines, however, exceptions have been made.

Subparagraph M9003–7 of 1 Joint Travel Regulations (1 JTR) provides that a member without dependents assigned to a two-crew nuclear submarine will be entitled to a dislocation allowance upon arrival at the vessel's home port providing the member is not assigned to Government quarters and he occupies non-Government quarters for a period of more than 15 days prior to reporting aboard the vessel.

Appendix J of 1 JTR defines permanent change of station as including a change in the home port of a vessel or a mobile unit.

In the past we have held that since the submarine was the permanent station of both crews assigned to it, entitlement to a dislocation allowance was for determination on that basis. See 48 Comp. Gen. 480 (1969). However, this decision was modified to the extent that it was inconsistent with our decision 57 Comp. Gen. 178 (1977). In the latter decision, we concluded that, while 37 U.S.C. 407(a)(3) authorizes payment of a dislocation allowance to a member when he is not assigned to quarters of the United States at his permanent station, the payment of the allowance is authorized when a member is not able to occupy the assigned quarters aboard the submarine and is in fact incurring the expense of moving into non-Government quarters.

Since the change of home port of a vessel is considered a permanent change of station for the crew members, a dislocation allowance may be paid to the members without dependents of both crews when they initially occupy permanent non-Government quarters at the home port for more than 15 days. This, of course, is subject to any restrictions contained in 37 U.S.C. 407.

The question is answered in the affirmative.

[B-194375]

Travel Expenses — Air Travel — Fly America Act — Employees Liability — Travel By Noncertificated Air Carriers — Involuntary Re-Routing

Employee was scheduled to travel on certificated U.S. air carrier and, upon arrival at airport, was informed by carrier that it could not accommodate him and carrier re-routed him on foreign air carrier. U.S. air carrier service is considered unavailable and traveler is not subject to penalty for use of noncertificated carrier. 56 Comp. Gen. 216 modified (amplified).

Matter of: James A. Norberg — Fly America Act — involuntary re-routing, January 23, 1980:

The Nuclear Regulatory Commission (NRC) requests an advance decision concerning a specific claim by James A. Norberg, one of its employees, involving use of a foreign air carrier.

Mr. Norberg was on official travel in Austria. When he went to the airport he was told that because his scheduled Pan American flight had developed mechanical difficulties a smaller plane would be used for the flight from Austria to the United States. There was no room for Mr. Norberg on the smaller replacement aircraft and he was involuntarily re-routed by Pan American to a British Airlines flight to London where he transferred to a Pan American flight to the United States.

In connection with Mr. Norberg's claim for the airfare from Vienna to the United States without assessment of a penalty for his use of a foreign air carrier between Vienna and London, the NRC asks:

1. Is a traveler required to wait up to the 48 hours specified in 56 C.G. 216, when he is informed upon arrival at the airport, that his scheduled flight cannot accommodate him for some reason?

2. Should a traveler be assessed a penalty for the involuntary use of a foreign carrier when an American carrier, for some reason, provides alternate transportation on a foreign carrier?

The controlling statute is the Fly America Act, 49 U.S.C. § 1517. The Act's purpose is to ensure that Government revenues not benefit noncertificated foreign air carriers when certificated service by United States carriers is available. 56 Comp. Gen. 209 (1977). The Act requires the Comptroller General to disallow any expenditure from appropriated funds for transportation on a foreign air carrier in the absence of proof that such service was necessary.

The Comptroller General's guidelines for implementation of the Fly America Act, B–138942, March 12, 1976, provide that a foreign air carrier may be used only when United States air carrier service is unavailable. These guidelines contain criteria for determining when service is considered unavailable but do not expressly address the situation in which a traveler is involuntarily re-routed by a United States carrier onto a foreign carrier at the initiation of his travel. In 56 Comp. Gen. 216 (1977) we noted that the unavailability criteria set forth in the guidelines are addressed to en route travel or elapsed traveltime and provide no guidance in determining the length of time an employee should delay his departure from point of origin to facilitate use of certificated United States air carrier service. We there held that if the total delay, including delay in initiation of travel, in en route travel and additional time at destination involves more than 48 hours additional per diem costs in excess of the per diem that would be incurred in connection with the use of noncertificated service, certificated service may be considered unavailable.

Our holding in 56 Comp. Gen. 216 places a high degree of responsibility on the Government traveler to schedule his travel for the benefit of United States air carriers. While that decision could be read as controlling in Mr. Norberg's and similar situations, we believe that where the employee has properly scheduled his travel and relied upon that scheduling and where his efforts are frustrated through no fault of his own but by the air carrier, there is adequate justification to consider that he has discharged that responsibility. We, therefore, find that Mr. Norberg was not obliged to further delay his travel in accordance with 56 Comp. Gen. 216 to make use of United States air carrier service.

Where, because of mechanical or other difficulties, a United States air carrier reroutes an employee's travel aboard a foreign air carrier, United States air carrier service may be considered unavailable. Insofar as the traveler is given a choice as to substitute service, he should of course reschedule his travel by United States air carrier if to do so will not unduly delay his travel. These principles apply to involuntary re-routings that occur enroute as well as upon initiation of travel.

At the date of Mr. Norberg's travel, Pan American was the only United States air carrier serving Vienna and the afternoon flight on which he had reservations was the last United States air carrier departing that day. Because connecting service by way of Frankfurt, Germany, similarly was not available that day, Mr. Norberg's travel by foreign air carrier to London was proper even if he was provided a choice as to substitute service. Under the circumstances, London was the nearest practicable interchange point to connect with United States air carrier service.

Accordingly, Mr. Norberg is not subject to penalty under the Fly America Act for his use of a foreign air carrier between Vienna and London under the circumstances described above.

[B-192470]

Pay — Retired — Waiver For Civilian Retirement Benefits — Survivor Benefit Plan Coverage — Effect

A retired service member who elected survivor benefit plan (SBP) coverage and who later retires as a Civil Service employee may waive receipt of military retired pay in order to combine military with civilian service for purposes of computing his Civil Service annuity. It was held in B-192470, January 3, 1979, that an individual who waives military retired pay in those circumstances and accepts survivor coverage under Civil Service Retirement is not covered by SBP and upon his death no payment under SBP either to his widow or his surviving children may be allowed. This is true even where the individual had "child only" coverage under the SBP. On reconsideration that decision is sustained.

Matter of: Chief Master Sergeant Allen J. Gallagher, USAF Retired (Deceased), January 24, 1980:

This action is in response to a request from the Director of Accounting and Finance, Headquarters United States Air Force, for reconsideration of our decision B-192470, January 3, 1979. The case involved the question of entitlement of Peggy A. Gallagher, a minor, to receive a Survivor Benefit Plan (SBP) annuity as the surviving dependent child of the late Chief Master Sergeant Allen J. Gallagher, USAF.

The request for reconsideration has been assigned Submission No. DO-AF-1300 by the Department of Defense Military Pay and Allowance Committee.

The reported facts are that the member retired from the United States Air Force effective August 1, 1965, and elected dependent children coverage under the Retired Serviceman's Family Protection Plan (RSFPP). Thereafter, he was employed by the Federal Government in a civilian capacity. On May 21, 1973, he elected supplemental coverage under the SBP for his children only. On January 21, 1978, the member, preparatory to retirement from the Civil Service, waived receipt of military retired pay for the purpose of using his years of military service to increase his Civil Service annuity. Additionally, he elected a survivor annuity under the Civil Service retirement system. Sergeant Gallagher died April 23, 1978. For survivor annuity purposes, he was survived by his spouse, Mary, and one dependent child, Peggy, born April 23, 1961.

Mrs. Gallagher indicates that a Civil Service survivor annuity account was established in her favor effective April 24, 1978, but payments were reduced because she was entitled to receive Social Security benefits on behalf of Peggy, who at that time was under age 18. Effective the same date, Peggy became entitled to and apparently did receive an annuity under the RSFPP, which annuity continued through April 1979, the month of her 18th birthday. No SBP annuity payments were made to Peggy.

The question which was the subject of decision B-192470, January 3, 1979, was whether the language of 10 U.S.C. 1450(d) and 1452(e) was intended to bar payment of an SBP annuity only to a spouse or whether its applies equally to dependent children.

We concluded in that decision that 10 U.S.C. 1450(d) and 1452(e) bar payment of an SBP annuity to both spouse and dependent children in cases such as Sergeant Gallagher's. That is, a retired military member who has elected SBP coverage, but retires from the Civil Service and waives military retired pay for the purpose of counting military time for Civil Service retirement purposes, has survivor benefits under Civil Service Retirement (unless that protection has been declined) and upon his death there is no spouse or child protection under SBP.

The arguments presented by Mrs. Gallagher are that Sergeant Gallagher elected child only coverage under the SBP; that the language of 10 U.S.C. 1450(d) and 1452(e) refers only to declination of spouse coverage under the Civil Service survivor system; and that amendments made to the SBP by Public Law 94-496, provide for child coverage even if there is no spouse coverage. Further, she indicates we did not consider the importance of the amendment made by Public Law 94-496 in our decision. For these reasons she argues that Peggy is not barred from receiving an SBP annuity although Sergeant Gallagher provided coverage under the Civil Service survivor system based on both his civilian and military service.

Section 1 of Public Law 94-496 amended 10 U.S.C. 1448(a), 1450(a), and 1452(b) to permit a member to bypass his spouse for SBP annuity purposes and elect children only coverage. On page 6 of H.R. Rept. 94-458, Part 1, 94th Cong., 2d Sess., which accompanied H.R. 14773, and which became Public Law 94-496, the following statement regarding that amendment was made:

> Under the RSFPP which the Survivor Benefit Plan replaced a military member could elect to provide an annuity for "children only" even though there was an eligible spouse. The Department of Defense directive which implemented the SBP provided procedures for such elections under the plan. The Comptroller General ruled that the language of Public Law 92-425 did not clearly authorize such elections but advised the Department of Defense that no objection would be interposed to continue such election pending submission of appropriate clarifying legislation to the Congress. H.R. 14773 contains appropriate language clearly authorizing such elections.

Thus, it is to be observed that the law was amended to clarify an ambiguity in the basic provisions authorizing elections of an SBP annuity. Notwithstanding that fact, we do not view the amendment as altering the scope and thrust of either 10 U.S.C. 1450(d) or 1452(e).

Subsection 1450(d) of title 10, United States Code, provides:

(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(j) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title.

And subsection 1452(e) provides:

(e) When a person who has elected to participate in the Plan waives his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect unless * * * he has notified the Civil Service Commission that he does not desire any spouse surviving him to receive an annuity under section 8341(b) of title 5.

The language at issue in those subsections is notification to the Civil Service Commission that the member does not desire "any spouse surviving him to receive an annuity under section 8341(b) of title 5."

Under the Civil Service survivor annuity plan, children coverage is not optional. Unlike the SBP, Civil Service survivor annuity coverage is an all or nothing proposition. The employee may not elect coverage for dependent children and exclude his spouse nor may he have spouse coverage and exclude dependent children. If the employee accepts Civil Service survivor coverage, both his spouse, if he has one, and dependent children, if any, are automatically included in the coverage. The amount deducted from his Civil Service annuity as a cost charge for survivor coverage is for the combined coverage. Therefore, since the retiring employee cannot elect spouse coverage and reject children coverage, to permit continued children coverage under the SBP after the employee waives receipt of military retired pay for Civil Service purposes would be tantamount to providing children with a double benefit.

The argument has been also raised that within the SBP an annuity payment to children is not diminished by payments of Dependency and Indemnity Compensation (DIC). Therefore, such other entitlement as they may have should not diminish that entitlement either. The point of the matter is that the provisions of law governing SBP annuities recognize and take into account that DIC payments which might be payable to a survivor of a military member are part of the package of benefits payable under the SBP program. The SBP and the Civil Service retirement and survivor annuity plan, however, are separate and distinct. Subsection 1450(d) of title 10, United States Code, requires the transfer from the SBP to the Civil Service survivor annuity plan where an individual waives receipt of military retired pay for Civil Service retirement computation and accepts survivor coverage under the latter plan. So long as that waiver is in effect and the individual is providing survivor coverage under the Civil Service plan, that transfer is complete. We are not aware of any provision of law whereby a surviving spouse or dependent children of a Civil Service annuitant in these circumstances may receive or be put in the position to receive survivor benefits under both plans at the same time.

Regarding the reduction in Civil Service retirement benefits required by 5 U.S.C. 8332(j) when the beneficiary is receiving Social Security benefits, payments of Civil Service Retirement annuities and survivor benefits thereunder are for determination by the Office of Personnel Management and not by this Office. Accordingly it would be inappropriate for us to comment on the appropriateness of reductions in survivor benefits made under that provision.

Accordingly, on reconsideration, our decision B-192470, January 3, 1979, is sustained.

[B-92288]

Appropriations—Availability—Indigent Intervenors

Nuclear Regulatory Commission may use appropriated funds to provide financial assistance to intervenors in its proceedings if it determines that participation of party can reasonably be expected to contribute substantially to a full and fair determination of the issues before it, and if intervenor is indigent or otherwise unable to finance its own participation.

Statutory Construction—Legislative Intent—Appropriation Act *v.* Committee Report

Nuclear Regulatory Commission may use fiscal year 1980 funds to provide financial assistance to intervenors in its proceedings despite appropriation committee statement that no funds are being provided for this purpose. Limitations on spending contained in committee reports are not binding on agency unless expressly stated in appropriation act.

Matter of: Financial Assistance to Intervenors in Proceedings of Nuclear Regulatory Commission, January 25, 1980:

The General Counsel of the Nuclear Regulatory Commission has requested our views on the Commission's authority to provide financial assistance to participants in its proceedings. Specifically, the General Counsel asks first whether the Commission may use appropriated funds to assist intervenors in certain of its proceedings when the Congress has neither expressly approved nor prohibited such assistance by law. Second, he asks whether there are circumstances under which the Commission may use fiscal year 1980 funds to assist intervenors although the Committee on Appropriations of the House of Representatives has indicated in its report that the appropriation act for 1980 does not contain funds for intervenors.

For the reasons indicated below it is our opinion that the Nuclear Regulatory Commission may legally expend appropriated funds to assist intervenors in its proceedings if it wishes to do so and that it may legally use fiscal year 1980 funds for this purpose despite the langauge in the appropriations committee report.

FUNDING INTERVENORS IN GENERAL

In response to an earlier request of the Commission, we issued our decision, *Costs of intervention-Nuclear Regulatory Commission*, B-92288, February 19, 1976. We determined that the Commission could properly use its appropriated funds to assist intervenors if it determined that it could not make licensing determinations "unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matters before it * * *."

In reaching this conclusion we looked at section 189 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239, which authorizes the Commission to conduct hearings and to admit as a party to its proceedings anyone who may be affected by its proceedings. We also considered that the Commission generally receives a lump sum appropriation for necessary expenses in carrying out the purposes of the Energy Reorganization Act of 1974. We then stated:

> While 31 U.S.C. §628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 619 (1927); 17 *id.*, 636 (1938); 29 *id.* 419 (1950); 44 *id.* 312 (1964); 50 *id.* 534 (1971); 53 *id.* 351 (1973).

We finally decided that only the Commission was able to determine whether it was necessary to fund intervenors in order to carry out its statutory responsibilities, and if it so determined, we would not object to its use of appropriated funds for this purpose.

In a subsequent decision, *Costs of intervention-Food and Drug Administration*, 56 Comp. Gen. 111 (1976), we modified our Nuclear Regulatory Commission decision. We stated:

> While our decision to NRC did refer to participation being "essential," we did not intend to imply that participation must be absolutely indispensable. We would agree with Consumers Union that it would be sufficient if an agency determines that a particular expenditure for participation "can reasonably be expected to contribute substantially to a full and fair determination of" the issue before it, even though the expenditure may not be "essential" in the sense that the issues cannot be decided at all without such participation. (Id. at 113.)

Subsequent to our most recent decision on this issue, the United States Court of Appeals for the Second Circuit issued a decision which held that it was not error for the Federal Power Commission to determine that it lacked the statutory authority to reimburse intervenors for their expenses. *Greene County Planning Board* v. *FPC*, 559 F. 2d 1227 (1977) (Rehearing en banc), *cert. denied*, 434 U.S. 1086 (1978). In so ruling, the court indicated its disagreement with our determinations described above.

Although the *Greene County* case cast some doubt on the validity of our previous decisions, it is our opinion that the court decision applied only to the former Federal Power Commission (FPC), and does not apply broadly to other Federal agencies or even to the agencies which succeeded to the FPC's responsibilities. In *Greene County*, the Second Circuit relied on three previous court decisions in reaching its result. These were *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Turner* v. *FCC*, 514 F. 2d 1354 (D.C. Cir. 1975); and *Greene County Planning Board* v. *FPC*, 455 F. 2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972). However, none of these previous decisions dealt directly with the authority of a Federal agency to expend its own funds voluntarily to reimburse the expenses of intervenors before it. In *Alyeska* and *Turner*, *supra*, the issue was whether a court or administrative agency could order one party to its proceedings to pay the expenses of another. In each case the court ruled that this could not be done without specific statutory authority. In the first *Greene County* case the question was whether a court could order either an opposing party or the agency to pay the intervenor's expenses. The court ruled that, in the absence of a statutory requirement that such expenses be paid, it could not order that they be paid.

As we stated in distinguishing these three cases in our Nuclear Regulatory Commission decision, *supra:*

> In the matter before us, we are not considering whether NRC has the authority to determine whether one participant in its proceedings should pay the expenses of the other, nor are we concerned with whether the persons to whom financial assistance is extended prevail. There is also no question of *compelling* NRC to pay the expenses of any of the parties. We hold only that NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial costs of participation in the proceedings. [Italic in the original.]

We therefore do not believe that the second *Greene County* decision applies to the Nuclear Regulatory Commission or to any other Federal agency other than the former Federal Power Commission.

The United States District Court for the District of Columbia, in *Chamber of Commerce* v. *United States Department of Agriculture*, 459 F. Supp. 216 (1978), likewise determined that *Greene County* did not extend generally to all Federal agencies. The Office of Legal Counsel of the Department of Justice has taken a similar position on the effect of *Greene County*.

Therefore, in response to the first question raised by the Commission's General Counsel, we conclude that based on the authority given it by its organic legislation, the Commission may use appropriated funds to assist an intervenor in its proceedings if it determines that the participation of that party can reasonably be expected to contribute substantially to a full and fair determination of the issue before it, and if the party is indigent or otherwise unable to finance its own participation.

USE OF FISCAL YEAR 1980 FUNDS

Concerning the General Counsel's second question, the Energy and Water Development Appropriation Act, 1980, Pub. L. No. 96–69, 93 Stat. 437, 449, provides with respect to the Commission:

> For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974, as amended * * * $363,340,000, to remain available until expended * * *.

This appropriation is a lump-sum amount for necessary expenses of the Commission and contains no prohibition on the use of these funds to assist intervenors in the Commission's proceedings.

However, in reporting the bill which later became the Energy and Water Development Appropriation Act, the House Committee on Appropriations stated:

> * * * The Budget request and the Committee Recommendation do not include funds for intervenors. (H.R. Rept. No. 96–243, 96th Cong., 1st Sess. 139 (1979).)

Although there was no similar language in the Senate Appropriation Committee Report, the report of the Conference Committee incorporated by reference the House Committee language. *See* H. R. Rept. No. 96–388, 96th Cong., 1st Sess. 1 (1978). We might note that there is no statutory requirement that the Commission specifically request funds to assist intervenors.

This Office has frequently expressed the view that expressions of intent as to spending, contained either in an agency's budget submission or in appropriation committee reports, are not legally binding upon the agency unless they are specified in the text of the appropriation act itself or in some other legislation. *E.g.* B–114833, July 21, 1978; *Newport News Ship Building and Dry Dock Company*, 55 Comp. Gen. 812, 820 (1976); *LTV Aerospace Corporation*, 55 Comp. Gen. 307, 319 (1975). Our position is based on the recognition that a certain amount of flexibility is necessary in the financial operations of Federal departments and agencies, and that if the Congress desires to restrict that flexibility with respect to a specific item, it may do so by inserting a limitation in the text of the appropriation act or in some other enactment. As we stated in *LTV Aerospace Corp., supra:*

> * * * it is our view that when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies. (55 Comp. Gen. at 319.)

In *Soil Conservation Service's Standard Level User Charge Payments.* B–177610, September 3, 1976, the reports of the appropriation committees in both Houses indicated that they desired to reduce the appropriation requested by the agency for a specific line item purpose. The appropriation act, however, contained a lump-sum amount without any limitations. We determined that the reduction indicated in the reports was not a legal limit on the agency's spending because it was not expressly stated in the appropriation act.

Similarly, in the present case, although the appropriation committee indicated that it was not including any funds for intervenors, the appropriation act itself contains no such provision. In other instances in which the Congress desired to prohibit funding of intervenors, it has specifically indicated this intent in the appropriation act itself. *See* Department of the Interior and Related Agencies Appropriation Act, 1980, P.L. 96–126, 93 Stat. 954, 972 (Appropriation for Economic Regulatory Administration, Department of Energy). Therefore, in the absence of an express statutory prohibition on spending appropriated funds for assisting intervenors, the Commission may legally use fiscal year 1980 funds for that purpose if it makes the determinations we have indicated above.

We wish to make it clear that we are not directing or in any way suggesting that the Commission *should* fund intervenors solely because it is possible to make these determinations. As we said in *LTV Aerospace Corp., supra:*

> * * * This does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress.

The Commission may be well advised to postpone further implementation of the pilot intervenor's program mentioned in its submission in the light of the 1980 House Appropriations Committee report. This decision addresses only the question of whether its fiscal year 1980 funds are *legally* available to fund intervenors should it choose to do so. We hold that if the Commission does decide to initiate the pilot intervenor's program, in accordance with our criteria, we would not be required to object.

[B-195272]

Claims — Settlement by General Accounting Office — "Contract Disputes Act of 1978" Effect — Express *v.* Informal Contractual Commitments

Executive agencies should continue to refer demands for payment arising under informal commitments to General Accounting Office for settlement. Contract Disputes Act of 1978 does not conflict with statutory authority of GAO to pass upon propriety of expenditures of public funds.

Matter of: Contract Disputes Act of 1978, January 29, 1980:

The United States Army Finance and Accounting Center asks us to reconsider the action of the Payment Branch of our Claims Division which returned a voucher from that agency without settlement. The Finance Center had asked us to concur that an invoice submitted by the Georgia Lions Eye Bank to the Department of the Army should be paid and to certify the Army's voucher for payment. The Payment Branch returned the voucher to the Finance Center, questioning whether the matter should be settled by our Office in light of the Contract Disputes Act of 1978, P.L. 95–563, November 1, 1978, 41 U.S. Code 601 note. We are instructing the Payment Branch to determine whether the voucher should be certified for payment.

The facts are these. An Army medical officer ordered a cornea from the Georgia Lions Eye Bank for transplant to an eligible patient. The doctor thought there would be no charge for the cornea. He believed that eye donations from non-profit organizations were free of charge and the procurement procedures were not used. In fact, the Georgia Lions Eye Bank's practice is to charge a $200 processing fee. The Army, believing the invoice should be paid, states that $200 is a reasonable fee, that the corneal lens was received and used, and that if the fee had been known in advance a purchase order would have been issued.

The Contract Disputes Act of 1978 provides that all claims by a contractor against the Government relating to a contract shall be submitted to the contracting officer for a decision. (Section 6(a) of the Act, 41 U.S.C. 605.) Section 2 of the Act, 41 U.S.C. 601) defines the contracts to which the Act applies as including "any express or implied contract * * * entered into by an Executive agency for [the procurement of property, services or construction work on real property]."

The invoice of the Georgia Lions Eye Bank was forwarded here because of the absence of an express contract underlying the request for payment. Our Payment Branch advised the agency that claims arising from an express or implied contract entered into by an Executive agency should be settled by the agency under the provisions of the Contract Disputes Act of 1978.

The threshold question, however, is whether the Georgia Lions Eye Bank has submitted a claim which must be decided by the contracting officer under the disputes provisions of the Act. We hold it has not, and that this matter should be referred to our Office for settlement under 31 U.S.C. §§ 71, 74 (1976).

The applicability of the Contract Disputes Act begins with the contractor's filing of a "claim." The Act does not in any way define the term "claim." While in its broadest sense, "claim" could be read to include such routine matters as progress payment requests, price proposals on formal changes and even invoices, the context of the Act itself clearly indicates that "claim" as used in the Act is intended to refer to situations where the entitlement to recovery or the amount of recovery is disputed by the Government.

The Act states, as noted above, that: "All claims by a contractor against the government shall be in writing and shall be submitted to the contracting officer for a decision." In practice, virtually all matters (whether or not denominated as claims) are submitted to the contracting agency either for payment, as in the case of simple progress payments, or for negotiation, as in the case of complex changes. Customarily, these matters are not in the first instance submitted to the contracting officer for a final decision, thereby initiating the disputes-resolving procedures of the Act. It is only after the settlement process fails that the contractor seeks a decision by the contracting officer.

This has been recognized by the Office of Procurement Policy (OFPP) which is empowered to issue guidelines under the Act. (Section 8(2)(h) of the Act.) OFPP has proposed the following definition:

> "Claim" means
> (1) a written request submitted to the contracting officer
> (2) for payment of money, adjustment of contract terms, or other relief;
> (3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the government; and
> (4) for which a contracting officer's final decision is demanded. 44 Fed. Reg. 12524, March 7, 1979.

The agency does not disagree with the Georgia Lions Eye Bank that the invoice should be paid. In fact, the Army states it will pay the invoice if authorized by our Office. Since there is no dispute between the parties, either with regard to entitlement to payment or amount of payment, the disputes-resolving procedures of the Act should not be involved. That is to say, the invoice submitted is not a "claim" under the Act for which a decision by the contracting officer is required. Rather, the invoice here is simply a request for payment. Because there is no express contract underlying this request, the agency has asked us to certify its voucher.

Where proper procurement procedures are not used, such as this case, certain steps must be taken before payments properly may be made. This is because informal commitments, unlike express contracts which are subject to various procedural safeguards to insure compliance with appropriation and procurement requirements imposed by statute or regulation, by their very nature are not subjected to the same safeguards as express contracts. Thus, before an implied procurement contract to which the United States is a party may be legally recognized, questions must be resolved which concern not only the authority of Government officials to enter into or ratify a contractual arrangement, but also whether the purported contract is prohibited by a statute or not within the agency's statutory authorization. Also, there may be questions concerning the availability of funds to pay an invoice resulting from an informal commitment, even if it is clear that there is no legal impediment to recognizing an implied contractual relationship.

These are questions that we have traditionally decided under 31 U.S.C. §§ 71, 74. We see no conflict between the disputes-resolving procedures of the Act and our responsibility to settle and adjust demands against the Government and to render binding decisions involving the payment of appropriated funds. In response to a situation such as this, a contracting agency should refer the question regarding propriety of payment to this Office for decision.

To hold otherwise would be inconsistent with the statutory authority of our Office to pass upon the propriety of expenditures of public funds and would result, in effect, in a repeal by implication of 31 U.S.C. §§ 71, 74, a construction not favored by the law. 1A Sutherland, *Statutes and Statutory Construction*, 23.10 (4th Ed. C. Sands 1973). Moreover, our interpretation provides for a harmonious reading of different statutes, a result which is favored by the law. 2A Sutherland 51.02.

Accordingly, we are instructing the Payment Branch to consider the matter in accordance with this decision. The contracting agency is advised that requests for payment, based on informal commitments, should continue to be referred to our Office in accordance with 4 GAO 5.1.

[B-195288]

Quarters — Government Furnished — Rent Payments — Salary Deduction *v.* Direct Payment — Special Account Reimbursement Propriety

Forest Service Certifying Officer may use amounts remaining in appropriations as a result of payroll deduction for use of Government quarters, for maintenance and operation expenses of such quarters. 5 U.S.C. 5911(c) allows such deductions to remain in applicable appropriation and Forest Service's appropriations from which salaries are paid are available for such expenses.

Matter of: Payments for Quarters Maintenance and Operation Expenses from Salary Deductions for Quarters, January 29, 1980:

The Unit Certifying Officer, Black Hills National Forest, Forest Service, Department of Agriculture (Department), has requested an advance decision on the propriety of using rent collected from Forest Service employees for the use of Government quarters to pay for the maintenance and operation expenses of such quarters. He also questions the propriety of the Office of Management and Budget (OMB) determination that salary deductions be treated as reimbursements rather than refunds.

The rental charges are collected from employees through salary deductions pursuant to 5 U.S.C. § 5911(c). The certifying officer states—

> The Office of Management and Budget has determined that employee salary deductions for quarters must be treated as reimbursements rather than appropriation refunds.
>
> My instructions are to charge quarters maintenance and operational expenses, up to the amount of salary deductions to the reimbursement accounts.

The law authorizing the furnishing of quarters to employees (5 U.S.C. § 5911) does not provide for applying the deduction for quarters to maintenance of buildings.

Does the OMB determination supersede the law?

For reasons set forth below, we conclude that payroll deductions for the use of Government quarters may be used to pay for quarters maintenance and operation expenses since the Forest Service appropriations out of which salaries are paid are available for such purposes.

The statutory provision in question, 5 U.S.C. § 5911, authorizes heads of agencies to provide employees with quarters and facilities "when conditions of employment or of availability of quarters warrant the action." Under 5 U.S.C. § 5911(c), rates for quarters and charges for facilities—

> . . . shall be paid by, or deducted from the pay of, the employee or member of a uniformed service, or otherwise charged against him in accordance with law. The amounts of payroll deductions for the rates and charges *shall remain in the applicable appropriation or fund*. When payment of the rates and charges is made by other than payroll deductions, the amounts of payment shall be credited to the Government as provided by law. [Italic supplied.]

Under the above statutory provision, the amount of the rental charges may be collected from employees either through payroll deductions or by direct payment. If the amount is collected through a payroll deduction, it remains in the appropriation or fund out of which salaries are paid. If payment "is made by any other method, such as payment in cash, the amounts of the payment shall be credited to the Government as otherwise provided by law. In most cases such cash payments would go to the general fund of the Treasury, or to a revolving fund or appropriation from which the expenses of the operation involved are paid." H. Rep. No. 88–1459, 88 Cong. Sess., 12 (1964).

The statute, 5 U.S.C. § 5911(c), *supra*, specifically states that payroll deductions "shall remain in the applicable appropriation or fund." We understand that the Forest Service appropriation out of which salaries are paid is available for the payment of operation and maintenance expenses of Government quarters. Therefore, any funds remaining in the appropriation as a result of payroll deduction for Government quarters would be available for the expenses of operating and maintaining those quarters as well as any other expenses properly payable from that appropriation.

OMB's Assistant Director for Budget Review advised in a letter to us that deductions from employees for quarters and subsistence should be treated as reimbursements to be credited to the appropriation or fund account that provides the service when there is legal authority—such as that contained in 5 U.S.C. § 5911(c)—to do so. In the absence of specific statutory authority to return them to agency appropriations, employee payments (as distinguished from salary deductions) for quarters and subsistence must be deposited to miscellaneous receipts. We agree with OMB's position.