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[B-202611]

Officers and Employees—Transfers—Relocation Expenses—Real Estate Expenses—Condominium Purchase—Garage Space Acquisition

A transferred employee entitled to reimbursement of expenses required to be paid by him in connection with the purchase of a residence at his new duty station may be reimbursed under paragraph 2–6.1 of the Federal Travel Regulations for expenses incurred separately in obtaining garage parking space in connection with the purchase of a condominium, since garage parking was reasonably necessary and since it was obtained in conjunction with the condominium unit.

Matter of: Kaye D. Hollingsworth—Real Estate Expenses—Purchase of Garage Space in Conjunction With Residence, September 1, 1981:

Mr. H. O. Miller, Accounting and Finance Officer, Defense Logistics Agency, requests an advance decision regarding Mr. Kaye D. Hollingsworth's supplemental claim for real estate purchase expenses in the amount of $153 incurred in obtaining garage space in conjunction with the purchase of a residence incident to transfer of station.

Payment of the claim is authorized since the garage parking space was reasonably necessary and obtained in conjunction with his purchase of a condominium unit even though it was purchased separately.

Mr. Kaye D. Hollingsworth was transferred from Atlanta, Georgia, to Alexandria, Virginia. He has been reimbursed relocation expenses, including real estate expenses incurred for the purchase of his new residence, a condominium unit. His original voucher included a statement that an additional claim would be submitted for reimbursement of expenses to be incurred in the purchase of parking space in the condominium's garage. He has now submitted a supplemental voucher for these expenses.

Mr. Hollingsworth states in support of his claim that while the initial sales of condominium units in his building were made without garage spaces, new owners were given an option to obtain such space by a separate purchase. Since the original owners from whom he purchased his unit did not obtain garage space at the time they acquired the property, it was necessary for him to purchase garage space separately. While he was not required to make the purchase, he contends that the limited parking space on the grounds at times would have left him with only an alternative of dangerous and illegal curb side parking in the street.

The submission indicates that the Accounting and Finance Officer believes that paragraph C1400 of Volume II, Joint Travel Regulations, which authorizes reimbursement for expenses required to be

paid by an employee in connection with the purchase of a residence at his new duty station, does not permit payment of expenses incurred in connection with the purchase of a garage when it can be acquired separately and sold independently of the residence unit.

Allowances for expenses incurred in connection with residence transactions incident to a permanent change of station are authorized by 5 U.S.C. 5724a (1976) and by the Federal Travel Regulations (FPMR 101–7). Paragraph 2–6.1 of the FTR provides that the Government shall reimburse an employee for expenses required to be paid by him for purchase of a dwelling at his new official station. Where an employee's old or new residence includes a garage, we have routinely authorized reimbursement for the associated real estate expenses and we have not drawn a distinction between or required an apportionment of costs associated with the dwelling and garage portions of the residence.

The record indicates that the residence purchased by Mr. Hollingsworth had a reasonable requirement for adequate and protected parking. It further establishes that the parking space in question was obtained incident to his purchase of a condominium unit in the same building and that both were purchased incident to his permanent change of station. There is no evidence that Mr. Hollingsworth intends to use the garage for any purpose other than in connection with the occupancy of his condominium. Therefore, otherwise reimbursable real estate expense incurred for the purchase of such garage space may be reimbursed as a necessary expense in connection with the purchase of such residence.

Accordingly, Mr. Hollingsworth's supplemental claim for real estate expenses may be paid, if otherwise proper.

[B–201451]

Contracts—Payments—Assignment of Claims Act—Lease Payments to New Owner—Propriety—Real *v.* Personal Property

General Accounting Office (GAO) concludes that claimant, as alleged assignee of contractor, has not presented sufficient evidence to establish entitlement to proceeds of two contracts because (1) contracts could not be legally transferred to assignee, (2) evidence does not indicate valid assignment of the contracts' proceeds, and (3) in the circumstances, requirements of Assignment of Claims Act should not be waived.

Contracts — Payments — Withholding — Doubtful Claims—Court Suit or Private Settlement Recommended

GAO concludes that the contractor's actions give rise to substantial doubt concerning its entitlement to proceeds of two contracts. Accordingly, GAO recommends that payment be withheld pending agreement of the parties or judgment of a court of competent jurisdiction.

Matter of: Payment of Proceeds Under Magna Cool Corporation Contracts, September 4, 1981:

The Associate Deputy Assistant for Pay, Travel and Disbursing Systems, Navy Accounting and Finance Center, a disbursing officer, requests our decision on the propriety of payment of the claim of Southern Equipment, Inc. (Southern), in the amount of $24,287.13, representing the unpaid balance under two Navy contracts. Southern contends that it is entitled to the money as the assignee of the proceeds of the two Navy contracts with Magna Cool Corporation (Magna Cool). Magna Cool contends that it is entitled to the money because the proceeds of one contract were not assigned to Southern and, under the other contract, only the proceeds for the first year of the contract, which are not involved here, were assigned to Southern.

We conclude that Southern has not sufficiently established its entitlement to the unpaid balance and that there is enough doubt concerning Magna Cool's entitlement to recommend withholding payment on either claim pending an agreement of the parties or a judgment from a court of competent jurisdiction.

On April 26, 1978, the Navy entered into contract No. N00612-78-C-T222 for rental of one 75-ton portable heat pump from Magna Cool. On June 29, 1978, the Navy entered into contract No. N00612-78-C-T286 for rental of another 75-ton portable heat pump from Magna Cool. By modifications, the terms of the contracts were extended from earlier ending dates to August 31 and October 31, 1979, respectively. These extensions cost $7,737.13 and $16,550, respectively, for a total of $24,287.13. Payment for the rental through the earlier ending dates was made to the order of Magna Cool and, pursuant to Magna Cool's instructions, sent to an address which was subsequently determined to be Southern's office. Southern received Magna Cool's payments, stamped them with Magna Cool's bank stamp, and deposited the proceeds into Southern's bank account. On October 10, 1979, Southern contacted the Navy regarding late payments under the Magna Cool contracts; this was the Navy's first notice that Southern was involved in the matter.

Southern's inquiry resulted in a Navy investigation revealing that Southern and Magna Cool had made some agreement regarding the proceeds of the two Navy contracts possibly involving the sale of the two heat pumps by Magna Cool to Southern. Southern contends that the proceeds of both contracts were assigned to it, thus it is entitled to the balance of the unpaid account. Documentation supporting the assignments consists of an agreement regarding only one contract covering a period for which payment has already been made. The file contains no written agreement involving the other contract. In addi-

tion to the documentation, Southern argues that oral assignments are valid between the parties under applicable state law and Southern has offered to post a bond to protect the Government against the possibility that a payment to Southern might later be determined to be erroneous.

Magna Cool demands payment because in essence Magna Cool is the contractor and there has been no valid assignment of the proceeds of the contracts. The Navy notes that if it is determined that the now defunct Magna Cool is entitled to the proceeds, the Internal Revenue Service and a judgment creditor of Magna Cool contend that they should receive Magna Cool's entitlement.

The Navy reports that, under applicable state law, the oral assignment may be binding between Southern and Magna Cool; however, the Magna Cool contracts permit assignment of the proceeds to a bank, trust company or other financial institution, if certain conditions were met including notice to the contracting officer. Here, it was on October 10, 1979, when the Navy first learned that Southern and Magna Cool had some type of arrangement—that was after one contract had ended and 3 weeks before the other one was scheduled to end. To date, the precise details of that arrangement are not certain. No notice of assignment or true copy of the assignment was filed with the Navy at any time during performance of the contracts and, there is some doubt about Southern's ability to be considered a bank, trust company or financial institution within the meaning of the contractors' provisions regarding assignments. In the Navy's view, the requirements of the Assignment of Claims Act should not be waived.

Further, the Navy reports that there is some evidence that Magna Cool sold the two heat pumps to Southern, raising the possibility that Southern may have a valid equitable claim for rental payments flowing from the Navy's use of Southern's equipment.

First, as the Navy points out, there is precedent holding that the Assignment of Claims Act does not bar payment of lease payments to the new owner of real property. *Freedman's Savings and Trust Co.* v. *Shepherd*, 127 U.S. 494 (1888); 4 Comp. Gen. 193 (1924). We are not aware, however, of any authority holding that the act does not bar payment of rental payments to the new owner of personal property. Second, it is not clear from the record that Magna Cool's rental contracts were meant to be sold to Southern along with the heat pumps. Third, documentation is not adequate to establish the precise Magna Cool and Southern arrangement.

In our view, therefore, Southern has not presented sufficient evidence to establish its entitlement to the proceeds. Magna Cool's contracts could not be legally transferred to Southern and no novation occurred.

We are not persuaded that Magna Cool validly assigned the proceeds of its contract to Southern in accord with the terms of the contracts and the Assignment of Claims Act. While the requirements of the Assignment of Claims Act may be waived (*Maffia* v. *United States*, 163 F. Supp. 859 (Ct. Cl. 1958)), we concur with the Navy that it should not be waived here.

Further, in our view, Magna Cool's actions—in at least attempting to assign certain contracts proceeds, permitting Southern to deposit contract payments into Southern's bank account, and purportedly selling the heat pumps to Southern, all without proper notice to the Navy—give rise to (1) substantial doubts concerning Magna Cool's entitlement and (2) possibility that the Navy would be required to reimburse Southern for rental value of its equipment.

Accordingly, we recommend that payment of the proceeds be withheld pending an agreement of the parties or a judgment of a court of competent jurisdiction. *See* B–155504, July 8, 1966; 20 Op. Atty. Gen. 578 (1893).

[B–198385, B–198386, B–198400]

Compensation — Overtime — Traveltime — Criteria for Entitlement—Non-Compliance

Entitlement to overtime compensation while in travel status under 5 U.S.C. 5542(b)(2)(B)(iv) requires at least that: (1) travel result from event which could not be scheduled or controlled administratively, and (2) immediate official necessity in connection with event requiring travel to be performed outside employee's regular duty hours. In instant case, neither condition was fulfilled, and request for overtime compensation is denied. B–192839, May 3, 1979, overruled in part.

Compensation — Overtime — Traveltime — Criteria for Entitlement—Separate From Those for Per Diem

Our so-called "two-day per diem" rule merely governs payment of per diem when employee delays travel in order to travel during regularly scheduled working hours. Entitlement to overtime compensation, however, is determined by the distinct criteria under 5 U.S.C. 5542(b)(2) as interpreted by our decisions. Mere compliance with "two-day per diem" rule will not result in payment of overtime compensation since per diem and overtime are governed by different criteria.

Matter of: John B. Schepan, *et al.*—Overtime Compensation for Travel, September 10, 1981:

This decision is in response to consolidated appeals by Messrs. John B. Schepman, H. Paul Ringhand, and Leland R. Alexander, employees of the Food and Drug Administration (FDA), Department of Health and Human Services, Cincinnati, Ohio, from our Claims Group's actions of December 21, 1979, Settlement Certificate Nos. Z–2818652, Z–2818653, and Z–2819227, respectively, denying their requests for overtime compensation.

The above-named employees (hereafter claimants), along with several others, were required to travel from their duty station in Cincinnati, Ohio, to Cleveland, Ohio, on November 6 or 7, 1978, on very short notice. A Temporary Restraining Order had been issued by the United States District Court, and these employees, who were FDA investigators and analysts, had to assist the United States Attorney in the preparation of his case and had to be prepared to testify as witnesses on behalf of the Government at a hearing on November 9, 1978. The claimants traveled to Cleveland within regularly scheduled working hours which were 8 a.m. to 4:30 p.m. On Thursday, November 9, 1978, the hearing took place. At approximately 5:30 p.m., when the hearing was over, the claimants were released and instructed to return to their duty stations. The claimants returned to Cincinnati that evening by Government car which took approximately 6 hours. The following day was Friday, November 10, 1978, a Federal holiday. The next regularly scheduled workday for the claimants did not begin until 8 a.m. on Monday, November 13, 1978.

After returning to their duty stations, the claimants reported the hours spent in travel for the return trip as overtime, and submitted expense vouchers for the trip. Their supervisors requested overtime compensation for the travel time back to Cincinnati as compensable overtime work as provided for in 5 U.S.C. § 5542(b)(2)(B)(iv) (1976).

All parties involved and our Claims Group agree that the initial trip to Cleveland resulted from an administratively uncontrollable event, i.e., the Court's scheduling of the hearing. Furthermore, FDA now agrees that Friday, November 10, 1978, was a holiday for all purposes, and cannot be considered an ordinary workday for travel purposes.

The proper resolution of the instant case depends upon an understanding of two distinct legal concepts which often appear in the same case: (1) the so-called "two-day per diem" rule, and (2) the employees' entitlement to overtime compensation or compensatory time for time spent traveling.

The former concept governs payment of per diem when an employee delays travel in order to travel during regularly scheduled working hours, and was set forth in our decision, *James C. Holman*, B-191045, July 13, 1978 as follows:

> * * * insofar as permitted by work requirements, travel may be delayed to permit an employee to travel during his regular duty hours where the additional expenses incurred do not exceed 1¾ days' per diem costs. 56 Comp. Gen. 847 (1977).* * *

This rule originally evolved as a prohibition against delaying travel over a weekend for the sole purpose of allowing an employee to travel during working hours. It was predicated in part on the statutory pol-

icy of 5 U.S.C. § 6101(b)(2) calling for the scheduling of employee travel, to the maximum extent practicable, within the regularly scheduled workweek (which will be discussed further, below). 56 Comp. Gen. 847, 848 (1977). Thus, the "two-day per diem" rule, as stated in that decision and in 55 Comp. Gen. 590, 591 (1975), provides that where scheduling to permit travel during normal duty hours would result in the payment of 2 days or more of per diem, the employee may be required to travel on his own time rather than on official time.

In order to be entitled to overtime compensation, however, the circumstances of an employee's travel must meet the *distinct and additional* criteria for payment of overtime compensation set forth at 5 U.S.C. § 5542(b)(2). The mere fact that the "two-day per diem" rule applies is not sufficient to create an entitlement to overtime. We have held that the travel time on nonworkdays may be compensated when the above statutory criteria are met. 51 Comp. Gen. 727, 732 (1972) and 50 *id.* 674, 676 (1971). Similarly, an employee may be paid overtime under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* when travel must be performed on a nonworkday during regular working hours in order to avoid the payment of more than 1¾ days' per diem costs. *Shirley B. Hjellum and Gary B. Humphrey*, B–192184, May 7, 1979.

In the instant case, since the claimants as professional employees are exempt from coverage under FLSA, their entitlement to overtime compensation is governed by the applicable provisions of 5 U.S.C. § 5542(b)(2)(B) which, in relevant part, provides:

> (b) For the purpose of this subchapter—
>
> * * * * * * *
>
> (2) time spent in a travel status away from the official duty station of an employee is not hours of employment unless—
>
> * * * * * * *
>
> (B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

There is nothing in the administrative record which indicates the applicability of items (i), (ii), or (iii). Thus, the issue presented is whether the claimants' return trip can be considered as resulting from an event which could not be scheduled or controlled administratively as that phrase has been interpreted by our decisions. In addition, an employee's travel is to be scheduled in accordance with the provisions of 5 U.S.C. § 6101(b)(2) which provides:

> To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee.

As interpreted by our decisions, 5 U.S.C. § 5542(b)(2)(B)(iv) requires that, for the purpose of allowing overtime compensation or compensatory time, the following conditions be present: (1) travel resulting from an event which could not be scheduled or controlled administratively, and (2) an immediate official necessity in connection with the event requiring the travel to be performed outside the employee's regular duty hours. 51 Comp. Gen. 727 (1972) and *Mark Burstein*, B–172671, March 8, 1977. The interrelationship between our "two-day per diem" rule and entitlement to overtime compensation can be seen in cases where, for example, we have required that in addition to the two foregoing conditions, both of which must be met, the employee must also fulfill a third condition, namely, notwithstanding that there is sufficient notice of the uncontrollable event to permit scheduling of the travel during his regularly scheduled duty hours, the scheduled start of the event must require travel during a period of at least two successive off-duty days. 51 Comp. Gen. 727, 732 (1972) and 50 *id.* 674, 676 (1971).

Although initial travel to a place may fall within one or more of the conditions of 5 U.S.C. § 5542(b)(2)(B) to qualify as hours of employment, we have consistently held that the return travel itself must meet one of those conditions in order to qualify the travel time involved as hours of employment. 51 Comp. Gen. 727 (1972); 50 *id.* 519 (1971); 50 *id.* 674 (1971); and *William C. Boslet, et al.*, B–196195, February 2, 1981. In the instant case, the record fails to reveal that the claimants were required to return to Cincinnati by an administratively unscheduled or uncontrollable "event," i.e., anything which necessitates an employee's travel. 51 Comp. Gen. 727 (1972) and *Mark Burstein*, B–172671, March 8, 1977. While FDA obviously had no control over the time that the Court dismissed the hearing, the fact that the return travel began at that time is not determinative. To meet the requirements of the statute, the event which necessitated the claimants' travel outside of regular duty hours must have been one which could not be scheduled or controlled administratively. As found by our Claims Group, the only purpose of the claimants' travel was to return to their duty station. Furthermore, an employee's mere presence at his permanent duty station on the next workday is not normally considered an administratively uncontrollable event. *John B. Currier*, 59 Comp. Gen. 96 (1979) and *Raymond Ratajczak*, B–172671, April 21, 1976.

Even if the first condition had been fulfilled, however, there is no indication in the record that there was an immediate official necessity, in connection with the event, and, thus, the second condition was not fulfilled either. While an FDA memorandum in the file of this case

indicates the claimants were not "ordered" to return to their duty station, another notes that at 5:30 p.m. they were "instructed to return to their duty stations." There is nothing in the record to show that there was any official necessity for them to return immediately to Cincinnati, so neither of the requirements for the entitlement to overtime compensation for travel time is met.

In their submissions, claimants have placed great emphasis on the "two-day per diem" rule. Their argument is to the effect that this rule required their return on Thursday night. Furthermore, they argue that their actions are in accord with the Federal Personnel Manual Supplement (FPM Supp.) 990–2, Book 550, subchapter S1–3b (Case No. 5), relating to premium pay, which states in part as follows:

> On the other hand, if the employee (whose regular hours of work are 8 a.m. to 5 p.m., Monday through Friday) completes the course at 5 p.m. Friday, his travel on either Friday night or Saturday (depending on availability of transportation) will be payable because, under a decision of the Comptroller General (B–160258, November 21, 1966), he is not entitled to per diem if he should remain until Monday, and thus, his travel time cannot be controlled realistically.

The above line of argument, however, represents a confusion between the two distinct legal concepts of the "two-day per diem" rule, and entitlement to overtime compensation. As explained in more detail above, the former concept merely governs payment of per diem when an employee delays travel in order to travel during regularly scheduled working hours. The latter concept is governed by the *district and additional* criteria for payment set forth at 5 U.S.C. § 5542(b)(2). It is true that the policies of 5 U.S.C. § 6101(b)(2) requiring scheduling, to the maximum extent practicable, of travel within an employee's regularly scheduled workweek are common to both concepts. However, merely because an employee complies with the "two-day per diem" rule, it does not follow that he is entitled to overtime compensation under 5 U.S.C. § 5542(b)(2)(B)(iv), which requires at least that (1) the travel results from an event which could not be scheduled or controlled administratively, and (2) an immediate official necessity in connection with the event requiring the travel to be performed outside the employee's regular duty hours. 51 Comp. Gen. 727 (1972) and *Mark Burstein*, B–172671, March 8, 1977. As can be seen from some of our cases, the proper application of these two different but related concepts will result, in certain cases, in the conclusion that there is no statutory authority for allowing payment of either per diem for delaying travel until it can be accomplished during normal working hours or overtime compensation when the employee travels outside normal working hours. *Charles C. Mills* B–198771, December 10, 1980 and B–163654, January 21, 1974. See *Barth* v. *United States*, 568 F.2d 1329 (Ct. Cl. 1978).

In regard to claimants' argument based on the FPM Supp. example, we must reluctantly conclude that the FPM Supp. has improperly applied the case of B-160258, November 21, 1966, which is published at 46 Comp. Gen. 425 (1966). That decision, while it is still legally valid, deals only with per diem and its relevant rules. It did not purport to deal with the question of overtime compensation. While the FPM Supp. example is correct in finding that there would be no entitlement to per diem in the example given if the employee should remain until Monday, it incorrectly assumes that such compliance will necessarily entitle the employee to overtime compensation merely because his travel time cannot be controlled realistically. As shown above, such an assumption is unfounded, and the "two-day per diem" rule and entitlement to overtime compensation are governed by different criteria. Accordingly, the claimants' argument fails because 46 Comp. Gen. 425 (1966) in this context was only concerned with per diem, and has no applicability to the question of entitlement to overtime compensation. We have provided the Office of Personnel Management with a copy of this decision.

For the foregoing reasons, we affirm the disallowance by our Claims Group of claimants' request for overtime compensation for travel.

We note that the answer to question 2 in our decision *Earl S. Barbely*, B-192839, May 3, 1979, is inconsistent with this decision. To the extent of the inconsistency, *Barbely* will no longer be followed.

[B-203554]

Officers and Employees—Executive Development Programs—Civil Service Reform Act—Agencywide Implementation—Pooling of Appropriations—Authority

The appropriations made to various bureaus and offices within the Department of the Treasury may be pooled so as to permit implementation of the Legal Division's Executive Development Program, under the Civil Service Reform Act of 1978, on an agencywide basis.

Matter of: Funding the Executive Development Program Under the Civil Service Reform Act, September 10, 1981:

The General Counsel of the Treasury asks whether section 403(a) of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 3396 (Supp. II, 1978), permits the pooling of appropriations made to the 16 distinct bureaus and offices to which Treasury Department attorneys provide legal services so as to permit the implementation of the Treasury Department Legal Division's Executive Development Program on an agencywide basis. We agree with the General Counsel that the various constituent appropriations may be collectively administered for the

benefit of a comprehensive departmentwide Legal Division program.

Section 403(a) of CSRA provides:

> The Office of Personnel Management shall establish programs for the systematic development of candidates for the Senior Executive Service and for the continuing development of senior executives, or require agencies to establish such programs which meet criteria prescribed by the Office. 5 U.S.C. § 3396(a).

The Office of Personnel Management (OPM) has elected to implement the latter of these statutory alternatives. The implementing regulations (5 C.F.R. Part 412) set forth OPM's criteria for agency executive and management development programs. These criteria include the following, with regard to program management:

> Overall planning and management of the agency executive and management development program(s) shall be provided by a departmental or independent agency executive resources board or a complex of executive boards at agency and subordinate levels. * * * 5 C.F.R. § 412.107(a) (1980).

The regulations also provide that "[e]ach program * * * shall include provisions for the funding and staffing needed to support the program." 5 C.F.R. § 412.107(b) (1980).

The Treasury submission cites a recent decision by our Office as support for the argument that the pooling of appropriations is allowable. In B-195775, September 10, 1979, we were asked whether the CSRA authorized transfers of appropriations so as to permit implementation of the Merit Pay System on an agencywide basis. In reaching a decision, we noted that two statutory provisions would preclude establishment of the proposed OPM implementation plan for the Merit Pay System unless CSRA authorized the transfer of funds from several appropriations to a common fund. The first of these provisions is 31 U.S.C. § 628, which prohibits the expenditure of appropriated funds for objects other than those for which they were appropriated, except as otherwise provided by law. The second is 31 U.S.C. § 628-1, which bars the transfer of funds between appropriation accounts, except as authorized by law. We found that, although neither CSRA itself nor the legislative history of the Act addressed the issue of pooling, a reading of the language of the Act in the light of the apparent purpose of the Merit Pay System indicated that agency level implementation was permissible. We thus concluded that a pooling of funds was otherwise "authorized by law" for purposes of 31 U.S.C. §§ 628 and 628-1.

In the case now before us, we find the language of the statutory provision itself and the legislative history of the Act to be similarly silent. However, we again conclude that agencywide implementation of the program in question is permissible. The purpose of the executive development program is to ensure that the executive management of the Government is of the highest quality. *See* 5 U.S.C. § 3131. The

General Counsel urges that that goal is most effectively pursued in the Legal Division if the program is administered on a department-wide level since all attorney SES candidates can be provided the same training opportunities, which "substantially insulates the program from bias or favoritism that might occur at a subordinate level." The implementing regulations (5 C.F.R. § 412.107(a)) indicate that OPM is also of the view that executive development programs are best administered at the agency level.

Since it appears to Treasury and OPM that the congressional objective of providing Government agencies with highly competent executive management is best served through the administration of executive development programs on an agencywide level, we conclude that a pooling of Treasury Department appropriations to implement this Legal Division program is "provided" or "authorized" by law within the meanning of 31 U.S.C. §§ 628 or 628–1, and is accordingly permissible.

[B–200007]

Appropriations—Availability—Personal Property Furnished by Army—Replacement for Damage, Loss, etc.—Difference Between Purchase and Depreciated Price

Proposed Army program which would permit a member of the service who loses, damages, or destroys an item of Government property issued for personal use to purchase a replacement at an Army Self-Service Supply Center for a sum equivalent to the depreciated value of the item, and would automatically obligate the Government for the difference between the full purchase price and the depreciated price, is acceptable. GAO sees no violation of 31 U.S.C. 628 since Army appropriations are available to pay such replacement costs wholly or partially. The proposed program does not violate the Antideficiency Act, 31 U.S.C. 665, per se, but Army must establish adequate funding controls to assure that no replacement purchases are authorized unless Army has sufficient funds available to cover its share.

Matter of: Army Self-Service Supply Centers—Sales of replacement items, September 17, 1981:

The Acting Assistant Secretary of the Army (Installations, Logistics and Financial Management) asks whether a proposed Army program is consistent with the intent of Title 31, U.S. Code, §§ 628 and 665(a). The program would permit a member of the service, who loses, damages, or destroys an item of Government property issued to him or her for personal use, to purchase a replacement at an Army Self-Service Supply Center for a sum equivalent to the value of the depreciated item. Appropriated funds would be obligated for the difference between the purchase price of the replacement item and the amount paid by the individual soldier. The Army asks specifically whether the payment of such a "depreciation allowance" by the Gov-

ernment would constitute an unauthorized augmentation of private funds with appropriated funds in violation of 31 U.S.C. § 628. The Army also questions whether the procedure would violate subsection (a) of the Antideficiency Act, 31 U.S.C. § 665, since a soldier's purchase of a replacement item would result in an automatic obligation of appropriated funds for the amount of the depreciation.

The proposed scheme of payment would not violate 31 U.S.C. § 628. Section 628 limits the availability of appropriations to the objects for which they are made. Under the Army proposal, the appropriated funds would be used for acquisition of replacement property, a purpose for which they are clearly available, even at full cost. Moreover, in recognizing depreciation of the lost property as a cost when the property is replaced in kind, the Army would not be "augmenting" the private funds of the service member who lost the property, just as it is not doing so now when it collects the depreciated value from him in cash. It has merely determined that the total amount of his debt to the Government is the lesser amount.

The proposed program does not inherently violate the Antideficiency Act, although conceivably, in practice, the "automatic" obligation of appropriated funds could occur at a time when the procurement account has insufficient funds remaining in its allotment to cover the obligation. We assume that the Army will develop fund control procedures to ensure that sufficient appropriated funds are available before authorizing the service member's purchase from the Self-Service Supply Centers. (See also the restriction in 10 U.S.C. § 2208(f).)

In this connection, we note that the Army intends to reimburse the stock fund on a quarterly basis. While this is a matter of administrative determination, stock fund billings and reimbursements are usually accomplished more frequently than quarterly, affording tighter financial controls on the amount of obligations incurred.

[B-201313]

Station Allowances—Military Personnel—Housing—Government Quarters Inadequate, etc.—Refusal to Occupy—Nonentitlement to Allowance

A service member may, if necessary, be involuntarily assigned to Government quarters classified as inadequate or substandard when reporting to an overseas duty station for a tour of duty he is to perform unaccompanied by his dependents. In such circumstances, he may not secure private housing near his duty station, decline the involuntary assignment to "inadequate" quarters, and thereby gain entitlement to overseas housing and cost-of-living allowances, which are payable under prescribed conditions to service members overseas when they are not furnished with Government quarters. 37 U.S.C. 405.

Station Allowances—Military Personnel—Housing—Government Quarters Inadequate, etc.—Refusal to Occupy—Reassignment of Quarters' Effect

If a service member declines an assignment to Government quarters or elects to move out of his assigned quarters, the responsible installation commander may properly reassign the quarters to another person without thereby incurring any liability on behalf of the United States for payment of allowances to the member on the basis that Government quarters are then unavailable for assignment to him, since commanders of military installations have no obligation to maintain unoccupied quarters for service members who have voluntarily elected to reside elsewhere.

Station Allowances—Military Personnel—Dependents—Moving Overseas—Not Command-Sponsored—Nonentitlement to Allowances

A service member on an unaccompanied overseas tour of duty may not be paid military overseas housing and cost-of-living allowances on account of dependents who move to the overseas area, because in those circumstances the dependents' overseas residence is purely a matter of personal choice. 37 U.S.C. 405; 53 Comp. Gen. 339.

Station Allowances—Military Personnel—Members Unaccompanied by Dependents—Dependents Individual-Sponsored-Government Quarters Inadequate, etc.—Nonentitlement to Certificate of Unavailability

A Marine Corps officer serving an unaccompanied tour of duty in Okinawa chose to bring his family to Okinawa at personal expense, and he moved off base into private family housing. His Government quarters were reassigned to another, but he was offered substitute, substandard quarters for potential emergency use. He is not entitled to a certificate of nonavailability of quarters nor to payment of overseas housing and cost-of-living allowances on his own account based on a theory that he was thereby personally forced to reside and take his meals off base since his move was a matter of personal choice.

Matter of: Lieutenant Colonel Joseph E. Underwood, USMC, September 18, 1981:

This action is in response to a request from a disbursing officer of the Marine Corps Finance Center for an advance decision concerning the propriety of crediting Lieutenant Colonel Joseph E. Underwood, USMC, 022–28–8855, with military overseas housing and cost-of-living allowances for periods in 1978 and 1979 after he moved out of his room at the bachelor officers quarters at Marine Corps Air Station, Futenma, Okinawa, Japan, to reside off base in private living quarters with his family. The disbursing officer's request was given Control Number 80–31 and forwarded to our Office by the Department of Defense, Per Diem, Travel and Transportation Allowance Committee. In light of the facts presented, and the applicable provisions of law and regulation, we have concluded that Colonel Underwood is not entitled to the overseas housing and cost-of-living allowances in question.

Certain Fleet Marine Force units in the Western Pacific are kept in

a constant state of combat readiness, and it has been the practice of the Marine Corps to assign personnel to those units on unaccompanied, "dependents-restricted," tours of duty lasting 12 months. Marine Corps directives define a "dependents-restricted duty station" as an overseas location where dependents of marines are not authorized to be present, but the directives recognize that the families of marines on "dependents-restricted" assignments may be able to visit those overseas locations if the visits are otherwise permitted by the United States Government as well as by the concerned foreign governments. *See generally* Marine Corps Order 1300.8L, January 22, 1979. Families joining marines on "dependents-restricted" assignments, through the use of tourist visas or other means, must make arrangements to do so privately and at personal expense, without assistance from the Marine Corps. They have the status of being "individual sponsored" rather than "command sponsored" dependents under the terms of the administrative directives.

In June 1978 Colonel Underwood reported to the Air Station, Futenma, Okinawa, for a 12-month "dependents-restricted" tour of duty. He was assigned a private room in the installation's bachelor officers quarters which was, according to guidelines contained in applicable housing regulations, "adequate" for an unaccompanied officer of his rank. An officers mess was also available at the installation for his meals.

Apparently, Futenma remained a "dependents-restricted duty station" throughout 1978 and 1979, and Colonel Underwood was not eligible to have his wife and children join him as "command sponsored" dependents. He chose, however, to bring them to Okinawa at personal expense as his "individual sponsored" dependents. They arrived on about the first of October 1978, and he then moved into private off-base living quarters with them.

By letter dated October 17, 1978, the base commander of the Air Station advised Colonel Underwood that since he was residing off base, his private room at the bachelor officers quarters was being reassigned to someone else who had a "bona-fide" need for it. The base commander further advised him that "minimal" accommodations in a four-man room would be kept available for his possible use, adding, "The minimal support is a contingency should something occur requiring (your) presence on base for a short period." It is undisputed that under applicable housing regulations, the space in the four-man room then assigned to him for his potential on-base use did not constitute "adequate" Government quarters for an unaccompanied officer of his rank.

Colonel Underwood responded by advising the base commander that

he had vacated his private room in the bachelor officers quarters, but that he declined to accept the space in the four-man room assigned to him because he believed he could not properly be required to accept an assignment to "inadequate" Government quarters. He simultaneously applied to the base commander for a certificate of nonavailability of quarters and messing facilities in order to obtain eligibility for overseas housing and cost-of-living allowances. The base commander denied his application for that certificate.

Subsequently, Colonel Underwood filed a claim for overseas housing and cost-of-living allowances for the period from November 1, 1978 (the date of his reassignment to inadequate on-base quarters), through June 11, 1979 (the date his 12-month tour of duty at Futenma ended). In substance, he expressed the belief that since adequate on-base Government quarters were not assigned to him during that time, he had been forced to reside and take most of his meals off base in non-Government facilities. He suggested that he should, therefore, have been entitled to the housing and cost-of-living allowances payable to service members stationed overseas who are not furnished with Government quarters and dining facilities.

In requesting an advance decision in the matter, the disbursing officer essentially questions whether, on the basis of his assignment to inadequate Government quarters, Colonel Underwood may be paid the overseas housing and cost-of-living allowances he has claimed.

Provisions of statutory law governing the payment of military allowances are contained in chapter 7 of title 37, United States Code (37 U.S.C. 401–429). The overseas housing and cost-of-living allowances at issue here are payable under 37 U.S.C. 405, which states in pertinent part that:

> * * * the Secretaries concerned may authorize the payment of a per diem, considering all elements of the cost of living to members of the uniformed services under their jurisdiction and their dependents, including the cost of quarters, subsistence, and other necessary incidental expenses, to such a member who is on duty outside of the United States or in Hawaii or Alaska * * *.

No reference is made in 37 U.S.C. 405 to either "adequate" or "inadequate" Government quarters.

Regulations implementing 37 U.S.C. 405 are contained in chapter 4 of Volume 1, Joint Travel Regulations (1 JTR). Paragraph M4300–2, 1 JTR, provides that a service member on an unaccompanied tour of duty, including one "who has individual sponsored dependents residing in the vicinity of his permanent duty station," is considered to be a "member without dependents" for purposes of establishing eligibility for the per diem authorized by 37 U.S.C. 405. This is consistent with our decisions holding that a service member on an unaccompanied assignment overseas may not be paid allowances under

37 U.S.C. 405 on account of dependents residing with the member overseas, since in those circumstances the dependents' overseas residence is purely a matter of personal choice. See 53 Comp. Gen. 339 (1973) and 49 *id.* 548 (1970).

Paragraph M4301, 1 JTR, provides for payment of housing and cost-of-living allowances at different rates and under different conditions for service members classified as being either "with" or "without" dependents. Subparagraph M4301–3f(1) generally precludes payment of a cost-of-living allowance to a "member without dependents" if Government dining facilities are available to him. Moreover, subparagraph M4301–3f(3) directs that the housing allowance is payable to a "member without dependents" only "for any day upon which Government quarters are not assigned to him at his permanent duty station," and there is no qualifying language in the regulation requiring that the assigned Government quarters be "adequate."

It is our view that a service member may acquire no entitlement to a housing allowance under the above-cited provisions of law and regulation on the basis of an involuntary assignment to Government quarters classified as "inadequate" since, as noted, 37 U.S.C. 405 makes no provision for any payment based on an assignment to "inadequate" Government quarters, and subparagraph M4301–3f(3), 1 JTR, specifically precludes payment of a housing allowance if the member is assigned Government quarters, regardless of their classification as adequate or inadequate. Furthermore, our Office has long held that the military and naval departments are under no requirement to close housing units classified as inadequate or substandard, and that a finding of inadequacy of quarters does not in and of itself establish their nonavailability. See B–196628, December 19, 1979, and decisions there cited. Hence, we conclude that a service member on an unaccompanied overseas tour of duty may not secure private off-base housing, decline an involuntary assignment to "inadequate" Government quarters, and thereby gain entitlement to overseas housing and cost-of-living allowances.

This conclusion is consistent with the regulatory rule barring an unaccompanied service member involuntarily assigned to "inadequate" Government quarters overseas from entitlement to the Family Separation Allowance, Type I, which is payable under 37 U.S.C. 427(a) to reimburse a member for extra housing expenses when he must maintain one home for his dependents and another for himself. See paragraph 3030a(3), Department of Defense Military Pay and Allowances Entitlements Manual.

When Colonel Underwood was joined by his wife and children in Okinawa in October 1978, he established a private off-base family

residence with them near the Air Station at Futenma. Because the members of his family were his "individual sponsored" dependents who had been brought to the oversease area as a matter of personal choice, he remained classified as a "member without dependents" under the provisions of paragraph M4300–2, 1 JTR, and was ineligible to draw overseas housing and cost-of-living allowances on their account.

Furthermore, at the time Colonel Underwood moved into the private off-base residence with his family near Futenma, adequate on-base Government quarters remained assigned to him for his personal use, and Government dining facilities remained available to him at the base if he elected to occupy those quarters. Consequently, under the provisions of paragraph M4301, 1 JTR, he remained ineligible to draw overseas housing and cost-of-living allowances on his own account as a "member without dependents." Moreover, it is our view that at that point the base commander could properly have assigned his on-base Government quarters to another person without giving him any substitute quarters at all and without incurring any liability on behalf of the Government for payment of housing and cost-of-living allowances to him, since commanders of military installations have no obligation to maintain unoccupied quarters for service members who have voluntarily elected to reside elsewhere. See 57 Comp. Gen. 194, 197 (1977), and *McVane* v. *United States*, 118 Ct. Cl. 500 (1951), concerning the entitlement of members to the Basic Allowance for Quarter after they voluntarily vacate adequate Government quarters. Thus, while the base commander did assign Colonel Underwood substitute "inadequate" quarters for his potential on-base use in the interests of military preparedness, such action does not support a conclusion that Colonel Underwood was "forced" by the Marine Corps to move off base and was, therefore, entitled to overseas housing and cost-of-living allowances.

Accordingly, Colonel Underwood may not be credited with the housing and cost-of-living allowances in question.

[B–203374]

Contracts—Awards—Labor Surplus Areas—Qualification of Bidder—Eligibility Certification—Place of Manufacture in Lieu of

Failure of a bidder to complete a clause in its bid indicating that it is a labor surplus area (LSA) concern, even though a place of manufacture was listed elsewhere in its bid, prevents consideration of the bidder as an LSA concern not subject to a five percent evaluation penalty; place of manufacture is not by itself determinative of whether a contractor is an LSA concern. Distinguished by B–204531, B–204531.2, Feb. 4, 1982.

Contracts—Awards—Labor Surplus Areas—Failure to Furnish Information Effect—Minor *v.* Material Omissions—Eligibility Certification

Failure of a bidder to complete a clause in its bid indicating that it is an LSA concern is not a minor informality which could be waived by the agency; the omission affects the relative standing of bidders, and is material since the bidder thereby fails to commit itself to incur the requisite proportion of costs in LSAs.

Contracts—Awards—Labor Surplus Areas—Geographical Location—Place of Performance—Changes After Bid Opening

Where a bidder represents in eligibility clause set forth in the IFB that 100 percent of contract costs will be incurred in a particular LSA, but after bid opening indicates that a significant portion of contract costs will be incurred in previously unspecified LSAs, the bidder's LSA status is not affected since the bidder has committed itself to incur the required minimum costs (50 percent) in LSAs and it is not material in which LSAs such costs will be incurred.

Contracts—Awards—Labor Surplus Areas—Subcontractor, Supplier, etc.—Size Status

A bidder qualifies as a small business, even though it buys materials from, or subcontracts a major portion of work to, a large business, so long as the bidder makes a significant contribution to the manufacture or production of end items.

Matter of: Chem-Tech Rubber, Inc., September 21, 1981:

Chem-Tech Rubber, Inc. protests the award of a contract for 14,000 yards of coated nylon cloth, to any other firm, under invitation for bids (IFB) No. DLA100-81-B-0793, issued by the Defense Logistics Agency's (DLA) Defense Personnel Support Center in Philadelphia, Pennsylvania. Chem-Tech contends DLA improperly refused to consider it eligible for a labor surplus area (LSA) evaluation preference on the ground that Chem-Tech failed to indicate on the bid form that it was an LSA firm, and that no other bidder qualified for the preference. We deny the protest.

This solicitation was issued as a total small business/LSA small business set-aside which provided that non-LSA small businesses were subject to a five percent evaluation factor.[1] The criteria for eligibility as an LSA small business were set forth generally under section K of the IFB. Paragraph K17, entitled "ELIGIBILITY FOR PREFERENCE AS A LABOR SURPLUS CONCERN," instructed bidders as follows:

Each offeror desiring to be considered for award as a Labor Surplus Area (LSA) concern on the set-aside portion of this procurement, specified elsewhere in the schedule, shall indicate below the address(es) where costs incurred on

[1] Historically, a provision known as the Maybank Amendment was included in the annual Department of Defense (DOD) appropriation acts to prohibit the use of appropriated funds to pay price differentials on contracts for the purpose of relieving economic dislocation. In the 1981 DOD Appropriation Act, Pub. L. No. 96-527, 94 Stat. 3085, however, the Maybank Amendment was modified to permit DLA, on a test basis, to pay up to a 5 percent price differential on these contracts. The contract here was issued pursuant to this authorization.

account of manufacturing or production (by offeror or first tier subcontractor) will amount to more than fifty percent (50%) of the contract price. * * *

The paragraph concluded with a warning to bidders:

Caution: Failure to list the location of manufacture or production and the percentage, if required, of cost to be incurred at each location will preclude consideration of the offeror as a LSA Concern.

Similar warnings were set forth on the IFB cover sheet, and the notation "FILL IN ALL CLAUSES" was also handwritten in both margins alongside paragraph K17.

Chem-Tech's bid of $3.45 per yard was the lowest of the five bids received. Aldan Rubber Company was the second low bidder at $3.47 per yard. Aldan completed paragraph K17 of its bid indicating that 100 percent of the contract would be performed at its plant in Philadelphia, Pennsylvania, an LSA, and thus was not subject to the five percent price increase assessed against non-LSA firms. Chem-Tech's sole manufacturing facility apparently is located in New Haven, Connecticut, an LSA, but Chem-Tech did not complete paragraph K17 in its bid and thus failed to indicate that at least 50 percent of the contract costs would be incurred in an LSA. DLA accordingly determined that Chem-Tech was not an LSA concern and, in evaluating Chem-Tech's bid, increased its price by five percent. Consequently, Chem-Tech was displaced as the low bidder by Aldan. The award has been postponed pending the outcome of this protest.

Chem-Tech characterizes its failure to complete the LSA eligibility clause as a clerical omission which DLA should have waived as a minor informality, since the missing information had no bearing on the contract price or terms or the relative standing of the bidders. Chem-Tech believes DLA's position emphasizes form over substance inasmuch as its manufacturing facility is actually located in an LSA and it indicated in paragraph K39 of the IFB that the contract would be performed at that facility. Chem-Tech asks that the omission be waived and that it now be permitted to certify itself as an LSA concern even though bids have been opened.

Paragraph K39 of the IFB, entitled "PLACE OF PERFORMANCE," required bidders to insert the name and location of the manufacturing facility where the contract work would be performed. The paragraph further stated that "the performance of any of the work contracted for in any place other than that named in the offer and any resulting contract is prohibited unless the same is specifically approved in advance by the Contracting Officer." Chem-Tech inserted its New Haven plant address and indicated that the total contract would be performed there.

This offer by Chem-Tech to perform the contract at its New Haven plant does not satisfy the requirements of the LSA eligibility clause

set forth in paragraph K17 of the IFB. The place at which the contractor will perform may be immaterial with respect to the determination of whether the contractor is an LSA concern if costs greater than 50 percent of the contract price will be incurred for subcontracting or purchase of materials. *Voss Industries, Inc.*, B–184258, November 12, 1975, 75–2 CPD 298. We have specifically recognized, for example, that the cost of purchased materials is a cost of production which alone may be sufficient to qualify or disqualify a firm as an LSA; the determining factor is the location of the seller. *See* 41 Comp. Gen. 160, 164 (1961). It appears that significant portions of the production costs here were attributable to purchases of material and other non-manufacturing expenses. Aldan's cost breakdown indicates, for example, that approximately 45 percent of its costs will be incurred in purchasing various materials. DLA thus properly concluded that Chem-Tech's offer to perform the manufacturing at its plant was not necessarily a promise to incur costs constituting at least 50 percent of the total contract price in an LSA.

We further disagree with Chem-Tech's view that its omission here should have been waived as a minor irregularity. The regulations provide for such a waiver by the contracting officer where the irregularity or informality would have a negligible effect on price, quality, quantity or delivery, and the correction would not affect the relative standing of, or otherwise prejudice bidders. Defense Acquisition Regulation (DAR) § 2–405 (1976 ed.). If Chem-Tech became eligible as an LSA concern after bid opening, the five percent differential would affect its contract price only for evaluating purposes, and other contract terms would not be effected. However, the relative standing of the bidders would obviously be altered since Chem-Tech would displace Aldan as the evaluated low bidder. Indeed, Chem-Tech desires to qualify for the LSA preference only because its bid would thereby be reduced below Aldan's. Moreover, a bidder's failure to complete the LSA certification clause is, in effect, a failure to enter a commitment to perform the requisite proportion of the contract in LSAs. We have thus specifically held that this is a material omission which cannot be waived as a minor informality. *Voss Industries, Inc., supra; Standard Bolt, Nut and Screw Co. Inc.*, B–184755, July 21, 1976, 76–2 CPD 62. We reach the same conclusion regarding the clause in this case.

Chem-Tech also maintains that no other bidder qualified as an LSA concern. DLA considered Aldan an LSA concern based on its indication in paragraph K17 that it would incur 100 percent of the contract costs in Philadelphia. After Chem-Tech protested, however, the contracting officer asked Aldan to submit a cost breakdown. The information submitted by Aldan indicated that significant portions of

the contract costs would be incurred in Wilmington, Delaware, and New Bedford, Massachusetts. Both of these areas are LSAs and the contracting officer determined Aldan was still eligible for the LSA preference inasmuch as at least 50 percent of the contract costs would be incurred in LSAs. Chem-Tech argues that Aldan should be ineligible as an LSA concern because the information supplied in its bid was inaccurate. Chem-Tech believes that by allowing corrections in Aldan's list of locations where costs would be incurred, DLA, in effect, was allowing Aldan to establish its eligibility as an LSA concern after bid opening. We disagree.

Aldan established its eligibility as an LSA concern when it submitted its bid indicating that at least 50 percent of the contract costs would be incurred in an LSA, thereby obligating itself to incur that proportion of the contract costs in LSAs. In *Clark Division of Euclid Design and Development Company*, B–185632, April 21, 1976, 76–1 CPD 270, a bidder represented in its bid that 100 percent of contract costs would be incurred in a particular LSA, but after bid opening, reduced that amount to 30 percent (which still exceeded the 25 percent minimum set forth in that IFB). In concluding that the change did not affect the bidder's eligibility for award, we stated that:

> We interpret clause B17 to require a commitment in the bid to perform not less than the designated percentage of the work at the stated locations in order to qualify for the preference category sought. Any indication of a commitment to perform more than the minimum called for cannot affect the bidder's eligibility for the preference. Therefore, if a bidder indicates at least the minimum percentage called for to qualify for the preference category and the contracting officer is satisfied that he can and will meet that commitment in performance, he should not be disqualified because his bid showed a percentage exceeding the minimum which he cannot in fact meet.

The only factor distinguishing this case from *Clark* is that Aldan's cost breakdown showed that Aldan would not incur the minimum percentage in the stated location (Philadelphia). We do not think this disqualifies Aldan from eligibility as an LSA concern. The cost breakdown confirmed that Aldan intended to incur approximately 70 percent of the contract costs in LSAs and thus, that Aldan would satisfy the minimum requirements of the solicitation. Although two of those LSAs were not indicated in Aldan's bid, the solicitation does not prohibit substitution of a subcontractor in one LSA for a subcontractor in another LSA, and we do not see how substitution in this manner would prejudice the Government or other bidders. Again, the determining factor is that Aldan clearly committed itself in its bid to perform in accordance with the minimum requirements for LSA concerns. These requirements are that more than 50 percent of the work represented by the contract price be performed in LSAs. It is not legally significant which LSAs ultimately are involved; Aldan qualifies simply by virtue of its commitment reflected in its bid. We

thus conclude that DLA properly determined that Aldan qualified as an LSA concern.

It is true, as Chem-Tech observes, that Aldan, after its status was challenged, could have chosen to submit a cost breakdown which would make it ineligible as an LSA concern, and thus had the option of accepting or rejecting the award after bid opening. However, this same possibility is always present when a firm's eligibility or responsibility is in question; a firm can usually take steps after bid opening to assure its ineligibility or nonresponsibility. The deterrent in these situations is the threat of sanctions if a firm has acted in bad faith. We finally note that if Aldan decided after award not to perform in an LSA, it would be subject to default. *Cf. Hendry Corporation*, B–195197, March 31, 1980, 80–1 CPD 236.

In its comments submitted in response to the agency report on this matter, Chem-Tech complains it was confused by the criteria used to determine a bidder's status as an LSA concern. It is Chem-Tech's view that in small business/LSA small business set-aside procurements, the solicitations should not permit bidders to qualify as LSA concerns by contracting with suppliers and other subcontractors in LSAs unless those firms are also small businesses. Absent such a prohibition, the protester maintains, a small business could qualify for the award even though its own manufacturing or production costs would constitute only a small percentage of the contract price; the small business portion of the set-aside would be defeated.

We have held that as long as a small business firm makes some significant contribution to the manufacture or production of the items to be supplied under the contract, it has fulfilled its contractual requirement that the end item be manufactured or produced by a small business.[2] *Fire & Technical Equipment Corp.*, B–191766, June 6, 1978, 78–1 CPD 415. Thus, it is of no consequence that a firm may get its raw materials from or subcontract a major portion of the work to a large business if it satisfies this significant contribution requirement. This rule is not changed by addition of the LSA requirement. The record here indicates Aldan will make a significant contribution to the manufacture of the end item; more than one third of the contract costs will be incurred at its Philadelphia plant. In any event, if the protester did not understand the terms of the IFB, or objected to them, it should have protested prior to bid opening. *See* Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1981).

The protest is denied.

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[2] This requirement is contained in paragraph 1 on page 14 of the subject IFB, Standard Form 33, Part 2.

[B-189712]

Loans—Loan Guarantees—Rural Development Program—Obligation Authority Beyond Fiscal Year—Ceilings on Loan Amounts—Substituted Borrower Effect

Loan guarantee by Farmers Home Administration (FmHA) initially charged against level of guarantee authority for particular fiscal year in which guarantee was first approved cannot, as general rule, continue to be charged against the authority for that year when entirely new borrower is substituted in subsequent fiscal year, since determination of whether to approve guaranteed loan to particular borrower is an individual one requiring specific eligibility determination by FmHA. However, if substituted borrower bears close and genuine relationship to original borrower, such as would exist between corporation and partnership controlled by same individuals, and loan purpose remains substantially unchanged, FmHA would have authority to charge loan guarantee to substitute borrower against ceiling for fiscal year in which original guarantee was approved.

Loans—Loan Guarantees—Rural Development Program—Obligation Authority Beyond Fiscal Year—Ceilings on Loan Amounts—Revision of Loan Agreement Terms Effect

Loan guarantee by FmHA initially charged against level of loan guarantee authority for particular fiscal year in which guarantee was first approved cannot continue to be charged against ceiling for that year when major changes to character of the project or loan terms occur during subsequent fiscal year. However, if less substantial changes are involved where the purpose and scope of the revised loan guarantee agreement are consistent with the purpose and scope of the original guarantee and the need for the project continues to exist, FmHA would have authority to change amended loan guarantee against ceiling for fiscal year in which it was first approved.

Loans—Loan Guarantees—Rural Development Program—Obligation Authority Beyond Fiscal Year—Ceilings on Loan Amounts—Substituted Lender Effect

Loan guarantee by FmHA initially charged against level of loan guarantee authority for particular fiscal year in which guarantee was first approved can continue to be charged against authority for that year if new guaranteed lender is substituted in subsequent fiscal year, provided the borrower, loan purpose, and loan term remain substantially unchanged. Although the guarantee is actually extended to the lender, the lender is merely a conduit through which FmHA provides assistance to an eligible borrower to achieve the statutory objectives. Therefore, new lender can be designated without changing the essence of the agreement.

Agriculture Department—Farmers Home Administration—Loan Guarantees—Approval/Disapproval—Written Notice Requirement

FmHA's regulations as well as terms of relevant FmHA forms indicate that applications for loan guarantees are to be approved or disapproved in writing. Oral notification of loan guarantee approval thus would not be sufficient to create a valid guarantee.

Matter of: Farmers Home Administration—Loan Guarantee Program, September 23, 1981:

This decision is in response to a request from the Acting Administrator of the Farmers Home Administration (FmHA), concerning

several questions that have arisen in connection with FmHA's business and industrial guaranteed loan program. In essence, FmHA is concerned as to whether a commitment by FmHA to guarantee a loan by a private lender to an eligible borrower can still be counted against the authorized loan guarantee ceiling for the fiscal year in which the commitment was made, when changes affecting different aspects of the guarantee occur in a subsequent fiscal year.

Specifically, FmHA's written submission requests that we answer the following three questions:

1. Whether guarantee authority reserved ("obligated") during a previous fiscal year must be lost irrevocably when the lender is changed during a subsequent fiscal year.
2. Whether guarantee authority reserved during a previous fiscal year must be lost irrevocably when the borrower is changed during a subsequent fiscal year.
3. Whether guarantee authority reserved during a previous fiscal year must be lost irrevocably when major changes to the character of the project or loan terms occur during a subsequent fiscal year.

Subsequently, in informal discussions with representatives from FmHA these questions were further amplified and clarified. Also, we were informally requested to address a fourth issue involving the extent to which a valid guarantee commitment can be viewed as having been created in a particular fiscal year on the basis of FmHA's oral rather than written notification to the lender. We conclude, with exceptions we shall discuss below, that each of the changes indicated by FmHA with respect to questions 2 and 3 would create a new guaranteed loan which must be charged against the guarantee ceiling for the fiscal year in which the change was made. On the other hand, the change indicated in question 1 would not create a new guarantee and could continue to be charged against the ceiling for the fiscal year in which the guarantee was first approved. Further, with respect to the informal question, we conclude that oral notification does not create a valid guarantee commitment.

FmHA's business and industrial loan program, also known as the rural or industrial development loan program, is authorized by section 310B of the Consolidated Farm and Rural Development Act, as amended (Act), 7 U.S.C. § 1932(a), as follows:

> The Secretary may also make and insure loans to public, private, or cooperative organizations organized for profit or nonprofit, to Indian tribes on Federal and State reservations or other federally recognized Indian tribal groups, or to individuals for the purposes of (1) improving, developing, or financing business, industry, and employment and improving the economic and environmental climate in rural communities, including pollution abatement and control, * * * Such loans, when originated, held, and serviced by other lenders, may be guaranteed by the Secretary under this section without regard to subsections (a) and (c) of section 1983 of this title. * * *

The word "insure" as used in this subsection is specifically defined in 7 U.S.C. § 1991 as including "guarantee, which means to guarantee the

payment of a loan originated, held, and serviced by a private financial agency or other lender approved by the Secretary * * *."

The rural development loan program established by 7 U.S.C. § 1932 is funded out of a special revolving fund—the Rural Development Insurance Fund—created under section 309A of the Act, 7 U.S.C. § 1929a. Maximum limitations on the amount of industrial development loans that can be made out of, or under, the fund in a particular fiscal year are set forth in section 346(b) of the Act, as amended, 7 U.S.C. § 1994(b),[1] as follows:

> Loans for each of the fiscal years 1980, 1981, and 1982 are authorized to be insured, or made to be sold and insured, or guaranteed under the Rural Development Insurance Fund as follows:
>
> * * * * * * *
>
> (B) industrial development loans $1,500,000,000 of which $100,000,000 may be for insured loans and $1,400,000,000 may be for guaranteed loans with authority to transfer amounts between categories * * *.

Under 7 U.S.C. § 1994(a), Congress can impose additional limitations on the amount of guaranteed and insured industrial development loans that can be made in a particular fiscal year as follows:

> (a) * * * There shall be two amounts so established for each of such programs and for any maximum levels provided in appropriation Acts for the programs authorized under this chapter, one against which direct and insured loans shall be charged and the other against which guaranteed loans shall be charged, * * *

For the 1980 and 1981 fiscal years, such limitations have been included in FmHA's annual appropriation. For example, the following provision is set forth in the Agriculture, Rural Development, and Related Agencies Appropriations Act, Fiscal Year 1981, Pub. L. No. 96-528, 94 Stat. 3095, 3106, December 15, 1980:

> For an additional amount to reimburse the rural development insurance fund for interest subsidies and losses sustained in prior years, but not previously reimbursed, in carrying out the provisions of the Consolidated Farm and Rural Development Act, as amended (7 U.S.C. 1988(a)), $143,282,000.
>
> For loans to be insured, or made to be sold and insured, under this fund in accordance with and subject to the provisions of 7 U.S.C. 1928 and 86 Stat. 661-664, as follows: Insured water and sewer facility loans, $750,000,000; guaranteed industrial development loans, $741,000,000; and insured community facility loans, $260,000,000.

Similar language setting a $1.1 billion overall limitation on the total amount of rural development loans for the 1980 fiscal year, including $10 million for insured loans and the remainder for guaranteed loans is contained in the Agriculture, Rural Development, and Related

[1] Although guaranteed loans are included within the statutory definition of insured loans, this provision (7 U.S.C. § 1994(b)) sets one limit for insured industrial development loans and a separate limit for guaranteed industrial development loans. In this context, the term "insured loan" refers to loans which are initially made by FmHA directly out of the revolving fund and are then promptly sold by FmHA with recourse in the secondary market. The term "guaranteed loan" refers to loans which from their inception are made, held, and serviced by a participating financing institution or other approved lender, with FmHA's assurance that upon default by the borrower it will assume up to 90 percent of the lender's loss on the loan.

Agencies Appropriations Act, Fiscal Year 1980, Pub. L. No. 96-108, 93 Stat. 821, 831, November 9, 1979.

Although the language in the appropriation legislation for both the 1980 and 1981 fiscal years is written in a form that might appear to appropriate $1.1 billion and $741 million for guaranteed industrial development loans for the 1980 and 1981 fiscal years respectively, it is apparent that what was intended by the Congress was the imposition of ceilings on the total amounts of guaranteed rural development loans that could be made by FmHA in each fiscal year.[2] It is the existence of precisely these limitations in FmHA's annual appropriation on the total amount of industrial development loans that can be guaranteed in a particular fiscal year that resulted in FmHA's request to us for a legal opinion as to the proper treatment of a guaranteed loan approved in a particular fiscal year which is modified in a subsequent fiscal year.

FmHA urges us to take the position that a guaranteed loan that has been modified should continue to count against the authorized guaranteed loan level for the year in which it was first approved rather than the level of the subsequent fiscal year in which the guarantee was changed.

Before considering the specific issues raised by FmHA, we believe it is necessary to clarify FmHA's use of the term "obligation" in referring to approved loan guarantees. Our office has taken the position that a loan guarantee is only a contingent liability that does not meet the criteria for a valid obligation under 31 U.S.C. § 200. Ordinarily, when a loan is guaranteed by the Federal Government, an obligation is only recorded if, and when, the borrower defaults—and a Federal outlay is necessarily required to honor the guarantee. This will not usually take place, if at all, in the same fiscal year in which the loan guarantee was initially approved. *See* GAO Audit Report "Legislation Needed to Establish Specific Loan Guarantee Limits for the Economic Development Administration," FGMSD-78-62, January 5, 1979. Thus, we have held that it is not necessarily required that funds be available in the underlying revolving fund, or elsewhere, before the agency may approve a loan guarantee so long as the guarantee itself is authorized and within whatever annual monetary limits Congress has placed on it. *See* 58 Comp. Gen. 138, 147 (1978).

Based on informal discussions with FmHA representatives, it appears that FmHA's practices and procedures in connection with its guaranteed loan program are consistent with our interpretation that a

[2] As is explained at greater length hereafter, funds are not ordinarily appropriated for loan guarantees since no obligation or disbursement of Federal funds occurs when a loan guarantee is approved.

loan guarantee approval does not result in an actual obligation of funds. Apparently, what FmHA actually does upon approval of a loan guarantee is "charge" the amount of the loan guarantee against the authorized ceiling for that year. Also, it may administratively reserve, or earmark, in its revolving fund a certain percentage of the total amount of the guarantee based on the estimated default rate for such loans.

The primary case cited by FmHA in its submission, B–189712, January 5, 1978, (57 Comp. Gen. 205) and most of the other related cases in this general area involved Federal grants. The issue in these cases was the availability in a later fiscal year of appropriated funds that were obligated in a prior fiscal year where the underlying agreement that formed the basis for the obligation was modified in the later fiscal year, after the end of the period of availability of the funds.

Although the situation in the instant case is somewhat different—since, as explained above, it does not involve an actual obligation of appropriated funds—the same legal principles are involved. The applicable limitation on loan guarantees, which is set forth in an annual appropriation act, refers to the total amount of loan guarantees that can be approved in a particular fiscal year. The basic question in the "obligation" cases is whether an otherwise binding commitment of funds in a particular fiscal year remains valid if the purpose or the recipient of the funds is changed after the funds are no longer available for a new commitment. Similarly, the basic question here is whether a loan guarantee, once approved, remains a valid and binding commitment if a change affecting the purpose, recipient, or nature of the guarantee occurs after the period of loan guarantee authority expires.

With these considerations in mind, we shall address the specific questions raised by FmHA in its submission (as clarified in informal discussions with FmHA officials) although we have changed the order in which these questions are answered. The first question is whether a loan guarantee initially charged against a level of a loan guarantee authority for a particular fiscal year can continue to be charged against the authority for that year when the borrower is charged during a subsequent year. When the question is presented in this form, without further amplification, the answer is necessarily "no."

We have consistently held in the grant cases that, when the recipient of an original grant is unable to implement the grant as originally contemplated and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, the award to the alternate grantee must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. *See* 57 Comp. Gen. 205, *supra*;

B–164031 (5), June 25, 1976; and other cases cited in those decisions. The rationale behind the general rule is set forth in B–114876, January 21, 1960, as follows:

> The awards here involved are made to individuals based upon their personal qualifications. Whether the award is considered an agreement or a grant, it is a personal undertaking and where an alternate grantee is substituted for the original recipient, there is created an entirely new and separate undertaking. The alternate grantee is entitled to the award in his own right under the new agreement or grant and not on behalf of, on account of, or as an agent of, the original grantee. It seems clear that the award to an alternate grantee is not a continuation of the agreement with, or grant to, the original grantee executed under a prior fiscal year appropriation, but is a new obligation.

Similarly, in the case at hand, the determination of whether to approve a loan guarantee to a particular borrower is an individual one, necessarily requiring a specific determination by FmHA of the borrower's eligibility under the relevant statutory and regulatory provisions. Obviously, the determination by FmHA with respect to the eligibility of one borrower and the extent to which approval of a guaranteed loan to that borrower would achieve one of the legislative objectives of the rural development loan program, as set forth in 7 U.S.C. § 1932, would be of no value in making such a determination about an entirely different and unrelated borrower, even if a similar project was involved. Thus, adherence to the general rule, as set forth in B–114876, January 21, 1960, and similar cases, requires us to hold that when a loan guarantee is approved for a new borrower having no relationship to the original borrower it must be treated as an entirely new undertaking and must be charged against the authorized loan guarantee level in effect when it, as opposed to the original guarantee, is approved.

Although the above conclusion answers the question set forth in FmHA's written submission, there are exceptions to the general rule. FmHA's represenatives informally advised us of some specific situations that may arise in which the originally approved borrower and the proposed substitute are linked in some way. One example is the situation in which the originally approved borrower—a corporation—is replaced with a substitute borrower—a partnership—(or the reserve). In this example, the individuals controlling both the corporation and the partnership are the same and the purpose of the loan presumably remains the same as well. In this or similar situations, the substituted borrower is not a new and independent entity that is separate and apart from the original borrower.

This distinction is significant. Our Office has held that "* * * it may be possible in certain situations to make an award to an alternate grantee after expiration of the period of availability for obligation where the alternate award amounts to a 'replacement grant' and is

substantially identical in scope and purpose to the original grant." B-164031(5) June 25, 1976, *supra*.

Our decisions in two cases are especially relevant. In B-157179, September 30, 1970, we held that the unexpected balance of grant funds originally awarded to the University of Wisconsin could properly be used in a new fiscal year to support Northwestern University's completion of the unfinished project. Essentially, we took this position because the designated project director had transferred from the University of Wisconsin to Northwestern University and was viewed as the only person capable of completing the project. Further, we found that the original grant was made in response to a *bona fide* need and that the need for completing the project continued to exist. Our decision analogized the circumstances of that case to the situation involving replacement contracts.

Concerning replacement contracts, we take the position that the funds obligated under a contract are, in the event of the contractor's default, generally available in a subsequent fiscal year "* * * for the purpose of engaging another contractor to complete the unfinished work, provided a need for the work, supplies, or services existed at the time of execution of the original contract and that it continued to exist up to the time of execution of the replacement contract. * * *" *See* 34 Comp. Gen. 239 (1954); and 60 Comp. Gen. 591 (1981).

The second relevant decision—57 Comp. Gen. 205, *supra*—was the one cited in FmHA's submission. In that case we considered whether to allow an alternate grantee to be substituted for the original grantee after the period of availability had expired where the original grant application had been jointly filed by both. We held that, provided the original and revised grants were for the same needs and purposes and were of the same scope (which determination was left to the agency), replacement of the designated grantee by the other applicant did not require a new obligation because "* * * the alternative proposal amounts to a replacement grant rather than a new and separate undertaking."

In both these cases a genuine and tangible relationship existed between the original and substituted grantee. Also, in both cases the purpose and scope of the grants, as well as the need for the grant project, remained the same. In the situation suggested informally by FmHA, the original and substituted borrowers would have a similar, if not greater, connection with each other. For example, in the case of a change from a partnership to a corporate borrower, or the reverse, the names of the controlling individuals presumably would appear on both the original and revised applications. Similarly, we assume that the purpose and the scope of the project supported by the loan guar-

antee would remain substantially the same since the same individuals would be involved. Therefore, we would not object if FmHA charges a substitute loan guarantee against the authorized ceiling of the fiscal year for which the guarantee was initially approved, provided the substituted borrower bears a close and genuine relationship to the originally approved borrower (such as has been discussed herein) and the purpose for which the loan funds are to be used by the substitute borrower is substantially unchanged.

The next question is whether a loan guarantee can continue to be charged against the ceiling for the year in which it was approved "when major changes to the character of the project or loan terms occur during a subsequent fiscal year." Examples of such major changes are listed in the submission as including "major changes to the facility design, project's purpose, loan terms." As was true of the previous question, when the issue is characterized in this fashion, the answer is clearly "no."

Our Office has consistently held that an agency has no authority to amend a grant so as to change its scope after the underlying appropriation has ceased to be available for obligation. For example in 39 Comp. Gen. 296, 298 (1959) we said the following:

> We cannot agree that authority to make one grant in a fiscal year necessarily carries with it authority to amend that grant where the amendment would alter the scope of the original grant and require additional funds. The execution of a grant based upon a proposal containing specific objectives, research methods to be followed, and estimates of project costs would ordinarily give rise to a definite and maximum obligation of the United States. To enlarge such a grant beyond the scope of the original is to create an additional obligation and must be considered as giving rise to a new grant. * * *

More recently, in 57 Comp. Gen. 459 (1978), we considered whether the Department of Agriculture could substitute one research grant project for another—to the same grantee. We held that although the grant as modified retained some aspects of the original proposal, the research objective and scope of the original grant was changed, creating a new obligation chargeable to the appropriation of the year in which the substitution was made.

Applying these grant decisions to the area of loan guarantees, when a major change to the "character" of the project supported by the guarantee is made, the revised loan guarantee must be charged against the ceiling in effect when the revision is made. We believe that just as a significant change in the terms and conditions under which a grant was made would be viewed as creating a new grant, a significant change in the terms and conditions under which a loan guarantee was approved would create a new loan. 60 Comp. Gen. 464 (1981).

However, the answer to this question as FmHA submitted it does not, as before, completely resolve this issue. FmHA's representatives

informally advised us that in some instances the only revisions to projects supported by FmHA loan guarantees were relatively minor ones (although no specific examples of such changes were stated). The question then becomes much more difficult to resolve definitively, since we have recognized the existence of exceptions to the general rule concerning modifications of the substantive terms of a grant. For example, in B–74254, September 3, 1969, we did not object to the amendment of an approved grant application after the period of availability of the grant allotments had expired, where the amendments involved changes in the use of the funds from construction to renovation or the reverse.

In 58 Comp. Gen. 676 (1979), we considered a similar question as to whether a proposed modification of a grant by ACTION in effect created a new grant where the change involved an enlargement of the area from which participants in the grant project were to be selected. We said the following in that decision:

> Our earlier decisions concerning changes in grants after the period of availability of the grant funds for obligation has ended have identified three closely related areas of concern:
> (1) Whether a *bona fide* need for the grant project continues;
> (2) Whether the purpose of the grant will remain the same; and
> (3) Whether the revised grant will have the same scope as the original grant.

Thus, the test of whether a modification of the terms of the grant agreement constitutes an amendment to the original grant or a new and separate undertaking is substantially the same test as is used in determining whether an alternate grantee can be substituted for the original grantee. That is, the need for the project must continue to exist and the purpose and scope of the revised grant must be consistent with the purpose and scope of the original grant.

Application of this test to FmHA loan guarantees can only be accomplished, in our view, on a specific case-by-case basis, considering the specific circumstances of a loan and the type of modification involved. However, as stated above, the type of changes mentioned in FmHA's written submission, including "major changes to the facility design, project, purpose, [and] loan terms," would in our view be so significant as to change the scope of the guarantee and therefore would have to be viewed as a new and separate undertaking.

The final question in the submission involves the substitution of one lender for another in a subsequent fiscal year. Based on the preceding discussion this question can be readily resolved. As stated above, the basic purpose of the FmHA rural development loan guarantee program is to provide assistance to eligible borrowers to enable them to accomplish one or more of the statutory objectives. In other words, although the guarantee is extended to the lender, it is clear that the purpose of doing so is not to provide a Federal benefit to the lend-

ing institution but to induce the lender to make the loan to the borrower. In this sense, the lender is just a conduit or funding mechanism through which FmHA provides assistance to an eligible borrower so that the statutory objectives can be realized. Thus, the particular lender involved is of relatively little consequence. In this respect, the relevant statutory provisions do not contain any specific eligibility requirements for lenders. This is clearly distinguishable from the situations discussed above in which the proposed change in the borrower or scope of the project would necessarily have affected the very essence of the agreement.

Accordingly, provided the other relevant terms of the agreement, including the borrower, loan purpose, and loan terms remain substantially the same, we believe that a change in the lender can legitimately be viewed as an amendment of the original loan guarantee. Therefore, the loan can continue to be charged against the authorized loan guarantee level for the year in which the agreement was initially approved.

Informally, we were requested to consider a fourth question—whether the notification of loan guarantee approval by FmHA has to be in writing in order to be effective within a particular year and therefore be charged against the loan guarantee ceiling for that year, or whether oral notification supported by an internal memorandum is sufficient. There are no statutory provisions in the legislation governing the rural development loan program or elsewhere, of which we are aware, that require loan guarantee approval to be in writing. Further, since a loan guarantee does not constitute an actual obligation of funds until the borrower has defaulted and the Government becomes legally "obligated" to make an expenditure in order to honor its guarantee, recording of guarantees is not required by 31 U.S.C. § 200, which requires that obligations be supported by written documentation.

However, FmHA's regulations set forth in 7 C.F.R. § 1980.452 provide in pertinent part as follows:

> FmHA will evaluate the application. FMHA will make a determination whether the borrower is eligible, the proposed loan is for an eligible purpose, and that there is reasonable assurance of repayment ability, sufficient collateral, and sufficient equity. If FmHA determines it is unable to guarantee the loan, the Lender will be informed in writing. Such notification will include the reasons for denial of the guarantee. If FMHA is able to guarantee the loan, it will provide the Lender and the applicant with Form FmHA 449-14, listing all requirements for such guarantees. * * *

In our view, this regulation clearly contemplates written notification to lenders of FmHA's decision to approve or disapprove the application for a guaranteed loan. Similarly, the terms and provisions set forth in the various forms and documents used by FmHA in approving loan guarantees (including Forms FmHA 449-35, FmHA 440-1, and

FmHA 449-14) indicate that loan guarantee approval must necessarily be in writing to be effective. In B-187445, January 27, 1977, we concluded that similar provisions in the regulations and contract governing the guaranteed loan portion of the Small Business Administration required that "the approval of a guarantee must, at a minimum, be in writing in order to be valid." Also, see 54 Comp. Gen. 219 (1974). Accordingly, it is our view that under FmHA's current regulations, oral notification would not be sufficient to create a valid guarantee.

The questions presented to us by FmHA are answered in accordance with the foregoing.

[B-201003]

Interest—Intergovernmental Claims—Federal Agency, etc. Against State, Local, etc. Governments—Federal Law Applicability—Claims Originating in Federal Law

As a general rule, interest is not allowed on claims brought against governmental entities unless expressly authorized by statute or stipulated to by contract. However, where a claim is inter-governmental in nature, and has its origin in Federal law; the liability of the debtor will depend on Federal law and not local law. If Federal law fails to resolve this question, then agencies must be guided by considerations of equity and public convenience and due regard should be paid to local institutions and interests including local law.

Government Printing Office—Printing and Binding Agreements—Debt Collection—Interest Claim—District of Columbia Indebtedness

Government Printing Office (GPO) may charge interest from the date payments were due under agreement between GPO and the District of Columbia for printing and binding services, or if no date was established by agreement, from the date payment was demanded due. Agreement and action on the agreement had their origins in Federal law and interest has been authorized by courts and in statutes on claims brought against District of Columbia in the past.

District of Columbia—Status—Debts Owed to United States—Set-Off Right

Although the District of Columbia receives an annual lump-sum payment from the Federal Government, a valid claim may exist between the District of Columbia and the Federal Government since they are separate and distinct legal entities. Therefore, claims by Federal Government against District of Columbia may be collected through setoff against unappropriated funds of the District in the hands of the Federal Government.

Set-Off—Authority—State, etc. Government Debts—Against Federal Salary Deductions for State, etc. Income Taxes—Public Policy Considerations

Government Printing Office (GPO) may not set off debts owed to it by District of Columbia against taxes withheld by GPO from wages of its employees for payment of employees' income taxes. The withheld taxes, while they constitute an employer indebtedness, are held in trust for the benefit of the District of Columbia. Strong public policy consideration precludes the setting off of debts against demands for payment of taxes in the absence of statutory authority.

Matter of: Collecting Debts from the District of Columbia Government by Offset, September 29, 1981:

This decision to the Public Printer is in response to an inquiry from the General Counsel, Government Printing Office (GPO), asking:

—Whether GPO can charge the District of Columbia Government interest on its overdue accounts.

—Whether GPO can settle the past due District Government account by setting off its debt against money the GPO has withheld from wages and salaries for payment of its employees' District income taxes.

For the reasons stated below we conclude that the GPO can charge the District of Columbia Government interest on its overdue accounts but for policy considerations recommend against setting off this indebtedness against money withheld from wages and salaries for payment of its employees' District income taxes.

The General Counsel has informed us that pursuant to 31 U.S.C. § 685a, GPO provided printing and binding services to the District of Columbia Government for which it is owed in excess of $150,000. 31 U.S.C. § 685a authorizes Federal agencies to enter into agreements to provide certain services to the District of Columbia Government upon the approval of both the Office of Management and Budget and the Mayor. In return, Federal agencies are to be reimbursed their actual costs in providing these services. The General Counsel has also informed us that GPO's attempts to collect this amount have thus far proved unsuccessful. However, while charging interest and setting off debts are measures generally available to Federal agencies for use against private persons, the General Counsel is concerned over the propriety of using these measures against the District of Columbia Government which, in addition to revenues generated by local taxes or assessments, receives a lump-sum payment from the Federal Government as part of its annual operating budget.

INTEREST ON DISTRICT GOVERNMENT DEBTS

The Federal Claims Collection Standards (issued jointly by the Attorney General and the Comptroller General pursuant to authority set forth in the Federal Claims Collection Act, 31 U.S.C. §§ 951–953) require the charging of interest on delinquent debts. 4 C.F.R. § 102.11, provides that:

> In the absence of a different rule prescribed by statute, contract, or regulation, interest should be charged on delinquent debts and debts being paid in installments in conformity with the Treasury Fiscal Requirements Manual. When a debt is paid in installments, the installment payments will first be applied to the payment of accrued interest and then to principal, in accordance with the so-called "U.S. Rule," unless a different rule is prescribed by statute, contract, or regulation * * *.

1 Treasury Fiscal Requirements Manual, (TRFM) 6–8020.40, requires late charges be applied and collected for overdue payments at a percentage rate based on the current value of funds to the Treasury.

Additionally, in *United States* v. *United Drill and Tool Corp.*, 183 F.2d 998 (D.C. Cir., 1950), the court held that statutory obligations in the nature of a debt bear interest even though the statute creating the obligation fails to provide for it. Also, we have held that Federal agencies are authorized to charge interest on the equitable theory that a creditor is entitled to be compensated for the detention of his money without regard to the manner in which the obligation arose. *See* 59 Comp. Gen. 359 (1981).

We note that as a general rule, Courts have held that interest is not allowed on claims brought against governmental entities (Federal, State or local governments) unless expressly authorized by statute or stipulated to by contract. See for example *United States* v. *Thayer West-Point Hotel Co.*, 329 U.S. 585 (1947); *United States* v. *North Carolina*, 136 U.S. 211 (1890); *Follmer* v. *State of Nebraska*; 142 N.W. 908, (Neb., 1913); *Blum* v. *City of San Francisco*, 19 Cal. Rptr. 574 (Cal. App., 1962) and 51 Comp. Gen. 251 (1971). However, the rule is not uniformly applied by the States. See cases collected at 24 ALR 2d 928–999.

However, regardless of the rule followed by a particular State's courts, where a claim is inter-governmental in nature and has its origin in Federal law, the liability of the debtor (State or local government) will depend on Federal law, not local law. If the Federal law fails to resolve this question, then agencies must be guided by consideration of equity and public convenience. *Board of County Commissioners of the County of Jackson, Kansas* v. *United States*, (*Board of Commissioners*), 308 U.S. 343 (1939). Of course, in considering public convenience, due regard will be paid to local institutions and interests (including local law) in the absence of any legislative policy to the contrary. *Board of Commissioners*, above, 351–352.

In the present case since the action arose under Federal law—31 U.S.C. § 685a authorizing the agreement and requiring reimbursement based on actual cost—it should be governed by Federal rather than local law. *United States* v. *Allegheny County*, 322 U.S. 174, 172–183 (1943). Additionally, interest has previously been allowed against the District Government at the rate of 6 percent per year (notwithstanding D.C. Code § 28–3302 providing for interest at 4 percent per year) from the date payment was due in a contract action where payment was wrongfully withheld. *Kenney Construction Co.*, v. *D.C.*, 262 F. 2d 926 (D.C. Cir., 1959). Thus in our opinion, interest may be assessed on the unpaid debts of the District Government at the rate prescribed

in 1 TFRM 6–8020.40 from the date payment was due under the agreement or demand made upon the District.

SETOFF OF DISTRICT OF COLUMBIA'S DEBTS

Generally, the right of setoff is inherent in the United States Government and is grounded in the common law right of every creditor to apply the moneys of his debtor in his hands to the extinguishment of claims due to him from the debtor. *Gratiot* v. *United States*, 40 U.S. (15 Pet.) 336, 370 (1841); *United States* v. *Munsey Trust Co.*, 322 U.S. 234, 239 (1946); 41 Comp. Gen. 178 (1961). This is the case even though the claim has not been reduced to judgment. *Shay* v. *Agricultural Stabilization and Conservation State Committee For Arizona*, 299 F. 2d 516, 524–525 (9th Cir., 1962). This is reflected by the Federal Claims Collection Standards which provide in pertinent part, that:

> Collections by offset will be undertaken administratively on claims which are liquidated or certain in amount in every instance in which this is feasible * * *. Appropriate use should be made of the cooperative efforts of other agencies in effecting collections by offset, including utilization of the Army Holdup List, and all agencies are enjoined to cooperate in this endeavor. 4 C.F.R. 102.3. See also 4 GAO 69.

Furthermore, we have specifically approved collection of interest as well as principal on debts collected by setoff. 59 Comp. Gen. 359. (1980).

Collection of claims by setoff has been approved for use in collecting debts owed to the Federal Government by State governments. See *United States* v. *Louisiana*, 127 U.S. 182 (1888), B–163922.53, February 10, 1978. 20 Op. Atty. Gen. 363 (1892).

While not a State, the District Government has been held to be a municipal corporation with its own powers and functions, its own funds and its own obligations and liabilities, separate and distinct from those of the Federal Government. 25 Comp. Gen. 579 (1946) and 36 *id.* 457 (1956). See also *Bradshaw* v. *United States*, 443 F. 2d 759 (D.C. Cir., 1971), holding that United States is not liable for claims against District of Columbia on grounds that they are separate and distinct legal entities. This being the case, the reverse should also be true, that is, the District of Columbia is not liable for claims against the United States. Since neither government is responsible for claims against the other government, it follows that claims may exist between the two governments. While these decisions were rendered prior to the passage of the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) Pub. L. No. 93–198, December 24, 1973, 87 Stat. 774, this status has remained unchanged by virtue of § 717(a) of the Home Rule Act, 87 Stat. 820. See also § 102(a) of the Home Rule Act, 87 Stat. 777, which, if anything,

indicates that the purpose of the Home Rule Act was to give the District Government even more control over local affairs.

Generally, Federal inter-agency claims for damages to property are not reimbursed (when not necessary to accomplish the purpose of some law, 59 Comp. Gen. 515 (1980)), on the theory that all property of agencies and instrumentalities of the Federal Government is not the property of separate entities but rather of the Government as a single entity. Thus there can be no reimbursement by the Government to itself for damage to or loss of its own property.

Although the District receives a lump-sum Federal payment as part of its annual operating budget, this does not affect the nature of the claim GPO has against the District Government. In 46 Comp. Gen. 586 (1966) we held that the fact that the Government of American Samoa (a territory of the United States) received direct Federal appropriations and grants-in-aid from the Federal Government in addition to its local revenues, was insufficient to preclude the Department of Agriculture from recovering a claim for damages to property resulting from improper storage of donated commodities. See also *Bradshaw* v. *United States*, 443 F. 2d 759–770 (D.C. Cir., 1971).

Consequently, since District of Columbia Government and United States Government are separate legal entities, a valid claim may exist between the District and GPO, notwithstanding the fact that the District of Columbia receives a lump-sum payment from the United States. Furthermore, setoff is available to GPO as a means for collecting this claim.

SETOFF AGAINST TAXES

Although as a general proposition the GPO can set off debts owed to it by the District of Columbia Government against Government funds due and owing to the District, we do not think that the District's indebtedness may be set off against a Federal employee's District income tax withholdings.

Federal agencies are directed to enter into agreements with the District of Columbia to withhold money from the salaries of employees for payment of the employees' District income taxes by 5 U.S.C. § 5516, which also directs agency heads to comply with the provisions of Subchapter II of chapter 15 of title 47, D.C. Code. Under this subchapter, employers are required to withhold employee taxes and are made *personally* and *individually* liable to the District for failure to *withhold* or *pay* any amounts required to be withheld and paid. D.C. Code § 47–1586g(b), (f)(1) and (h). Furthermore, employee taxes actually withheld at the source are deemed paid by the employee as of April 15 for tax purposes, D.C. Code 47–1586j. The employee's right to claim a

tax credit for withholdings is not conditioned upon the employer paying over the withheld amount by the District. Finally, amounts withheld by employers are held in trust for the District. D.C. Code 47–1586g(f)(1).

Thus it is clear that under District law, the employee is not liable for payment of the amounts withheld. Instead he is entitled to a tax credit up to the amount withheld and his tax liability is extinguished up to the amount withheld. Thus, the funds withheld should not be considered assets of the employees since what happens to the funds will not affect their tax indebtedness. Instead, they are held for the purpose of extinguishing what, by law, has become an employer indebtedness. Thus, any action against these funds will not affect the employees. However, the withholdings are apparently trust funds held for the benefit of the District and as such are not subject to diversion even for the payment of the District's debts. Compare *United States* v. *Louisiana*, 127 U.S. 182 (1887).

Even if these funds are not considered to be held in trust for the benefit of the District Government (in contradiction to the express pronouncement of D.C. Code § 47–1586g(f)(1)), another consideration militates against exercising this remedy in these circumstances. While this Office, the Attorney General and the courts have been amenable to setting off debts owed by taxpayers against refunds owed to them, 55 Comp. Gen. 1329 (1976); 20 Op. Atty. Gen. 363 (1892); *Belgard* v. *United States*, 232 F. Supp. 265 (W. D. La., 1964); *Cherry Cotton Mills, Inc.* v. *United States*, 59 F. Supp. 122 (Ct. Cl., 1945), they have been reluctant, as a matter of public policy, to permit setting off of debts against demands for the payment of taxes in the absence of express statutory authority, *United States* v. *Pacific Railroad Co.*, Fed. Case No. 15,983 (C.C.E.D. Mo., 1877); *Apperson* v. *Memphis*, Fed. Case No. 497 (C.C.W.D. Tenn., 1879); *Crabtree* v. *Madden*, 54 F. 426, 431 (8th Cir., 1893); *State* v. *Humble Oil and Refining Co.*, 169 S.W. 2d 707, 708 (Tex., 1943; *Boston Five Cents Saving Bank* v. *City of Boston*, 61 N.E. 2d 124, 126 (Mass., 1945). See also cases collected in 90 A.L.R. 433–438; 20 Am. Jur. 2d Counterclaim Recoupment, etc. § 113; 80 C.J.S. Set-off and Counterclaim § 20; 61 C. J. Taxation 1391; 57 C.J. Set-off and Counterclaim § 31; and, McQuillin Mun. Corp. (3rd Ed.) § 44.138.

We note that the collection of taxes is vital to the functioning and, in fact, to the existence of Government, *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 734 (1979). Obviously, if individual creditors of a governmental unit are permitted to set off debts owed to them by that governmental unit against taxes they owe to the governmental

unit, this would result in a severe disruption in the orderly collection of taxes and the orderly administration of government. Furthermore, it would increase the risk of erroneous duplicate payments being made to creditors.

While in the present situation the Federal Government would not be setting off a debt against taxes it owes to the District Government, but instead against funds withheld by it pursuant to agreement authorized by law for payment of its employees' District income taxes, this distinction is insufficient to remove it from the public policy prohibition. The purpose of the enactment of the employee withholding tax provision was to facilitate the payment and collection of employee income taxes. To permit setoff of the funds withheld would contravene this purpose. Consequently, in view of the strong public policy favoring noninterference in the collection of taxes, we would recommend against taking such action in the absence of clear legislative mandate to do so.

[B-202410]

Travel Expenses—Air Travel—Fly America Act—Applicability—Exceptions—Repatriation Loan Cases

The "Fly America Act," 49 U.S.C. 1517, does not require the use of United States air carriers in repatriation cases where the individuals are loaned funds by the Department of State for their subsistence and repatriation. Transportation procured by the individual with funds borrowed from an executive department is not Government-financed transportation to which the "Fly America Act" applies.

Matter of: Fly America Act—Repatriation Loans, September 29, 1981:

This action is in response to a letter dated March 3, 1981, from the Comptroller, Department of State, requesting an advance decision concerning the legality of a proposed change in Department of State regulations dealing with the repatriation of destitute Americans.

Section 2671 of title 22 of the United States Code (1976) authorizes the Secretary of State to make emergency expenditures and to delegate authority pertaining to the certification of those expenditures. Historically, Congress has appropriated monies to the Secretary's Confidential Fund, established for this emergency purpose, with the understanding that the fund would be used to provide loans to Americans needing financial assistance in returning to the United States. To ensure the proper use of these funds, the Department of State has promulgated regulations which define the circumstances in which financial assistance is to be provided and the procedures which must be followed. *See* 7 Foreign Affairs Manual (FAM) 370 and 375.

Generally, the individual is responsible for resolving his personal financial difficulties. However, when a United States national is seeking to return to the United States after a relatively brief period of absence, is destitute, and is without relatives and friends who are able and willing to help, the Department of State will provide temporary financial assistance. *See* 7 FAM 375.1–1. In these circumstances, the Department of State will provide a 60-day, interest-free loan to be used for subsistence and repatriation. The individual will not be furnished a passport for travel abroad until the obligation has been fully discharged.

Existing Department of State regulations at 7 FAM 375.3–1e(1) and (2) require the use of United States air carriers in repatriation cases where such service is available. The amendment proposed by the Department would permit foreign carriers to be used where they are less costly than their United States counterparts. The issue presented here is whether the Fly America Act, 49 U.S.C. § 1517 (1976), as amended by Pub. L. No. 96–192, 94 Stat. 43 (1980), requires the Department of State to condition the receipt of a repatriation loan on the use of United States air carriers. As explained below, we find that the Fly America Act imposes no such requirement and the Department of State may implement the new regulation.

Section 1517(a), of title 49, states in relevant part that:

> * * * whenever any executive department or other agency or instrumentality of the United States shall procure, contract for, or otherwise obtain for its own account or in furtherance of the purposes or pursuant to the terms of any contract, agreement, or other special arrangement made or entered into under which payment is made by the United States or payment is made from funds appropriated, owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States, or shall furnish to or for the account of any foreign nation, or any international agency, or other organization, of whatever nationality, without provision for reimbursement, any transportation of persons (and their personal effects) or property by air between a place in the United States and a place outside thereof, the appropriate agency or agencies shall take such steps as may be necessary to assure that such transportation is provided by air carriers holding certificates under section 1371 of this title.* * *.

The statute applies only to the activities of an "executive department or other agency or instrumentality of the United States." An individual's actions in procuring air transportation is not covered unless payment for the transportation is made by the United States or from funds "appropriated, owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States."

In the case of repatriation, the transportation is obtained for the individual. As a condition to his receipt of repatriation assistance, the individual is required to execute a note by which he agrees to repay the

Department of State the amount advanced for travel, subsistence, and related purposes. The funds are not granted or conditionally granted for these purposes by the United States. They are loaned to the individual. Because they are furnished with specific provision for reimbursement, we find that their expenditure is not subject to 49 U.S.C. § 1517, as amended. This is consistent with the statement in 57 Comp. Gen. 546 at 547 that nothing in the Act or its legislative history suggests that any person is required to use U.S. air carriers when no expenditure of Government revenues is involved. By virtue of the repatriated individual's obligation to make repayment, the expenditure involved in purchasing air transportation by such an individual must be viewed as an expenditure of individual funds.

This determination is predicated on the assumption that the Department will not purchase air transportation directly from the carrier but that the purchase of transportation will be made from funds loaned to the repatriated individual. Some changes in the wording of 7 FAM 375.3-1e(4) and in procedures used for obtaining such travel may be required so that purchase of the transportation will not be by the Department directly. Accordingly, we find no objection to the proposed amendment to permit the use of foreign air carriers for the repatriation of destitute Americans where such service is less costly than United States air carrier service.

[B-202599]

Travel Expenses—Air Travel—Fly America Act—Employees' Liability—Travel by Noncertificated Air Carriers—Government-Contractor Booking Error

Employees who travel overseas on foreign air carrier when service by U.S. air carriers is available in violation of Fly America Act are personally liable for cost even though they may have been ignorant of the Act and relied upon arrangements made by Government contractor. However, if contract contains provision by which contractor may be held accountable for such scheduling errors, employee's liability may be shifted to contractor.

Matter of: Jasinder S. Jaspal and Claude A. Goode—Fly America Act—Travelers' Liability, September 29, 1981:

The authorized certifying officer for the Chicago Operations and Regional Office, Department of Energy (DOE), has asked whether Mr. Jasinder S. Jaspal and Mr. Claude A. Goode may be reimbursed for certain transoceanic portions of their air travel to and from the United States via foreign air carriers although U.S. air carrier service was available. The issue in this case is whether the DOE employees

may be relieved of liability for travel by foreign air carriers because the flights in question were booked by a DOE contractor. We find that the fact that travel arrangements were made for a Government traveler does not amount to adequate justification for use of a foreign air carrier under 49 U.S.C. 1517, as amended, commonly referred to as the Fly America Act.

The chief of the Production Branch, Mr. Goode, and one of his mining engineers, Mr. Jaspal, both from the Pittsburgh Mining Technology Center, DOE, were scheduled to travel together to visit certain mines and factories abroad which were the subject of a DOE contract. Boeing, Services Int., a DOE contractor responsible for booking transportation for DOE employees, made travel arrangements for Mr. Goode and Mr. Jaspal and booked them on the same foreign air carriers for the portions of the trip from New York to London and return. Although the travelers were originally scheduled on the supersonic foreign air carrier, Concorde, from New York to London, the Government Travel Request (GTR) did not authorize payment of the amount by which the Concorde fare exceeded the regular economy fare. Upon arriving at the airport and finding they would otherwise be responsible for the substantial fare differential, the employees rescheduled their travel from New York to London aboard a British Airways Flight which departed 5 hours later. The travelers departed together on the same foreign air carrier although U.S. air carrier service to London was available at the same time.

Mr. Jaspal included a certificate with his travel voucher explaining the use of the foreign air carrier in these words:

> I certify that it was necessary for Jasinder S. Jaspal to use British Airways Flight 174 between New York City, New York and London, England on April 6, 1980 due to the following reason:
> Boeing Services, Int. erroneously booked the traveler on the Concorde—traveler waited for the next available flight which was 10 hours later on the British Airways flight BA174.

Mr. Goode also included a certificate with his travel voucher that was substantially the same.

After performing duty in Germany, Poland, and Hungary, Mr. Jaspal and Mr. Goode returned from Hungary through London to Pittsburgh. Mr. Goode took the foreign air carrier from London to New York that the contractor booked him on without providing any justification for its use, even though a U.S. air carrier departed at exactly the same time. Mr. Jaspal delayed his return 2 days for personal business and rescheduled his travel aboard a U.S. air carrier from London to New York.

Since 1975 the Fly America Act has required the use of U.S. air carriers for international air travel paid for from appropriated funds if service by such carriers is available, and has imposed a nondiscretionary duty on the Comptroller General to disallow expenditures from appropriated funds for such travel by foreign air carriers in the absence of satisfactory proof of the necessity therefor. The implementing guidelines, B–138942, issued March 12, 1976, and revised March 31, 1981, as the result of a 1980 amendment to the Act, define for travelers the conditions under which U.S. air carriers will be considered to be available, for the use of foreign air carriers will be considered to be necessary. Under the guidelines U.S. air carriers were available for travel from New York to London and Mr. Goode's travel from London to New York because U.S. carriers were scheduled for departure at exactly the same time as the foreign air carriers on which the employees performed their travel. The only justification given by the travelers for the use of the foreign air carriers was that the Government contractor had made a booking error.

Because the requirement for the use of U.S. air carriers is imposed directly by statute, all persons are charged with knowledge of it. *Catherine Benton*, B–188968, August 8, 1977. For this reason and because Government funds may not be used to pay for unnecessary travel by foreign air carrier, we have held that the traveler is personally liable for any costs incurred because of his failure to comply with this requirement. He is not relieved of this responsibility merely because he relied upon the advice or assistance of others in arranging his travel. See B–189711, January 27, 1978, and *Robert A. Young*, B–192522, January 30, 1979.

Accordingly, reimbursement for the cost of Mr. Goode's travel between New York and London and Mr. Jaspal's travel from New York to London may not be allowed. In most situations the determination of the exact amount to be disallowed by the formula set forth in 56 Comp. Gen. 209 (1977) and the revised guidelines is a routine matter. However, in this case the fare authorized on the GTR and presumably paid by DOE appears to be excessive. In order to avoid charging the employees more than is required, the General Services Administration should be asked to verify the fares charged under the procedures at 41 C.F.R. 101–40.301 (1980).

Further, although the matter was not brought up in the submission, the contractor rather than the employees might be liable for the penalty assessed because it scheduled the travel in violation of the Fly America Act. Its liability would of course depend upon the provisions of the contract with DOE which has not been furnished us.

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Forest Service may transfer amounts of payroll deductions for use of Government quarters to separate appropriation accounts used to fund maintenance and operation of such quarters, even though salary expenses may be paid from several different accounts for a single employee. 5 U.S.C. 5911(c) does not preclude consolidation of various salary deductions for administrative convenience in making payments for maintenance expenses. 59 Comp. Gen. 235, modified 659

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The appropriations made to various bureaus and offices within the Department of the Treasury may be pooled so as to permit implementation of the Legal Division's Executive Development Program, under the Civil Service Reform Act of 1978, on an agencywide basis 686

What constitutes appropriated funds
Prison Industries Fund status

Prison Industries Fund, established by 18 U.S.C. 4126 as operating fund of Federal Prison Industries (FPI), constitutes permanent or continuing appropriation even though amounts originally appropriated have been returned to Treasury and Fund is self-sufficient, in view of fact that statute authorizes deposit into Treasury to credit of Fund of receipts for prison industries products and services and authorizes use of such funds for operation of FPI. Surplus personal property acquired by the Fund thus is donable under 40 U.S.C. 484(j), since it does not constitute non-appropriated fund property within meaning of regulation excluding such property from donation (41 C.F.R. 101–44.001–3) 323

ARMY DEPARTMENT
Appropriation availability
Personal property furnished by Army
Damage, loss, etc. (*See* **APPROPRIATIONS, Availability, Personal property furnished by Army**)

ASSIGNMENT OF CLAIMS (*See* **CLAIMS, Assignments**)

AUTOMATIC DATA PROCESSING SYSTEMS (*See* **EQUIPMENT, Automatic Data Processing Systems**)

AUTOMOBILES
Transportation. (*See* **TRANSPORTATION, Automobiles**)

AWARDS
Contract awards. (*See* **CONTRACTS, Awards**)

BIDDERS
Invitation right
Bidder exclusion not intended Page

Protest alleging deliberate exclusion of potential bidder is denied where protester fails to affirmatively prove that agency made deliberate or conscious attempt to preclude potential bidder from competing 41

Qualifications
Certifications
Minority subcontracting goal compliance
Subcontractor substitution after award
Contract administration matter

Bid is responsive where bidder certifies in its bid intention to perform work by utilizing percentage goal of minority subcontractors. Substitution of one subcontractor for another (whether or not listed in bid), before award, concerns bidder's ability to comply with terms of bid or bidder's responsibility; substitution after award concerns contract administration. Therefore, GAO's decision in *Paul N. Howard Company*, B-199145, Nov. 28, 1980, 80-2 CPD 399, correctly concluded that after bid opening grantee should permit reasonable substitution of one minority subcontractor for one listed in responsive low bid. This decision was extended by 61 Comp. Gen.——— (B-204923, Dec. 14, 1981) 606

Information
Time for submission

Invitation for bids' "Successful Commercial Operation" clause providing that no item of equipment would be acceptable unless equipment of approximately same type and class had operated successfully for at least one year appears to involve bid responsiveness and should have been satisfied by material submitted with bid. Even if clause is construed as relating to bidder's responsibility, it was not satisfied when preaward inquiry of equipment users disclosed that item would not be in use for one year until 2 months after award was made 543

Small business concerns
Definitive responsibility criteria

Where contracting officer finds small business nonresponsible, matter of small business responsibility is to be conclusively determined by Small Business Administration (SBA). Contracting officer is bound by SBA decision and cannot cancel solicitation absent compelling independent justification 97

Where Small Business Administration (SBA) headquarters was aware of definitive responsibility criteria in solicitation but decides compliance with criteria is not necessary for issuance of Certificate of Competency (COC), protester's "vital information" regarding small business concern's ability to meet invitation for bid's definitive responsibility criteria is irrelevant to SBA's decision and SBA's alleged failure to consider that information provides no basis for General Accounting Office review of SBA's action 283

BIDDERS—Continued

Responsibility *v.* bid responsiveness

Descriptive literature requirement Page

Decision is affirmed upon reconsideration where protester has failed to show that decision was as matter of law incorrect in holding that descriptive literature may be required only in connection with products and not services since applicable regulations and General Accounting Office decisions are clear on this point---------- 28

Minority subcontracting goal

Subcontractor listing

Solicitation requirement

General Accounting Office (GAO) affirms decision in *Paul N. Howard Company*, B-199145, Nov. 28, 1980, 80-2 CPD 399, in which GAO concluded that grantees cannot require bidders to submit with bids names of firms planned to be utilized in performing work as a condition of responsiveness. Therefore, grantor's current regulation requiring only certification with bid is consistent with that decision. This decision was extended by 61 Comp. Gen. ———(B-204923, Dec. 14, 1981)------- 606

BIDS

Acceptance time limitation

Bids offering different acceptance periods

Shorter periods

Extension propriety

Request prior to expiration of shorter period

Bidder who offered a bid acceptance period shorter in duration than that requested in invitation may not extend that period in order to qualify for award. To permit such an extension would be prejudicial to other bidders who offered the requested acceptance period. Distinguished by Comp. Gen.———(B-205969.2, B-205969.3, May 28, 1982)--------- 666

Dissimilar provisions

Cross-referencing

No entry by bidder

Bid responsiveness

Bidders' failure to insert number in space provided for indication of offered bid acceptance period does not render bids nonresponsive where invitation for bids (IFB) contained standard provision that bid would be considered open for acceptance for 60 days unless bidder indicated otherwise in space provided, with asterisk centered in space with footnote to another IFB provision requiring bids to be open for at least 90 days, since asterisk and cross-referencing had effect of incorporating 90-day acceptance period into standard provision, to which bidder committed itself by signing bid---------- 61

Extension

Refusal effect

Right to protest award delay

Where protester alleges unreasonable delay in making award, which required it to decline to extend bid acceptance period, it is interested party under General Accounting Office Bid Protest Procedures since nature of issue and requested remedy of cancellation and resolicitation are such that protester has established direct and substantial interest-- 499

BIDS—Continued

Aggregate *v.* separable items, prices etc.

Additives

Failure to bid on

Funding (control amount) insufficiency for base bid item

Later award on lowest base-bid basis Page

Where, under additive or Deductive Items clause, funding available before bid opening was insufficient to cover even lowest base item bid, award may properly be made if funds are subsequently acquired only to bidder submitting lowest base bid 327

Funds availability

Reallocation after bid opening

Advantage to Government

Single *v.* multiple awards

Invitation for bids permitted separate awards on three schedules where low aggregate bid exceeded available funds. Cognizant agencies, after receipt of low aggregate bid in excess of available funds, increased amount after bid opening. Award to low aggregate bidder was unjustified where a significantly lower bid on one schedule was rejected. Portion of contract pertaining to that schedule should be terminated for convenience, if feasible, and awarded to low bidder on that schedule 625

Bidders' qualifications. (*See* **BIDDERS, Qualifications**)

Bond. (*See* **BONDS, Bid**)

Buy American Act

Small business set-asides

Furnishing of foreign product by small business does not automatically negate its status as small business concern; firm may qualify as small even though item is not completely of domestic origin if it makes significant contribution to manufacture or production of contract end item 397

Competitive system

Equal bidding basis for all bidders

Government equalizing differences

Contracting agency is not required to equalize competition on particular procurement by considering competitive advantage accruing to offeror by virtue of its incumbency. 60 Comp. Gen. 316 is overruled 642

Oral advice erroneous

Invitation for bids

Interpretation

Contracting officer erroneously advised potential bidders that they were limited to offering individual prices for six items of laundry equipment, and could not submit alternative bids based on award of more than one item, unless specifically requested to do so by invitation for bids and unless alternative bid was based on award of no less than all six items. However, bidder relied on erroneous oral advice at its own risk 543

Specifications

Restrictive

Solicitation for recording and transcript services which preclude use of electronic tape recording devices on basis of agency personnel past experience with other systems and difficulties which concern bidder responsibility, thereby excluding monitored multimicrophone tape recording system with successful record of performance in similar proceedings in other agencies which procuring activity has neither tested nor used, unduly restricts competition 64

BIDS—Continued
Evaluation
Aggregate *v.* separable items, prices, etc.
Additives
Failure to bid on
Bidder submitting lowest base bid Page

Protest that successful bids were nonresponsive for alleged failure to bid on additive items is denied. Contracting agency determined not to accept any additive items, properly determined lowest bids on basis of work actually to be awarded (base bid item), and made awards on basis of lowest bids for base bid items 327

Increase in available funds

Invitation for bids permitted separate awards on three schedules where low aggregate bid exceeded available funds. Cognizant agencies, after receipt of low aggregate bid in excess of available funds, increased amount after bid opening. Award to low aggregate bidder was unjustified where a significantly lower bid on one schedule was rejected. Portion of contract pertaining to that schedule should be terminated for convenience, if feasible, and awarded to low bidder on that schedule 625

Estimates
Requirements contracts

Solicitation for requirements-type contract which fails to include estimates upon which bids will be evaluated and to define "other service" delivery basis upon which bids are sought precludes preparation and evaluation of bids on equal basis. Solicitation should be amended before agency proceeds with procurement to either include estimates and definition or to stipulate ceiling price for services in question 64

Labor costs
Old *v.* new wage rates

Where Davis-Bacon Act wage rate revision was published in *Federal Register* after bid opening but before award, cancellation of IFB is not mandatory unless agency intends to modify contract with low bidder to incorporate new wage rate. Award based on IFB's stated wage rate is proper since new wage rate was published later than 10 days before bid opening and is, therefore, not effective under Department of Labor regulations, 29 C.F.R. 1.7(b)(2) (1980) 271

Options
Additional quantities
Award on basic quantity basis
Bid not low on both quantities

Although protester literally complied with invitation for bid's level option pricing provision (LOPP) that line item unit prices for option quantities not exceed unit prices for basic quantities, lump sum price reduction for basic quantity effectively circumvented LOPP and bid may not be considered for award since manner of bidding prejudiced other bidders 202

Savings to Government
Evaluation requirement

Solicitation to maintain grounds maintenance equipment, which allowed biddders to offer special discounts for off-season work as well as prompt payment discounts, but provided for evaluation of only prompt payment discount in determining low bid, resulted in award that did not reflect most favorable cost to Government for total work to be performed, *i.e.*, seasonal and off-season work, and thus violated statute governing advertised procurements 495

BIDS—Continued
Invitation for bids
Cancellation
Erroneous
Bidder responsibility
Small business set-aside Page

Where contracting officer finds small business nonresponsible, matter of small business responsibility is to be conclusively determined by Small Business Administration (SBA). Contracting officer is bound by SBA decision and cannot cancel solicitation absent compelling independent justification 97

Clauses
"Equitable Adjustments: Waiver and Release of Claims"
Validity

Protest that contract clause regarding waiver and release of claims for equitable adjustments is unfair to contractors by requiring that all claims be presented at one time is denied as clause follows policy of Defense Acquisition Regulation 26–204 (1976 ed.) and does not constitute deviation from regulations or standard changes clause. Moreover, Board of Contract Appeals has allowed reservation of claim under protested clause and held that waiver only bars foreseeable, not unforeseeable, costs 576

Deviations from standard clauses
Approval authority
Military procurement
Transportation/storage of household effects

Protest that solicitation provisions which deviate from standard Defense Acquisition Regulation (DAR) clauses are improper because DAR Council approved only a "service test," rather than a deviation, is without merit where record shows that, regardless of how modifications were characterized, DAR Council carefully reviewed request for change and, in approving service test, met all requirements for approving actual deviation 501

Late
Mail delay evidence
Certified mail
Mail receipt, but not envelope, postmarked

While protester had certified mail receipt postmarked by Postal Service, envelope containing protester's late bid did not have required U.S. Postal Service postmark indicating that it had been mailed at least 5 days before bid opening date. Therefore, bid did not comply with invitation for bids requirements and agency was entitled to reject bid as late 79

Mistakes
Judgmental errors
Correction or withdrawal of bid precluded
Supplier costs
Estimated

Judgment error, *i.e.*, where bidder makes knowing judgment and assumes known risk at time it submits bid such as computing bid on basis of estimate of supplier's costs instead of obtaining actual quotation, is not a mistake for which relief may be granted. 58 Comp. Gen. 793, B–162379, October 20, 1967, and other decisions allowing relief where the bid was so low so as to raise presumption of error regardless of whether bidder established existence of mistake, as opposed to judgment error, will no longer be followed 189

BIDS—Continued
Multi-year
Evalution
Multi-year *v.* single year award
Inflation rate factor
Failure to compound Page

Cancellation and resolicitation of refuse collection service requirement was improper since contracting officer by failing to compound assumed inflation rate erroneously calculated inflation factor to find bid to be unreasonable as to price. This decision is overruled by 60 Comp. Gen. 642. 316

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)
Omissions
Failure to bid on all items

Protest that successful bids were nonresponsive for alleged failure to bid on additive items is denied. Contracting agency determined not to accept any additive items, properly determined lowest bids on basis of work actually to be awarded (base bid item), and made awards on basis of lowest bids for base bid items. 327

Options
Evaluation. (*See* **BIDS, Evaluation, Options**)
Level option pricing provision
Deviation
Option price higher than basic bid
After lump-sum price reduction for basic quantity

Although protester literally complied with invitation for bid's level option pricing provision (LOPP) that line item unit prices for option quantities not exceed unit prices for basic quantities, lump sum price reduction for basic quantity effectively circumvented LOPP and bid may not be considered for award since manner of bidding prejudiced other bidders. 202

Prices
Reasonableness
Basis for determination
Past procurements

Prior decision, 60 Comp. Gen. 316, that refuse collection services invitation improperly was canceled because contracting officer erroneously calculated inflation factor in finding low bid price unreasonable is reversed, since on reconsideration agency has shown that in view of procurement history regarding services low bid was unreasonably high. 642

Reduction propriety
Level option pricing provision
Evaluation

Although protester literally complied with invitation for bid's level option pricing provision (LOPP) that line item unit prices for option quantities not exceed unit prices for basic quantities, lump sum price reduction for basic quantity effectively circumvented LOPP and bid may not be considered for award since manner of bidding prejudiced other bidders. 202

Protests. (*See* **CONTRACTS, Protests**)
Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)

BIDS—Continued
Responsiveness
Responsiveness *v.* bidder responsibility
Commercial usage of equipment requirement Page
Invitation for bids' "Successful Commercial Operation" clause providing that no item of equipment would be acceptable unless equipment of approximately same type and class had operated successfully for at least one year appears to involve bid responsiveness and should have been satisfied by material submitted with bid. Even if clause is construed as relating to bidder's responsibility, it was not satisfied when preaward inquiry of equipment users disclosed that item would not be in use for one year until 2 months after award was made 543
Minority subcontracting goal
Certification of compliance in bid
Grant-funded procurement
Bid is responsive where bidder certifies in its bid intention to perform work by utilizing percentage goal of minority subcontractors. Substitution of one subcontractor for another (whether or not listed in bid), before award, concerns bidder's ability to comply with terms of bid or bidder's responsibility; substitution after award concerns contract administration. Therefore, GAO's decision in *Paul N. Howard Company*, B–199145, Nov. 28, 1980, 80–2 CPD 399, correctly concluded that after bid opening grantee should permit reasonable substitution of one minority subcontractor for one listed in responsive low bid. This decision was extended by 61 Comp. Gen. ——— (B–204923, Dec. 14, 1981) 606
Specifications. (*See* **CONTRACTS Specifications**)
Unbalanced
Evaluation
Options
Bid for base period approximately $180,000 greater than bids for two one-year options is not mathematically unbalanced where there is no evidence that bid is based on nominal prices for some work and enhanced prices for other work and bid for base period represents 36.7 percent of total bid price with each option year representing 31.6 percent of total price. Modifies B–183843, et al., Aug. 2, 1979 1
Not automatically precluded
Mathematically unbalanced bid is not materially unbalanced and may be accepted where there is no reasonable doubt that award would result in lowest ultimate cost under solicitation's evaluation criteria. Modifies B–193843, et al., Aug. 2, 1979 1

BOARDS, COMMITTEES, AND COMMISSIONS
Delegation of authority to Chairman
Administrative functions
Vacancy in chairmanship effect
The Chairman of the Occupational Safety and Health Review Commission is responsible for the administrative functions of the Commission. In the absence of a chairman such responsibilities rest with the remaining two commissioners. Therefore, if remaining two commissioners agree on administrative action, such action is valid. Accordingly, remaining two commissioners may execute lease for purpose of housing computer 627
Establishment
Energy Policy Task Force. (*See* **DEPARTMENT OF ENERGY, Advisory Committees, Establishment**)

BONDS
Bid
Requirement
Administrative determination Page
Contracting officer has discretion to determine whether it is necessary that solicitation require firms to furnish bid bonds with their bids. 60 Comp. Gen. 316 is overruled---------- 642
Timeliness
Independent evidence
Bond misplaced by Government finding
Bid responsive
Bid found after bid opening to include required bid bond was properly accepted as responsible despite agency bid opening officials' announcement at bid opening that there was no bond, since protesting second low bidder has not submitted independent evidence to refute agency's evidence that bond was out of low bidder's control and in hands of Government before bid opening---------- 290

BUY AMERICAN ACT
Small business concerns
Buy American Act *v.* small business requirements
Buy American Act requirement that preference be given to domestic end items is separate and distinct from that for furnishing domestic end items in small business set-aside---------- 397

CANAL ZONE
Employees. (*See* **PANAMA CANAL COMMISSION, Employees**)
Status
Under Panama Canal Treaty, 1977
Overseas differentials and allowances purpose
Not "foreign area"
Employee, who was hired as new appointee to position in the area formerly known as the Canal Zone, was erroneously authorized reimbursement for temporary quarters subsistence expenses although such reimbursement is not permitted under 5 U.S.C. 5723 and para. 2-1.5g(2)(c) of the Federal Travel Regulations (FPMR 101-7) (May 1973). Employee is not entitled to payment for temporary quarters as Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations. Employee must repay amounts erroneously paid as Government is not estopped from repudiating erroneous authorization of its agent. There is no authority for waiver under 5 U.S.C. 5584-- 71

CANAL ZONE GOVERNMENT (*See* **PANANA CANAL COMMISSION**)

CHECKS
Delivery
Banks
Salary payments
Expenses incidental to delivery delay
Government liability
An employee seeks reimbursement of $129 in check overdraft charges which resulted from the inadvertent failure of the Federal Aviation Administration to deposit the employee's paycheck with the employee's bank. The failure was due to the processing of the employee's address change one pay period earlier than requested. The employee may not recover the $129 since, absent statutory authority to the contrary, the Government is not liable for the unauthorized acts of its officers and

CHECKS—Continued
Delivery—Continued
Banks—Continued
Salary payments—Continued
Expenses incidental to delivery delay—Continued
Government liability—Continued Page
employees even though committed in the performance of their official duties. *German Bank* v. *United States*, 148 U.S. 573 (1893)..... 450

CIVIL SERVICE REFORM ACT OF 1978
Federal Labor Relations Authority. (*See* **FEDERAL LABOR RELATIONS AUTHORITY**)
Labor-management agreements
Provisions protected by statute
Pay rate entitlements. (*See* **COMPENSATION, Negotiation, Savings' clause applicability**)
Senior Executive Service. (*See* **OFFICERS AND EMPLOYEES, Senior Executive Service**)
Volunteer Services
Acceptance. (*See* **VOLUNTARY SERVICES, Prohibition against accepting, Statutory Exceptions**)

CLAIMS
Assignments
Contracts
Notice of assignment
To other than Federal agencies, etc. involved
Assignment of claim to proceeds under Federal Government contract must be recognized by contracting agency and all other Federal Government components including Internal Revenue Service (IRS), if assignee complied with filing and other requirements of Assignment of Claims Act, 31 U.S.C. 203, even though assignee failed to perfect assignment under Uniform Commercial Code and similar State provisions. 56 Comp. Gen. 499, 37 *id.* 318, 20 *id.* 458, B-170454, Aug. 12, 1970, and similar cases are overruled in part..... 510
Payments. (*See* **CONTRACTS, Payments, Assignment of Claims Act**)
Set-off. (*See* **SET-OFF, Contract payments, Assignments**)
Back Pay. (*See* **COMPENSATION, Removals, suspensions, etc., Back pay**)
False. (*See* **FRAUD, False claims**)
Statutes of limitation. (*See* **STATUTES OF LIMITATION, Claims**)

COMMERCE DEPARTMENT
Economic Development Administration
Business loans
Two notes representing one loan
Guaranteed and unguaranteed
Different interest rates
Economic Development Administration (EDA) has authority to allow guaranteed loans to be represented by two notes, with fully guaranteed note—representing 90 percent of loan amount, having a lower interest rate than unguaranteed note—representing remaining 10 percent of loan. Notwithstanding statements to contrary in B-194153, Sept. 6, 1979, in which we said two-note procedure could be used only if substantive terms of notes, including maturity dates and interest rates, were same, EDA is not prohibited from using split interest rates provided other substantive terms remain same..... 464

COMPENSATION
Additional
Environmental pay differential
Hazardous duty
Abritration decisions, etc. Page

Employee, whose claim for higher exposure environmental pay was denied by our Claims Group, requests reconsideration on basis of Arbitrator's award under labor-management agreement. In accordance with 4 C.F.R. 21.7(a) payments made pursuant to an arbitration award which is final and binding under 5 U.S.C. 7122(a) or (b) are conclusive on GAO and this Office will not review or comment on the merits of the award. To the extent that the employee's request places in issue the finality or propriety of implementation of Arbitrator's decision, GAO, under 4 C.F.R. 21.8, will not issue a decision. Those issues are more properly within the jurisdiction of the Federal Labor Relations Authority, pursuant to Chapter 71 of title 5, United States Code 578

Supervision of employees
Negotiated agreements
Civil Service Reform Act, 1978, effect
Prevailing wage practice consideration

Long-standing practice of paying double overtime to foremen whose pay is not negotiated but is fixed at 112.5 percent of negotiated journeyman base pay was discontinued because 57 Comp. Gen. 259 held that overtime is limited by 5 U.S.C. 5544 to time and a half, notwithstanding section 9(b) of Public Law 92-392 preserving previously negotiated benefits. Foremen claim restoration of double overtime because section 704(b) of Public Law 95-454 overturned holding and permitted double overtime for nonsupervisory employees who negotiate wages. While not directly covered by sections 9(b) or 704(b), foremen may continue to receive double overtime since broad purpose of these statutory provisions was to preserve prevailing rate practices existing before their enactment. Modifies (extends) 59 Comp. Gen. 583 (1980) 58

Aggregate limitation
Applicability to credit hours
Flexitime experiment

A grade GS-16, step 4 employee of the National Security Agency, being paid $50,112.50 per annum, the maximum salary payable under 5 U.S.C. 5308, was transferred from an office participating in a flextime experiment under title I of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, to an office not participating. He may be paid for his accumulated credit hours under the authority of section 106 of that Act. The limitations on maximum allowable pay in 5 U.S.C. 5547 and 5308, and section 304 of the Legislative Branch Appropriation Act of 1979, do not apply to payments for credit hours 623

Maximum scheduled *v.* maximum payable rate

Section 5547, title 5, U.S. Code, limits aggregate biweekly basic pay plus premium pay covered by that section to biweekly rate for maximum rate for GS-15. PATCO's contention that maximum rate for GS-15 is maximum scheduled rate ($57,912), rather than maximum payable rate ($50,112.50), must be rejected. Recent appropriation acts require that, in administering a provision of law such as section 5547 which imposes a limitation on the basis of a rate of basic pay, the rate of basic pay must be construed to be the rate payable 198

COMPENSATION—Continued
Backpay, (*See* COMPENSATION, Removals, suspensions, etc., Backpay)
Checks
Delivery to banks, etc. for deposit, (*See* CHECKS, Delivery, Banks, Salary payments)
Double
Concurrent military retired and civilian service pay
Reduction in retired pay
Not required
Peace Corps volunteers Page

Peace Corps volunteers serving under section 5 of the Peace Corps Act (22 U.S.C. 2504) do not hold "positions" as defined by the dual pay provisions of 5 U.S.C. 5531 and, therefore, retired Regular officers of the uniformed services are not subject to retired pay reduction as required by 5 U.S.C. 5532 for retired Regular officers who hold other Government positions 266

Downgrading
Saved compensation
Increases in saved salary

Civil Service Reform Act repealed some salary protection benefits for downgraded employees and enacted new ones. FAA Air Traffic Controller, downgraded after effective date of changes but erroneously advised he was entitled to more liberal repealed benefits, claims unjustified personnel action and backpay. Claim must be denied. Government is not bound by erroneous advice and it does not constitute unjustified personnel action. FAA had no authority to grant repealed benefits and no alternative but to apply law in effect at time of downgrading 417

Environmental pay differential. (*See* COMPENSATION, Additional, Environmental pay differential)
Hours of work
Fair Labor Standards Act
Effect of practice or custom
Red meat inspectors

Section 3(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, does not exclude red meat inspectors' clothes-changing and cleanup activities from being compensable hours worked under FLSA. There was no custom or practice to exclude such activities from being compensable as meat inspectors' union had always challenged Department of Agriculture's determination to exclude such activities from being compensable from the time FLSA was made applicable to Federal employees. Moreover, Agriculture had paid for a certain amount of clothes-changing and cleanup time in the past 611

Clothes-changing, etc. time

Office of Personnel Management is correct in holding that certain Department of Agriculture red meat inspectors, who are required to wear protective clothing and equipment and to keep them clean, are involved in an integral and indispensable part of their principal activity under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* when they are engaged in clothes-changing and cleanup activities at their worksites. GAO will not disturb OPM's factual findings unless clearly erroneous. *Paul Spurr*, 60 Comp. Gen. 354 611

COMPENSATION—Continued
Labor-management agreements. (*See* **COMPENSATION, Negotiation**)
Limitation. (*See* **COMPENSATION, Aggregate limitation**)
Military pay. (*See* **PAY**)
Negotiation
Prevailing rate employees. (*See* **COMPENSATION, Prevailing rate employees, Negotiated agreements**)
Savings' clause applicability
Applicable rate
Construction *v.* operation and maintenance rates
Temporary employees Page

Negotiated labor-management agreement provision, which is protected by savings provision of section 9(b) of Pub. L. 92-392, Aug. 19, 1972, provides for payment of construction rates of pay to specified temporary employees of Grand Coulee Project Office. The arbitrator found that as of September 1979 the payment of construction rates of pay to temporary employees was not a prevailing practice in the area. Since section 704 of the Civil Service Reform Act of 1978, Pub. L. 95-454, Oct. 13, 1978, requires that agreement provisions protected by section 9(b) shall be negotiated in accordance with prevailing rates and practices, we conclude that these temporary employees may not continue to be paid at construction rates of pay 668

Overpayments. (*See* **DEBT COLLECTIONS, Waiver**)
Overtime
Early reporting and delayed departure
De minimis **rule**

Guards at Rocky Mountain Arsenal claim overtime compensation for time spent in drawing out weapons and equipment. Where record does not establish that duties required more than 10 minutes to perform, the claim may not be allowed under 5 U.S.C. 5542. Preshift duties that take 10 minutes or less to perform may be disregarded as being *de minimis* 523

Guards
De minimis **rule.** (*See* **COMPENSATION, Overtime, Early reporting and delayed departure, *De minimus* rule**)
Fair Labor Standards Act
Claims
Settlement authority

Employee filed Fair Labor Standards Act (FLSA) complaint and Office of Personnel Management (OPM) issued a compliance order requiring agency to pay 30 hours overtime compensation per year retroactive to May 1, 1974. Agency states that its records do not support award of 30 hours per year. General Accounting Office will not disturb OPM's findings unless clearly erroneous and the burden of proof lies with the party challenging the findings. Here, agency statement that it cannot find travel vouchers to support OPM award does not satisfy burden of proof. Under FLSA, each agency is responsible for keeping adequate records of wages and hours. Once employee has provided sufficient evidence of hours worked, burden shifts to employing agency to come forward with evidence to contrary 354

Fair Labor Standards Act *v.* other pay laws

An interpretation of 5 U.S.C. 5542 (b)(2)(B)(iv) that travel to a training course which is scheduled by employee's agency does not qualify as compensable travel under that section has no relation to whether such travel time is hours worked under the FLSA 434

COMPENSATION—Continued
Overtime—Continued
Fair Labor Standards Act—Continued
Fractional hours
De minimis doctrine
Not applicable Page

Guards claim they daily performed 15 minutes of preshift duties incident to drawing out weapons and equipment. Where agency has failed to record overtime hours as required by Fair Labor Standards Act, part of claim may be allowed on basis that the record creates a just and reasonable inference that security guards reported to work an average of 7½ minutes prior to guard mount 523

Statute of limitations

This Office has previously held that 6-year limitations period contained in 31 U.S.C. 71a and 237 applies to claims arising under section 204(f) of the FLSA, 29 U.S.C. 201, 204(f) (1976). Thus, where agency appeals OPM/FLSA compliance order to this Office, the 6-year limitations period continues to run until claim is received in this Office. Therefore, any portion of award under OPM compliance order which accrued more than 6 years prior to filing of claim in this Office may not be paid 354

Time spent for acquiring required uniforms
Not compensable overtime

Security police employees of the United States Government Printing Office who, as a result of their work schedule must acquire their uniforms during their off-duty hours are not entitled to overtime compensation for the time spent in acquiring their uniforms. The time involved does not constitute "overtime work" for the purposes of 5 U.S.C. 5544 (1976). In addition, the time spent by the employees is not compensable as overtime hours worked under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* ... 431

Traveltime
"Foreign exemption"
Overseas temporary duty

Three Navy employees who are nonexempt under Fair Labor Standards Act (FLSA) are entitled to overtime under FLSA for return travel from Scotland. "Foreign exemption" under FLSA is construed narrowly, and hours of work in covered area during same workweek will defeat "foreign exemption." 90

Nonworkday travel
Employee *v.* agency scheduling

If an agency allows an employee to schedule travel and the employee travels during corresponding hours on a nonworkday, the agency may not subsequently defeat the employee's entitlement to overtime compensation by stating that the travel should not have been scheduled in the manner the employee chose. If, however, the employee travels by a route or at a time other than that directed by the agency, or if she travels by privately owned vehicle as a matter of personal preference, then a constructive travel time of the agency preferred schedule or mode of travel must be used to determine the amount of hours worked under FLSA 434

COMPENSATION—Continued
Overtime—Continued
Fair Labor Standards Act—Continued
Traveltime—Continued
Nonworkday travel—Continued
Training courses Page

Army civilian intern who traveled to training on nonworkday at time and via route selected by agency is entitled credit for hours worked under the Fair Labor Standards Act (FLSA) for travel time during hours corresponding to regular work hours. Where intern, for personal reasons, traveled at time or via route other than time or route selected by agency, she will be credited with lesser of (1) that portion of *actual* travel time which is considered to be working time, or (2) that portion of *estimated* travel time which would have been considered working time had she traveled at time and by route selected by Army 434

Government Printing Office employees. (*See* **GOVERNMENT PRINTING OFFICE, Employees, Overtime compensation**)
Guards
Time required to prepare for duty, etc. (*See* **COMPENSATION, Overtime, Early reporting and delayed departure, *De minimus* rule**)
Preliminary and postliminary duties. (*See* **COMPENSATION, Overtime, Early reporting and delayed departure**)
Premium pay
Sunday work regularly scheduled. (*See* **COMPENSATION, Premium pay, Sunday work regularly scheduled**)
Prevailing rate employees
Negotiated agreements. (*See* **COMPENSATION, Prevailing rate employee, Negotiated agreements**)
Traveltime
Criteria for entitlement
Non-compliance

Entitlement to overtime compensation while in travel status under 5 U.S.C. 5542(b)(2)(B)(iv) requires at least that: (1) travel result from event which could not be scheduled or controlled administratively, and (2) immediate official necessity in connection with event requiring travel to be performed outside employee's regular duty hours. In instant case, neither condition was fulfilled, and request for overtime compensation is denied. B–192839, May 3, 1979, overruled in part 681

Separate from those for per diem

Our so-called "two-day per diem" rule merely governs payment of per diem when employee delays travel in order to travel during regularly scheduled working hours. Entitlement to overtime compensation, however, is determined by the distinct criteria under 5 U.S.C. 5542(b)(2) as interpreted by our decisions. Mere compliance with "two-day per diem" rule will not result in payment of overtime compensation since per diem and overtime are governed by different criteria. B–192839, May 3, 1979, overruled in part 681

Fair Labor Standards Act, (*See* **COMPENSATION, Overtime, Fair Labor Standards Act, Traveltime**)
Reimbursement

Three Navy employees who performed temporary duty in Scotland returned to United States on Saturday, a nonworkday. Traveltime is not compensable as overtime under title 5, United States Code, under these circumstances 90

COMPENSATION—Continued

Panama Canal Commission positions. (*See* **STATUTORY CONSTRUCTION**)

Premium pay

Limitations on payment Page

Section 5547, title 5, U.S. Code, limits aggregate biweekly basic pay plus premium pay covered by that section to biweekly rate for maximum rate for GS-15. PATCO's contention that maximum rate for GS-15 is maximum scheduled rate ($57,912), rather than maximum payable rate ($50,112.50), must be rejected. Recent appropriation acts require that, in administering a provision of law such as section 5547 which imposes a limitation on the basis of a rate of basic pay, the rate of basic pay must be construed to be the rate payable 198

Applicability to credit hours

Flexitime experiment

A grade GS-16, step 4 employee of the National Security Agency, being paid $50,112.50 per annum, the maximum salary payable under 5 U.S.C. 5308, was transferred from an office participating in a flex-time experiment under title I of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, to an office not participating. He may be paid for his accumulated credit hours under the authority of section 106 of that Act. The limitations on maximum allowable pay in 5 U.S.C. 5547 and 5303, and section 304 of the Legislative Branch Appropriation Act of 1979, do not apply to payments for credit hours 623

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Any period of work performance on Sunday

Effect on entitlement

Midnight shift employees at US Army Communications Command, Detroit, whose tour of duty is from 2345 Sunday to 0745 Monday are entitled to Sunday premium pay for entire 8-hour period since there is no requirement in 5 U.S.C. 5546(a) (1976) for performance of minimum period of Sunday work as condition of entitlement to premium pay benefits 559

Prevailing rate employees

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Double

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Long-standing practice of paying double overtime to foremen whose pay is not negotiated but is fixed at 112.5 percent of negotiated journeyman base pay was discontinued because 57 Comp. Gen. 259 held that overtime is limited by 5 U.S.C. 5544 to time and a half, notwithstanding section 9(b) of Public Law 92-392 preserving previously negotiated benefits. Foremen claim restoration of double overtime because section 704(b) of Public Law 95-454 overturned holding and permitted double overtime for nonsupervisory employees who negotiate wages. While not directly covered by sections 9(b) or 704(b), foremen may continue to receive double overtime since broad purpose of these statutory provisions was to preserve prevailing rate practices existing before their enactment. Modifies (extends) 59 Comp. Gen. 583 (1980) 58

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Individual's appointment as Deputy U.S. Marshal was delayed after agency sought to remove his name from list of eligibles on grounds he was over agency age limitation for appointment. Although Civil Service Commission ruled individual must be considered for appointment, agency retained discretion to appoint. Since individual has no vested right to appointment, he is not entitled to retroactive appointment, backpay, or other benefits under the Back Pay Act ---- 442
Back Pay Act of 1966
Unjustified or unwarranted removal requirement
Civil Service Reform Act repealed some salary protection benefits for downgraded employees and enacted new ones. FAA Air Traffic Controller, downgraded after effective date of changes but erroneously advised he was entitled to more liberal repealed benefits, claims unjustified personnel action and backpay. Claim must be denied. Government is not bound by erroneous advice and it does not constitute unjustified personnel action. FAA had no authority to grant repealed benefits and no alternative but to apply law in effect at time of downgrading ---- 417
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Traveltime
Three Navy employees who performed temporary duty in Scotland returned to United States on Saturday, a nonworkday. Traveltime is not compensable as overtime under title 5, United States Code, under these circumstances ---- 90

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Partial award authority. (*See* **CONTRACTS, Disputes, Contract Appeals Board decision, Partial awards, Authority**)
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Where Small Business Administration (SBA) headquarters was aware of definitive responsibility criteria in solicitation but decides compliance with criteria is not necessary for issuance of Certificate of Competency (COC), protester's "vital information" regarding small business concern's ability to meet invitation for bid's definitive responsibility criteria is irrelevant to SBA's decision and SBA's alleged failure to consider that information provides no basis for General Accounting Office review of SBA's action 283

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Small business concerns Page

Army decided that small business otherwise eligible for award was nonresponsible because business lacked required security clearances to perform contract; however, Army did not refer nonresponsibility decision to Small Business Administration (SBA) under certificate of competency procedure. Army's decision was consistent with provisions of Defense Acquisition Regulation (DAR) but contrary to Small Business Act Amendments of 1977 and SBA's implementing regulations. Nevertheless, General Accounting Office will not recommend action leading to possible termination of contract and disruption of services thereunder since contracting officer reasonably relied on DAR provisions. 275

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Where agency does not issue solicitation for Architect-Engineering (A–E) services but synopsizes procurement in *Commerce Business Daily*, and synopsis shows procurement will not be set aside for small business, protest that procurement should have been set aside is untimely unless filed prior to deadline specified in synopsis for receipt of qualification statement 11

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Forest Service excluded retired employee from contract for architect and engineering services even though employee was highest-ranked competitor for services. Exclusion was improper since General Accounting Office is not aware of any basis for excluding retirees from obtaining Government contracts 298

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Single *v.* multiple awards

Fund reallocation after bid opening

Defense procurement

Invitation for bids permitted separate awards on three schedules where low aggregate bid exceeded available funds. Cognizant agencies, after receipt of low aggregate bid in excess of available funds, increased amount after bid opening. Award to low aggregate bidder was unjustified where a significantly lower bid on one schedule was rejected. Portion of contract pertaining to that schedule should be terminated for convenience, if feasible, and awarded to low bidder on that schedule 625

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Protest that award was unreasonably delayed and bid acceptance period extensions were improperly requested is denied where delay was relatively short and resulted from administrative problems which agency reasonably believed required resolution in order to make award 499

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Minority business utilization

Price reasonableness

Solicitation provided that, if any bidder offered reasonable price and met female-owned business utilization goal of one-tenth of 1 percent, grantee would presume conclusively that any bidder requesting waiver of goal would be ineligible for waiver and award. Grantee, with concurrence of grantor, arbitrarily rejected low bid ($243,000) and accepted second low bid ($343,875) solely on reasonableness of second low bid without any consideration of reasonableness of low bid and insignificant impact that goal had on overall cost of work 535

Review

Timeliness of complaints

General Accounting Office (GAO) will no longer review complaints regarding procurements by Federal grantees which are not filed within reasonable time. Prompt filing is required so that issues can be decided while it is still practicable to take action if warranted. B–188488, Aug. 3, 1977, and B–194168, Nov. 28, 1979, overruled in part. This decision was later extended by 61 Comp. Gen. 6 (B–201613, Oct. 6, 1981) .. 414

Contention that grantee's solicitation provisions are improper will not be considered on merits since basis of complaint was not filed within reasonable time. To be considered by General Accounting Office, complaint should have been filed prior to bid opening 535

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Failure of a bidder to complete a clause in its bid indicating that it is an LSA concern is not a minor informality which could be waived by the agency; the omission affects the relative standing of bidders, and is material since the bidder thereby fails to commit itself to incur the requisite proportion of costs in LSAs. Distinguished by B–204531,B–204531.2, Feb. 4, 1982 694

Geographical location
Place of performance
Changes after bid opening

Where a bidder represents in eligibility clause set forth in the IFB that 100 percent of contract costs will be incurred in a particular LSA, but after bid opening indicates that a significant portion of contract costs will be incurred in previously unspecified LSAs, the bidder's LSA status is not affected since the bidder has committed itself to incur the required minimum costs (50 percent) in LSAs and it is not material in which LSAs such costs will be incurred. Distinguished by B–204531, B–204531.2, Feb. 4, 1982 694

Price differentials
Prohibition
Nonapplicability to 8(a) subcontracts

Maybank Amendment prohibition on use of Department of Defense appropriations for payment of price differential on contracts made for purpose of relieving economic dislocation does not apply to 8(a) subcontracts. B–193212, Jan. 30, 1979, overruled in part 311

Qualification of bidder
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Failure of a bidder to complete a clause in its bid indicating that it is a labor surplus area (LSA) concern, even though a place of manufacture was listed elsewhere in its bid, prevents consideration of the bidder as an LSA concern not subject to a five percent evaluation penalty; place of manufacture is not by itself determinative of whether a contractor is an LSA concern. Distinguished by B–204531, B–204531.2, Feb. 4, 1982 694

Subcontractor, supplier, etc.
Size status

A bidder qualifies as a small business, even though it buys materials from, or subcontracts a major portion of work to, a large business, so long as the bidder makes a significant contribution to the manufacture or production of end items. Distinguished by B–204531, B–204531.2, Feb. 4, 1982 694

Multiple *v.* single procurements
Single procurement
Justification

Protest that request for proposals (RFP) for automatic data processing peripheral equipment was deficient because agency permitted all-or-none proposals knowing there was little prospect of competition for

CONTRACTS—Continued
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Single procurement—Continued
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several line items is denied. Offeror would not have been prejudiced by submitting proposal to furnish only some line items since agency limited all-or-none pricing to alternate proposal and included RFP requirement for cost and pricing data to insure that firm which offered to furnish items in question did not unbalance all-or-none bid 548

Notice
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Grant procurements

GAO is not aware of any regulation requiring notice to unsuccessful bidders in procurements by Federal grantees; even in direct Federal procurement, lack of notice constitutes mere procedural irregularity which, in absence of prejudice, does not affect otherwise proper award. B–188488, Aug. 3, 1977, and B–194168, Nov. 28, 1979, overruled in part. This decision was later extended by 61 Comp. Gen. 6 (B–201613, Oct. 6, 1981) 414

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General Accounting Office will not question agency decision to make award prior to resolution of protest where decision was made in accordance with applicable regulations 504

Retired Government employees
Right to compete for award

Forest Service excluded retired employee from contract for architect and engineering services even though employee was highest-ranked competitor for services. Exclusion was improper since General Accounting Office is not aware of any basis for excluding retirees from obtaining Government contracts 298

Small business concerns
Certifications
Mandatory referral to SBA
Security clearance requirement

Army decided that small business otherwise eligible for award was nonresponsible because business lacked required security clearances to perform contract; however, Army did not refer nonresponsibility decision to Small Business Administration (SBA) under certificate of competency procedure. Army's decision was consistent with provisions of Defense Acquisition Regulation (DAR) but contrary to Small Business Act Amendments of 1977 and SBA's implementing regulations. Nevertheless, General Accounting Office will not recommend action leading to possible termination of contract and disruption of services thereunder since contracting officer reasonably relied on DAR provisions 275

Procurement under 8(a) program
Scope of GAO review

General Accounting Office will review Small Business Administration compliance with its Standard Operating Procedures governing award of 8(a) subcontracts only when showing of bad faith or fraud on part of Government procurement officials has been made. B–193212, Jan. 30, 1979, overruled in part 311

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Allegation that violations of Small Business Administration's Standard Operating Procedures (SOP) for award of 8(a) subcontracts make award of subcontract a violation of 41 U.S.C. 11 (1976) statement that "no contract * * * shall be made, unless * * * authorized by law" is denied because purpose of provision is to prevent officers of Government from contracting beyond legislative authorization. Provision is not violated by mere procedural irregularities in award of authorized contract. Here, contract is authorized by section 8(a) of Small Business Act, and sufficient appropriations are available for purpose. B–193212, Jan. 30, 1979, overruled in part 311

Responsibility to perform contract
Conclusive determination vested in SBA

Where Small Business Administration (SBA) headquarters was aware of definitive responsibility criteria in solicitation but decides compliance with criteria is not necessary for issuance of Certificate of Competency (COC), protester's "vital information" regarding small business concern's ability to meet invitation for bid's definitive responsibility criteria is irrelevant to SBA's decision and SBA's alleged failure to consider that information provides no basis for General Accounting Office review of SBA's action 283

Set-asides
Administrative determination
Repetitive military procurements

Defense Acquisition Regulation provides that once service has been successfully acquired through small business set-aside, all future requirements of contracting activity for that service must be set aside unless contracting officer, in exercise of judgment, determines that there is not reasonable expectation that offers from two responsible small businesses will be received and award will be at reasonable price. 60 Comp. Gen. 316 is overruled 642

Partial
Competitive range establishment

In quick reaction work order procurement, establishment of competitive range for small businesses only is proper when (1) 25 percent set-aside was announced in solicitation and (2) small business proposals have real chance for award when compared with each other and preference is taken into account 120

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Where contracting officer finds small business nonresponsible, matter of small business responsibility is to be conclusively determined by Small Business Administration (SBA). Contracting officer is bound by SBA decision and cannot cancel solicitation absent compelling independent justification 97

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Protests against award on initial proposal basis and small business size status of awardee are denied since: (1) awardee was not allowed to change its initial proposal before award; and (2) size status protests are for review by SBA---- 275
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Solicitation provided that, if any bidder offered reasonable price and met female-owned business utilization goal of one-tenth of 1 percent, grantee would presume conclusively that any bidder requesting waiver of goal would be ineligible for waiver and award. Grantee, with concurrence of grantor, arbitrarily rejected low bid ($243,000) and accepted second low bid ($343,875) solely on reasonableness of second low bid without any consideration of reasonableness of low bid and insignificant impact that goal had on overall cost of work---- 535
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"Equitable Adjustments: Waiver and Release of Claims"
Interpretation
Armed Services Board of Contract Appeals
Protest that contract clause regarding waiver and release of claims for equitable adjustments is unfair to contractors by requiring that all claims be presented at one time is denied as clause follows policy of Defense Acquisition Regulation 26–204 (1976 ed.) and does not constitute

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Clauses—Continued
"Equitable Adjustments: Waiver and Release of Claims"—Continued
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Competitive advantage
Not resulting from unfair Government action
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Restrictions on competition
Prequalification of offerors, etc.
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Where agency rejects bid from defaulted contractor on reprocurement contract because bid price exceeds defaulted contract price, subsequent alteration of default termination to termination for convenience pursuant to decisions and orders of board of contract appeals does not render improper rejection of reprocurement bid since at time of rejection agency had reasonable basis for its action---- 609
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Discounts
Prompt payment
Computation basis
Trade-in allowance factor
Absence of contract provision Page

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Armed Services Board of Contract Appeals awarded a contractor-plaintiff in a contract dispute a principal amount of $12,226.43 and interest to which he may be entitled by law. Attorney General requested GAO to certify payment of principal from permanent indefinite appropriation contained in 31 U.S.C. 724a, which requires award to be final, while interest award was appealed to Court of Claims. Attorney General asked GAO to consider uncontested principal award as final and certified that no appeal had been or would be taken from the award of principal. Risk is extremely remote that Court of Claims would consider *sua sponte* and change uncontested principal award and, since Board could have made "partial award" or principal, it may be certified for payment. Letter dated Oct. 30, 1980, B-199470, to contractor-plaintiff's attorney, which declined to certify principal amount for payment, is modified accordingly 573

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Request for quotations for dictation equipment available under multiple-award Federal Supply Schedule contract, one of which did not inform quoters of life cycle evaluation factors and another which did not indicate that life cycle cost would be evaluated at all, are defective and, under circumstances, did not permit fair and equal competition 306

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Office of Federal Procurement Policy
Uniform contracting system
Notice in *Commerce Business Daily* requirement

Office of Federal Procurement Policy's (OFPP) prequalification of offerors in connection with its uniform system for contracting for film and videotape productions is not unwarranted restriction on competition because all firms may attempt to qualify. However, use of OFPP's qualified list by procuring agencies in soliciting for particular procurements is unduly restrictive of competition unless procurements are synopsized in *Commerce Business Daily* and interested firms on the prequalified lists are afforded opportunity to compete---------- 104

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Maybank Amendment prohibition on use of Department of Defense appropriations for payment of price differential on contracts made for purpose of relieving economic dislocation does not apply to 8(a) subcontracts. B-193212, Jan. 30, 1979, overruled in part 311

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Even though 10 U.S.C. 2302(1) does not list Secretary, Under Secretaries, or Assistant Secretaries of Defense as officials authorized to make D&F's justifying negotiation under 10 U.S.C. 2304(a)(16), statutes creating and reorganizing Department of Defense and expanding power of the Secretary of Defense, and legislative history of those statutes, make it clear that those officials may make such D&F's ---- 341
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Contention of inadequate time to prepare initial proposal is unpersuasive in view of lack of objection by other offerors and adequacy of competition. Allegation that solicitation provision is "confusing," raised after receipt of initial proposals, is not a basis for finding of prejudice, particularly where protester took no action to obtain clarification. Contention of unequal negotiations, based on request for clarification of protester's proposal to which protester did not respond in substance, leading to elimination from competitive range, is without merit 172

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Protest that request for proposals (RFP) for automatic data processing peripheral equipment was deficient because agency permitted all-or-none proposals knowing there was little prospect of competition for several line items is denied. Offeror would not have been prejudiced by submitting proposal to furnish only some line items since agency limited all-or-none pricing to alternate proposal and included RFP requirement for cost and pricing data to insure that firm which offered to furnish items in question did not unbalance all-or-none bid 548

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Failure of procuring agency to institute formal qualification procedure for known potential supplier, or to act in conjunction with Air Force in its qualification process of same supplier for similar parts for Air Force, contravened Defense Acquisition Regulation 3-101(d), which requires contracting officers to take action to avoid noncompetitive procurements. 361

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Solicitation improprieties
Apparent prior to bid opening
To extent protester objects after bid opening to inclusion and evaluation of option periods as set forth in invitation for bids, protest is untimely under General Accounting Office (GAO) Bid Protest Procedures, 4 C.F.R. 20.2(b)(1), which require protests based on alleged solicitation improprieties apparent prior to bid opening to be filed before such time. This decision modifies B-193843, et al., Aug. 2, 1979---- 1

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Grant procurements Page

Complaint alleging that Federal grantee's specifications for particular type of bus washer unduly restrict competition, filed more than 2 months after bid opening, was not filed within reasonable time and therefore will be dismissed. In order to be considered filed within reasonable time, future complaints based on alleged improprieties in grantee solicitations which are apparent prior to bid opening or receipt of initial proposals must be filed in accordance with time standards established for bid protests in direct Federal procurements. B–188488, Aug. 3, 1977, and B–194168, Nov. 28, 1979, overruled in part. This decision was later extended by 61 Comp. Gen. 6 (B–201613, Oct. 6, 1981)---------- 414

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Requests for proposals
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Contention of inadequate time to prepare initial proposal is unpersuasive in view of lack of objection by other offerors and adequacy of competition. Allegation that solicitation provision is "confusing," raised after receipt of initial proposals, is not a basis for finding of prejudice, particularly where protester took no action to obtain clarification. Contention of unequal negotiations, based on request for clarification of protester's proposal to which protester did not respond in substance, leading to elimination from competitive range, is without merit--------- 172

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Purchases on basis of quotations
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What constitutes

Essential information requirements Page

Procuring agency's letter to protester requesting "budgetary cost quote" did not amount to formal solicitation or request for quotations where letter did not advise protester of such essential Government requirements as time for delivery of procured items or cut-off date for submission of proposals and letter itself stated twice that it was merely request for "budgetary proposal" or "budgetary cost quote." 361

Specifications

Amendments

Acknowledgment

Contractor's responsibility for delivery

Where agency does not receive acknowledgment of material amendment to solicitation, fact that bidder mailed acknowledgment is not sufficient to constitute express acknowledgment; bidder has responsibility to assure that acknowledgment arrives at agency. This decision is overruled in part by 60 Comp. Gen 321 251

Failure to expressly require

Fact that telegraphic amendment does not expressly state it must be acknowledged does not eliminate bidder's obligation to acknowlege all material amendments. Overruled in part by 60 Comp. Gen. 321 251

Implied

Mailing, etc. records in lieu of actual

Records of telegraph company which show that two messages, one of which announced that amendment would be issued and another which constituted additional amendment, were received by protester do not constitute implied acknowledgment of amendments as telegraph company is not agency's agent for receipt of amendment acknowledgments, agency was not required to check company records prior to bid opening, and first message only announced that amendment would be issued and contained none of the specification changes included in actual amendment. Overruled in part by 60 Comp. Gen. 321 251

Oral

Evidence sufficiency

Evidence of oral acknowledgment of amendments, both of which, among other things, extended bid opening, is inconclusive where affidavit of contract specialist indicates that only general conversations regarding extended bid opening were held with protester prior to bid opening. Overruled in part by 60 Comp. Gen. 321 251

Unacceptable with respect to material amendments

Failure to acknowledge amendment in writing prior to bid opening usually renders bid nonresponsive and that failure cannot be cured by oral acknowledgment or discussions concerning amendment prior to bid opening. Prior decisions inconsistent with this rule are overruled (60 Comp. Gen. 251 (1981) and B–185198, Feb. 24, 1976) 321

Basic ordering agreements

Propriety

Failure of procuring agency to institute formal qualification procedure for known potential supplier, or to act in conjunction with Air Force in its qualification process of same supplier for similar parts for Air Force, contravened Defense Acquisition Regulation 3–101(d), which requires contracting officers to take action to avoid noncompetitive procurements. 361

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Solicitation for requirements-type contract which fails to include estimates upon which bids will be evaluated and to define "other service" delivery basis upon which bids are sought precludes preparation and evaluation of bids on equal basis. Solicitation should be amended before agency proceeds with procurement to either include estimates and definition or to stipulate ceiling price for services in question---------- 64

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Restrictive
"All or none" bidding limitation

Protest that request for proposals (RFP) for automatic data processing peripheral equipment was deficient because agency permitted all-or-none proposals knowing there was little prospect of competition for several line items is denied. Offeror would not have been prejudiced by submitting proposal to furnish only some line items since agency limited all-or-none pricing to alternate proposal and included RFP requirement for cost and pricing data to insure that firm which offered to furnish items in question did not unbalance all-or-none bid---------- 548

Geographical location
"Home Port Policy"

Navy's general use of geographic restriction to preclude firms in one district from competing for overhaul of ships home-ported in other districts in order to preserve overhaul capacity of those firms is unduly restrictive, although in given case it may be shown that restriction is necessary---------- 192

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Justification Page

Request for proposals provision that contractor should not have been associated with prior publicized position on matters which are subject of procurement with high public interest is not overly restrictive of competition, since *biased* public position is implicit in restriction, and agency's desire to obtain unbiased contractor is reasonable 223

Minimum needs requirement
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Reasonableness

Allegation that statement in request for proposals that agency will itself conduct epidemiological study to be designed by contractor is restrictive of competition because many scientists will refuse to stake their reputations on study over which they have no control is without merit where it is not shown that conduct of such study by party other than study designer is unusual or beyond legitimate agency needs 223

Protest timeliness

Opening of bids on scheduled date constitutes initial agency action adverse to protest against specifications filed with agency. Subsequent protest to General Accounting Office not filed within 10 days of notification of adverse agency action is untimely 97

Weight limitation
Hazardous materials

Protester's contention that Air Force 0.75-pound cylinder weight limitation is unduly restrictive of competition because Navy buys protester's 1.25-pound cylinder for similar use is denied. Navy determination that heavier cylinder meets its minimum needs does not preclude Air Force from considering particular use of equipment under operating procedures and conditions different from Navy 504

Tests
Benchmark
After best and final offers
Propriety

Request for proposals provision allowing benchmark of tentatively selected equipment after closing date for best and final proposals is not in itself objectionable 548

Reopening negotiations

If, in connection with Government-supervised benchmark, questions are likely to arise or additional information to be needed, benchmark is inherent part of negotiation process during which deficiencies must be identified and offerors given an opportunity to correct them. In this case, benchmark should precede best and final offers or agency should be prepared to reopen negotiations 468

Deficiencies
Notice of failure to pass

When otherwise-qualified offeror—who asserts failure to demonstrate technical capability in one area of benchmark was due to human error (other than deficiency in software)—is not advised of failure until month after benchmark, agency has not met duty to obtain maximum competition. Evaluators supervising benchmark either knew or should have known of failure at time it occurred, and question of capability could have been resolved immediately by re-running exercise in question 151

CONTRACTS—Continued
Specifications—Continued
Tests—Continued
Benchmark—Continued
Pass/fail basis
Propriety Page

Benchmark tests should not be run on "pass/fail" basis. In rare instances where agency can justify such a test, evaluators supervising benchmark have duty to point out failures at time they occur. If these can be corrected during benchmark, offeror should be afforded opportunity to do so ---- 151

Second opportunity
All or part re-run basis

When offeror has demonstrated ability to meet all but one mandatory requirement for teleprocessing system, General Accounting Office recommendation that offeror be allowed second attempt to successfully complete benchmark requires re-running only exercise in question, not entire benchmark ---- 151

Use as evaluation tool
Administrative discretion

When benchmark programs appear to represent system workload and, combined with functional demonstration, provide reasonable basis for identifying offeror with lowest life-cycle cost, use of benchmark as evaluation tool is within discretion of procuring agency ---- 113

Necessary amount of testing
Administrative determination

Protest that solicitation item description eliminates cylinder safety test requirements and allows use of cylinders not designed, manufactured, marked, or shipped in accordance with Department of Transportation (DOT) regulations on hazardous material is denied. Contracting activity has provided for adequate testing, and DOT regulations provide that material consigned to Department of Defense (DOD) must be packaged either according to DOT regulations or in container (cylinder) of equal or greater strength and efficiency, as required by DOD regulations. Contracting agency has determined that cylinders meet or exceed DOT requirements and need not apply for DOT exemption ---- 504

Stenographic reporting
Bidder responsibility

Solicitation for recording and transcript services which preclude use of electronic tape recording devices on basis of agency personnel past experience with other systems and difficulties which concern bidder responsibility, thereby excluding monitored multimicrophone tape recording system with successful record of performance in similar proceedings in other agencies which procuring activity has neither tested nor used, unduly restricts competition ---- 64

Specifications propriety

Solicitation for requirements-type contract which fails to include estimates upon which bids will be evaluated and to define "other service" delivery basis upon which bids are sought precludes preparation and evaluation of bids on equal basis. Solicitation should be amended before agency proceeds with procurement to either include estimates and definition or to stipulate ceiling price for services in question ---- 64

CONTRACTS—Continued
Subcontractors
Privity. (*See* **CONTRACTS, Privity, Subcontractors**)
Subcontracts
Administrative approval
Review by General Accounting Office
Active agency participation in subcontractor selection
What constitutes Page

Prior decision dismissing protest of subcontract award is affirmed where evidence submitted in support of request for reconsideration—a statement that agency, prior to approving subcontract, will examine prime contractor's methods for selecting subcontractor—does not establish active agency participation in selection of subcontractor so as to invoke GAO bid protest jurisdiction 101

Privity between subcontractor and United States. (*See* **CONTRACTS, Privity, Subcontractors**)
Synthetic fuels
Procurement. (*See* **SYNTHETIC FUELS, Procurement**)
Teleprocessing services. (*See* **GENERAL SERVICES ADMINISTRATION, Services for other agencies, etc., Teleprocessing Services Program (TSP)**)
Time and materials
Evaluation factors
Material handling costs
Not included in basic labor rates
Separate item for evaluation recommended

Evaluation scheme for award of time and materials contract which does not take into account reimbursable material handling costs when not included in basic labor rates violates fundamental principle that all competitors must be evaluated on comparable basis since offerors who do include these costs in hourly labor rates will be evaluated on basis of total cost to Government while others will not. Scheme is further defective because it may not indicate which offer does represent lowest overall cost to Government 487

CORPORATIONS
Legal Services Corporation
Lobbying

Legal Services Corporation (LSC) and its recipients organized a grass roots lobbying campaign in support of LSC reauthorization and appropriation pending before Congress, contending these activities are authorized by 42 U.S.C. 2996e(c)(2)(B) and 2996f(a)(5)(B)(ii). While these provisions allow LSC and recipients to provide testimony and appropriate comment to Congress concerning LSC legislation, they prohibit LSC and recipients from expending funds for grass roots lobbying activities 423

Appropriation prohibition
Moorhead Amendment

The Moorhead Amendment is a direct lobbying restriction included in the annual Legal Services Corporation (LSC) appropriation that prohibits LSC and recipients from expending Federal funds for grass roots lobbying activities. LSC has an obligation to implement this restriction and insure that its appropriations are not used for such lobbying activities 423

COURTS
Judgments, decrees, etc.
Partial
Contract Disputes Act applicability Page

Armed Services Board of Contract Appeals awarded a contractor-plaintiff in a contract dispute a principal amount of $12,226.43 and interest to which he may be entitled by law. Attorney General requested GAO to certify payment of principal from permanent indefinite appropriation contained in 31 U.S.C. 724a, which requires award to be final, while interest award was appealed to Court of Claims. Attorney General asked GAO to consider uncontested principal award as final and certified that no appeal had been or would be taken from the award of principal. Risk is extremely remote that Court of Claims would consider *sua sponte* and change uncontested principal award and, since Board could have made "partial award" or principal, it may be certified for payment. Letter dated Oct. 30, 1980, B-199470, to contractor-plaintiff's attorney, which declined to certify principal amount for payment, is modified accordingly 573

Payment
Indefinite appropriation availability
Judgments against Government
"Front pay"

As a result of an employment discrimination suit brought by certain female employees, the Government Printing Office (GPO) was ordered in a court judgment to pay the plaintiffs back pay for past economic harm and an added increment of pay above that to which they were otherwise entitled, for continuing economic harm until a certain number of plaintiffs were promoted. The so-called award of "front pay" in this instance amounts to damages and should be paid from the permanent indefinite appropriations provided in 31 U.S.C. 724a. Agency appropriations are not available to pay compensation above the amount prescribed for the particular job level in question. 55 Comp. Gen. 1447 (1976) is distinguished 375

Res judicata
Subsequent claims

Since acquittal on criminal charges may merely involve a finding of lack of requisite intent or failure to meet the higher standard of proof beyond reasonable doubt, doctrine of *res judicata* does not bar the Government from claiming in later civil or administrative proceeding that certain items on employee's voucher were fraudulent 357

Jury duty
Absence from work duty. (*See* LEAVES OF ABSENCE, Court)

CREDIT UNIONS
Federal. (*See* FEDERAL CREDIT UNIONS)

DAMAGES
Private property. (*See* PROPERTY, Private)

DEBT COLLECTIONS
Interest
Intergovernmental claims. (*See* INTEREST, Intergovernmental claims)

DEBT COLLECTIONS—Contitnued
Military personnel
Advance leave
Separation prior to leave accrual. (*See* **LEAVES OF ABSENCE, Military personnel, Advance leave**)
Pay withholding. (*See* **PAY, Withholding**)
Set-off. (*See* **SET-OFF**)
Waiver
Civilian employees
Compensation overpayments
Withholding deductions insufficient
Union dues allotments Page

If an employee authorizes the deduction of union dues from his pay, a Federal agency is obligated to withhold the amount from the employee and pay it over to the union. The payment of the dues is a personal obligation of the employee, and where the agency wrongfully fails to withhold the dues and later reimburses the union pursuant to the settlement of unfair labor practice charges, the agency must either collect the dues from the employee or waive collection of the debt. Modifies B-180095, Oct. 2, 1975 93

Quarters allowance

Employee, who was hired as new appointee to position in the area formerly known as the Canal Zone, was erroneously authorized reimbursement for temporary quarters subsistence expenses although such reimbursement is not permitted under 5 U.S.C. 5723 and para. 2-1.5g(2)(c) of the Federal Travel Regulations (FPMR 101-7) (May 1973). Employee is not entitled to payment for temporary quarters as Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations. Employee must repay amounts erroneously paid as Government is not estopped from repudiating erroneous authorization of its agent. There is no authority for waiver under 5 U.S.C. 5584 71

DEFENSE ACQUISITION REGULATION
Changes
Mess attendant services
Option provisions

Current DAR provision 1-1502 permits inclusion of options in solicitations for food services. On this basis, GAO decision in *Palmetto Enterprises, Inc.*, B-193843, et al., Aug. 2, 1979, is modified 1

Deviations
Approval authority
Transportation/storage of household effects

Protest that solicitation provisions which deviate from standard Defense Acquisition Regulation (DAR) clauses are improper because DAR Council approved only a "service test," rather than a deviation, is without merit where record shows that, regardless of how modifications were characterized, DAR Council carefully reviewed request for change and, in approving service tests, met all requirements for approving actual deviation. 501

Negotiated procurements
Competitive basis to maximum extent possible
Breakout of parts

Failure of procuring agency to institute formal qualification procedure for known potential supplier, or to act in conjunction with Air Force in its qualification process of same supplier for similar parts for Air Force, contravened Defense Acquisition Regulation 3-101(d), which requires contracting officers to take action to avoid noncompetitive procurements. 361

DEFENSE ASQUISITION REGULATION—Continued
Small business concerns
Nonresponsibility determinations
Referral necessity
"Applicable laws and regulations" exception
Unauthorized by law Page
General Accounting Office recommends that DAR provision, covering certificate of competency procedures, be promptly revised to eliminate exception to procedures for nonresponsibility determinations involving small business' alleged ineligibility to receive award under "applicable laws and regulations," since legislative history of Small Business Act Amendments of 1977 and implementing regulations do not provide for exception 275
Time and materials contract
Evaluation scheme for award of time and materials contract which does not take into account reimbursable material handling costs when not included in basic labor rates violates fundamental principle that all competitors must be evaluated on comparable basis since offerors who do include these costs in hourly labor rates will be evaluated on basis of total cost to Government while others will not. Scheme is further defective because it may not indicate which offer does represent lowest overall cost to Government 487

DEFENSE DEPARTMENT
Defense Production Act
Presidential authority
Synthetic fuel procurement. (*See* **SYNTHETIC FUELS, Procurement, National defense needs, Defense Production Act**)
Procurement
Contracting methods
Compliance with DOD reprogramming directives
Allegation that protester should have received award under proper application of solicitation provision stating that award would be made to technically acceptable proposal offering lowest systems life cost, subject to availability of funds for that method of acquisition, is without merit where agency reasonably concluded that funds were not available for exercise of purchase option under protester's lowest cost lease with option to purchase offer 331
Hazardous materials
Department of Transportation regulations. (*See* **TRANSPORTATION DEPARTMENT, Regulations, Hazardous materials, Compliance determination**)

DELEGATION OF AUTHORITY
Heads of agencies to subordinates
Contract matters
Even though 10 U.S.C. 2302(1) does not list Secretary, Under Secretaries, or Assistant Secretaries of Defense as officials authorized to make D&F's justifying negotiation under 10 U.S.C. 2304(a)(16), statutes creating and reorganizing Department of Defense and expanding power of the Secretary of Defense, and legislative history of those statutes, make it clear that those officials may make such D&F's 341

DEPARTMENT OF EDUCATION
Appropriation availability
Continuing resolution. (*See* **APPROPRIATIONS, Continuing resolutions, Availability of funds**)

DEPARTMENT OF ENERGY
Advisory committees
Establishment
Energy Policy Task Force
Federal Advisory Committee Act compliance Page

The Energy Policy Task Force (EPTF), a Department of Energy (DOE) advisory committee, was not legally established on the date of its first meeting because the Secretary of Energy had not completed consultation with General Services Administration (GSA), published determination notice, or filed its charter with the Library of Congress or congressional committees with "legislative jurisdiction" at that time as required by the Federal Advisory Committee Act (FACA). But it is thought DOE officials made good faith attempt to follow approval and filing procedures. 5 U.S.C. App. I, sec. 9 (1976); OMB Circular No. A-63, Revised (1974)---- 386

Approval and coordination functions

FACA legislative history shows requirement for agency head approval of advisory committee, after consultation with Office of Management and Budget (OMB), was developed to limit growing number of advisory committees. Since coordination and approval functions, although late, were duly performed by both GSA and OMB, with final decision made to authorize creation of EPTF, responsible officials had made determination this advisory committee was necessary, so basic concerns motivating Congress to establish these requirements had been addressed---- 386

Charter statement requirements

EPTF charter does not describe in sufficient detail its objectives and scope of activity or its duties as required by sections 9(c)(B) and (F) of FACA since no mention is made of the National Energy Policy Plan, even though development of a proposed plan is EPTF's sole function. Further, if EPTF's Plan drafting role gives it more than solely advisory functions, its charter should so state, citing authority given for those functions. Unless provided by statute or Presidential directive, advisory committees may be utilized solely for advisory functions under 5 U.S.C. App. I, sec. 9(b), but under 15 U.S.C. 776(a), DOE may be able to use advisory committee to perform some operational tasks---- 386

Membership balance requirements

All interests need not be represented or represented equally to meet FACA and Federal Energy Administration Act balance of membership requirements. Required standard must be judged on case-by-case determination depending on statute or charter creating committee. EPTF does not achieve FACA minimum balance of interest or represent all interests required by Federal Energy Administration Act. Deficiency may be overcome by changing EPTF membership to achieve better balance of energy, environmental and consumer interests. 15 U.S.C. 776(a) (Supp. III, 1979); 5 U.S.C. App. I, secs. 5(b), (c) (1976)---- 386

Notice requirements

FACA requirement for public notice of creation and objectives of advisory committee was met only minimally because first Federal Register notice, printed 8 days before first meeting of EPTF, gave only broad description of EPTF purpose without referring to its major function, i.e., preparation of the National Energy Plan draft. Congress and public had no access to EPTF charter or membership list prior to meeting---- 386

DEPARTMENT OF ENERGY—Continued
Advisory committees—Continued
Expenditures
Propriety
Energy Policy Task Force Page

Review of EPTF expenditure information supplied by DOE indicates all funds utilized to date were for travel expenses of task force members or incurred in connection with recording of meeting transcripts and were charged to Office of Secretary's Budget for travel, salary and related expenses. Since each agency is held responsible by section 5 of FACA for providing support services for each advisory committee established by or reporting to it, the use of these funds for this purpose seems legitimate---- 386

DEPARTMENT OF TRANSPORTATION (*See* **TRANSPORTATION DEPARTMENT**)

DEPARTMENTS AND ESTABLISHMENTS
Commercial activities
Private *v.* Government procurement
Cost comparison

Where decision to retain function in-house is based on comparison of estimated in-house costs with offers received in competitive procurement, integrity of process dictates that comparison be supported by complete and comprehensive data, and that elements of comparison are clearly identifiable and verifiable---------- 44

Protest against propriety of cost evaluation performed under Office of Management and Budget Circular No. A-76 is dismissed where protester did not exhaust available administrative appeal process---------- 372

Lobbying
Anti-lobbying statutes

Despite Legal Services Corporation (LSC) contentions to the contrary, the lobbying restriction in section 607 (a) of the annual Treasury, Postal Service, and General Government Appropriation Act, that prohibits the use of funds in all appropriation acts for any given year, applies to funds appropriated for LSC. LSC is required to implement this provision and insure that no appropriated funds are used by the Corporation or recipients to engage in grass roots lobbying---------- 423

Services between
Reimbursement
Real property use
"Interdepartmental waiver" doctrine

Dept. of Interior requests GAO's views on applicability of the "interdepartmental waiver" doctrine when an executive department relinquishes a withdrawn area under the Federal Land Policy and Management Act of 1976 (Act) (43 U.S.C. 1701 *et seq.* (1976)) and on proposed amendment to the public land regulations (43 C.F.R. 2374.2(b)). Doctrine ordinarily requires that restoration costs for property of one department which has been used by another department be borne by the department retaining jurisdiction over the property since restoration would be for future use and benefit of loaning department. Interior does not benefit in the sense contemplated by the doctrine from restoration of public lands. Accordingly, doctrine does not apply to withdrawn property. 59 Comp. Gen. 93 (1979) is distinguished---------- 406

DEPENDENTS
Military personnel. (*See* **MILITARY PERSONNEL, Dependents**)

DISTRICT OF COLUMBIA
Appropriations
Obligation Page

District of Columbia may obligate fiscal year funding authority allocated to it for purpose of making determination of individual's eligibility for Social Security disability benefits at the time it issues purchase order for medical examination of individual, notwithstanding fact that examination may be performed in next fiscal year. In this case need for examination arises at time person makes claim for disability benefits and scheduling of examination is beyond control of District. 58 Comp. Gen. 321 (1979), distinguished 452

DISTRICT OF COLUMBIA
Contracts
Specifications
Descriptive literature requirement
Propriety
Services *v.* supplies procurement

Decision is affirmed upon reconsideration where protester has failed to show that decision was as matter of law incorrect in holding that descriptive literature may be required only in connection with products and not services since applicable regulations and General Accounting Office decisions are clear on this point 28

Employees
Leaves of absence
Military
District of Columbia National Guard duty
Encampment status

Employee of the District of Columbia was ordered to perform 20 days of full-time training duty and 15 days of annual field training as a member of the District of Columbia National Guard. Since full-time training duty directed under the authority of 32 U.S.C. 502 is active duty, employee is entitled to military leave under 5 U.S.C. 6323(a) for 15 of the 20 days of such duty. Because the additional 15 days of annual field training was ordered under the authority of title 39 of the District of Columbia Code, applicable specifically to the District of Columbia National Guard, he is entitled to military leave for that encampment under 5 U.S.C. 6323(c) ... 381

Status
Debts owed to United States
Set-off right

Although the District of Columbia receives an annual lump-sum payment from the Federal Government, a valid claim may exist between the District of Columbia and the Federal Government since they are separate and distinct legal entities. Therefore, claims by Federal Government against District of Columbia may be collected through setoff against unappropriated funds of the District in the hands of the Federal Government 710

DONATIONS
Government property
Surplus
Educational, etc. purposes
To State agencies
Appropriated fund property requirement Page

Prison Industries Fund, established by 18 U.S.C. 4126 as operating fund of Federal Prison Industries (FPI), constitutes permanent or continuing appropriation even though amounts originally appropriated have been returned to Treasury and Fund is self-sufficient, in view of fact that statute authorizes deposit into Treasury to credit of Fund of receipts for prison industries products and services and authorizes use of such funds for operation of FPI. Surplus personal property acquired by the Fund thus is donable under 40 U.S.C. 484(j), since it does not constitute nonappropriated fund property within meaning of regulation excluding such property from donation (41 C.F.R. 101–44.001–3)---------- 323

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

EDUCATION
Department of Education. (*See* **DEPARTMENT OF EDUCATION**)

ENERGY
Department of Energy
Advisory committees. (*See* **DEPARTMENT OF ENERGY, Advisory committees**)
Authority and responsibility
Oil price and allocation regulation
Recovered overcharges
Distribution propriety

In distributing funds it has received under consent order with alleged violator of petroleum price and allocation regulations, Department of Energy must attempt to return funds to those actually injured by overcharges. Energy has no authority to implement plan to distribute funds to class of individuals not shown to have been likely victims of overcharges---------- 15

Procedural regulations' requirements

Department of Energy regulations, which create mechanism for persons injured by violations of price and allocation regulations to claim refunds, are mandatory. Department lacks authority to waive regulations in individual cases---------- 15

Status: trust *v.* miscellaneous receipt funds

To extent that Department of Energy receives moneys that it will return to victims of oil price and allocation regulations, it acts as trustee and funds need not be deposited in general fund of Treasury. However, to extent that Department seeks to distribute funds to class of individuals of its own choosing, rather than those overcharged, funds are not held in trust and must be deposited in Treasury as miscellaneous receipts---- 15

Contracts
Master
Quick reaction work orders
Competitive range establishment

In quick reaction work order procurement, competitive range may be relative one. Proposal which is technically acceptable or capable of being made acceptable need not be considered for negotiation if, in light of all proposals received, it does not stand real chance for award---------- 120

ENERGY—Continued
Department of Energy—Continued
Contracts—Continued
Master—Continued
Quick reaction work orders—Continued
Small business preference Page

In quick reaction work order procurement, establishment of competitive range for small businesses only is proper when (1) 25 percent set-aside was announced in solicitation and (2) small business proposals have real chance for award when compared with each other and preference is taken into account 120

ENVIRONMENTAL PROTECTION AGENCY
Advertising, etc. in newspapers. (*See* **ADVERTISING, Newspapers, magazines, etc.**)

EQUAL EMPLOYMENT OPPORTUNITY
Ethnic/cultural programs
Expense reimbursement
Entertainment *v.* training
Regulation guidelines

Internal Revenue Service may certify payment for a live African dance troupe performance incident to agency sponsored Equal Employment Opportunity (EEO) Black history program because performance is legitimate part of employee training. Although our previous decisions considered such performance as a nonallowable entertainment expense, in this decision we have adopted guidelines developed by the Office of Personnel Management (OPM) that establish criteria under which such performances may be considered a legitimate part of the agency's EEO program. 58 Comp. Gen. 202 (1979), B-199387, Aug. 22, 1980, B-194433, July 18, 1979, and any previous decisions to the contrary are overruled ... 303

EQUIPMENT
Automatic Data Processing Systems
Acquisition, etc.
Fixed-price requirement
Not undue restriction on competition

In view of need to avoid buy-ins and to evaluate life cycle costs accurately, thus insuring that Government obtains automatic date processing equipment at lowest overall cost, requirement for fixed or finitely determinable prices does not unduly restrict competition 654

Tariffed carriers
Ineligibility to compete

Tariffed carrier, whose existing rates are subject to change and which must by law treat all classes of customers receiving similar services in same manner, cannot be considered for award of fixed price contract ... 654

Master Terms and Conditions
Evaluation
Lease-purchase agreements

"Installment purchase plan," which provides for monthly payments over 39-month term, to be renewed at Government's option at end of each fiscal year, submitted in response to solicitation for automatic data processing equipment (ADPE) containing Master Terms and Conditions (MTC) was improperly evaluated, classified and accepted under solicitation as a purchase as it did not conform with the terms of the solicitation and solicitation was not amended so that all offerors were given opportunity to submit such plans 584

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Benchmarking
Postclosing
Propriety Page

Request for proposals provision allowing benchmark of tentatively selected equipment after closing date for best and final proposals is not in itself objectionable ---- 548

General Services Administration
Responsibilities under Brooks Act
Classification of equipment

Under Brooks Act, GSA has discretion to define type of equipment to be considered automatic data processing equipment, and protester disagreeing with recent reclassification of modems should seek change through GSA, not bid protest process ---- 654

Lease-purchase agreements
Appropriation availability
Loss, damage, etc.
Indemnification of contractor

Since risk of loss provision in "installment purchase plan" and incorporated into contract imposes on agency risk of loss for contractor-owned equipment, agency should have either obligated money to cover possible liability under risk of loss provision or specified in contract that such losses may not exceed appropriation at time of losses and nothing in contract is to be considered as implying Congress will appropriate sufficient funds to meet deficiencies ---- 584

Ownership of equipment status
Risk of loss purpose

Although ADPE under "installment purchase plan" does not clearly fall into either category of Government-owned property or contractor-owned property, since terms of "installment purchase plan" obligate agency to pay contractor full price of equipment upon loss, for purpose of risk of loss this ADPE should be considered contractor-owned property -- 584

Rental *v.* purchasing equipment
Funding availability
Notice to offerors

Allegation that protester should have received award under proper application of solicitation provision stating that award would be made to technically acceptable proposal offering lowest systems life cost, subject to availability of funds for that method of acquisition, is without merit where agency reasonably concluded that funds were not available for exercise of purchase option under protester's lowest cost lease with option to purchase offer ---- 331

Service contracts
Evaluation
Technical deficiencies

If, in connection with Government-supervised benchmark, questions are likely to arise or additional information to be needed, benchmark is inherent part of negotiation process during which deficiencies must be identified and offerors given an opportunity to correct them. In this case, benchmark should precede best and final offers or agency should be prepared to reopen negotiations ---- 468

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Service contracts—Continued
General Services Administration
Teleprocessing services
Multiple Award Schedule Contract Page

When offeror has demonstrated ability to meet all but one mandatory requirement for teleprocessing system, General Accounting Office recommendation that offeror be allowed second attempt to successfully complete benchmark requires re-running only exercise in question, not entire benchmark 151

Tests
Benchmark

When benchmark programs appear to represent system workload and, combined with functional demonstration, provide reasonable basis for identifying offeror with lowest life-cycle cost, use of benchmark as evaluation tool is within discretion of procuring agency 113

ESTOPPEL
Against Government
Employee claims
Appointive *v.* contractual relationship
Allowance decreases, etc.

Civilian employee of Department of the Army claims that Government is estopped to adjust his living Quarters Allowance in accordance with 1974 revision of Department of State Standardized Regulations (Government Civilians, Foreign Areas) because his entitlement to the allowance vested under terms and conditions of 1967 regulations. Claim is denied because doctrine of equitable estoppel does not apply in cases where, as here, the relationship between the Government and the employee is not contractual but appointive, and, pursuant to statute, allowance in question is ultimately discretionary and creates no permanent entitlement for any employee. Also, employee entered into licensing agreement, not a contract, when he constructed portable home on Government property, and such agreements are permissive, unassignable, and can be canceled at any time 243

FAIR LABOR STANDARDS ACT
Applicability
"Foreign exemption"
Not for application
Overseas temporary duty
Return travel on nonworkday within same workweek

Three Navy employees who are nonexempt under Fair Labor Standards Act (FLSA) are entitled to overtime under FLSA for return travel from Scotland. "Foreign exemption" under FLSA is construed narrowly, and hours of work in covered area during same workweek will defeat "foreign exemption" 90

Comparison with other pay laws
Combining benefits
Propriety

Employee, nonexempt under Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* (1976), travelled for 6 hours on a nonworkday during his corresponding duty hours. Although such time is hours of work under

FAIR LABOR STANDARDS ACT—Continued
Comparison with other pay laws—Continued
Combining benefits—Continued
Property—Continued Page

FLSA, since he had a holiday off and he only worked 38 hours under FLSA during that workweek and he has already been compensated for 40 hours under title 5, U.S. Code, he is not entitled under FLSA to 6 hours pay at his regular rate in addition to the 40 hours basic pay he has received ---- 493

Enforcement provisions
Office of Personnel Management role. (*See* **OFFICE OF PERSONNEL MANAGEMENT, Jurisdiction, Fair Labor Standards Act**)
Hours of work
Compensation. (*See* **COMPENSATION, Hours of work, Fair Labor Standards Act**)
Overtime
Compensation in general. (*See* **COMPENSATION, Overtime, Fair Labor Standards Act**)

FAMILY ALLOWANCES
Separation
Type 2
Quarters allowance requirement
Removal

The statutory purpose of the Basic Allowance for Quarters authorized by 37 U.S.C. 403 is to reimburse a service member for personal expenses incurred in acquiring non-Government housing when rent-free Government quarters "adequate for himself, and his dependents," are not furnished. The Family Separation Allowance, Type II–R, authorized by 37 U.S.C. 427(b)(1) has a separate and distinct purpose, i.e., to provide reimbursement for miscellaneous expenses involved in running a split household when a member is separated from his dependents due to military orders, and it is payable irrespective of the member's eligibility for a quarters allowance ---- 154

Wife also member of uniformed services
Mother's entitlement
Other parent receiving BAQ "with dependent" rate

Marine Corps member separated from her child and husband while serving an unaccompanied tour of duty overseas may properly be regarded as a "member with dependents" under 37 U.S.C. 427(b)(1) and is entitled to a Family Separation Allowance, Type II–R, notwithstanding that her husband is also a Marine and is drawing a Basic Allowance for Quarters at the "with dependent" rate on behalf of the child, since their child is their joint dependent and since payment of the two allowances—each for a separate purpose—would not improperly result in dual payments of the same allowance for the same dependent ---- 154

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

FEDERAL ADVISORY COMMITTEE ACT
Advisory committees
Establishment requirements
Energy Policy Task Force compliance. (*See* **DEPARTMENT OF ENERGY, Advisory committees, Establishment**)

FEDERAL CLAIMS COLLECTION ACT OF 1966
Interest on delinquent debts
Propriety of charging Page
Government Printing Office (GPO) may charge interest from the date payments were due under agreement between GPO and the District of Columbia for printing and binding services, or if no date was established by agreement, from the date payment was demanded due. Agreement and action on the agreement had their origins in Federal law and interest has been authorized by courts and in statutes on claims brought against District of Columbia in the past 710

FEDERAL CREDIT UNIONS
Services furnished by Government
Telephones not included
Federal agency may not provide telephone services, on a reimbursable basis, to Federal employees' credit union which has been allocated space by the agency pursuant to 12 U.S.C. 1770. Such use, absent authority similar to that provided by 12 U.S.C. 1770, would violate 31 U.S.C. 628, which makes appropriations available solely for the objects for which they are made. 58 Comp. Gen. 610, modified in part 653

FEDERAL EMPLOYEES FLEXIBLE AND COMPRESSED WORK SCHEDULES ACT (*See* **OFFICERS AND EMPLOYEES, Hours of work, Flexible hours of employment, Federal Employees Flexible and Compressed Work Schedules Act**)
Credit hours
Status
Maximum pay limitation purpose. (*See* **COMPENSATION, Aggregate limitation, Applicability to credit hours**)

FEDERAL ENERGY ACT
Advisory committees
Establishment
Membership balance requirements
All interests need not be represented or represented equally to meet FACA and Federal Energy Administration Act balance of membership requirements. Required standard must be judged on case-by-case determination depending on statute or charter creating committee. EPTF does not achieve FACA minimum balance of interest or represent all interests required by Federal Energy Administration Act. Deficiency may be overcome by changing EPTF membership to achieve better balance of energy, environmental and consumer interests. 15 U.S.C. 776(a) (Supp. III, 1979); 5 U.S.C. App. I, secs. 5(b), (c) (1976) 386
Utilization
Operational functions
EPTF charter does not describe in sufficient detail its objectives and scope of activity or its duties as required by sections 9(c)(B) and (F) of FACA since no mention is made of the National Energy Policy Plan, even though development of a proposed plan is EPTF's sole function. Further, if EPTF's Plan drafting role gives it more than solely advisory functions, its charter should so state, citing authority given for those functions. Unless provided by statute or Presidential directive, advisory committees may be utilized solely for advisory functions under 5 U.S.C. App. I, sec. 9(b), but under 15 U.S.C. 776(a), DOE may be able to use advisory committee to perform some operational tasks 386

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Union dues allotments
Wrongful termination by agency Page

Federal Labor Relations Authority has issued complaint charging Department of Labor with unfair labor practice in wrongfully terminating 40 dues allotments for AFGE Local 12 from March to June 1979. The Department proposes to settle by reimbursing the union for the amount of dues it should have received. Federal Labor-Management Relations Statute, 5 U.S.C. chapter 71, provides for dues allotments to unions and authorizes Authority to remedy unfair labor practices, including failure to comply with statute. We have no objection to settlement, if approved by the Regional Director of the Authority. Modifies B-180095, Oct. 2, 1975 93

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FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT
Disposal provisions
Historical monument preservation. (*See* **PROPERTY, Public, Surplus, Federal Property and Administrative Services Act**)
Surplus property
Donations to State agencies
What constitutes donable property

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Computation
Error in reenlistment agreement
Government's liability
A Navy petty officer who reenlisted became entitled to a reenlistment bonus in the amount of $3,209.40, computed under the statutory provisions of 37 U.S.C. 308 (1976) and implementing service regulations, but a recruiting official miscalculated the amount of his bonus entitlement and entered the higher figure of $3,459.60 in his reenlistment agreement as the amount of the bonus payable to him. Such mistake may not serve as a basis for payment of a bonus to him in excess of $3,209.40, the amount authorized by statute and regulations---------- 257

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Based on applicable law
Not contractual right Page

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Federal Archives Building
New York City

We are unaware of any basis for legally objecting to approval of Archives Preservation Corporation's (a wholly owned subsidiary of the New York State Urban Development Corporation) application for conveyance of the Federal Archives Building in New York City for historic monument purposes and revenue producing activities pursuant to 40 U.S.C. 484(k)(3). Even though the application requires the developer who will be restoring and maintaining the property to make payments in lieu of real estate and sales taxes, these are customary costs for UDC sponsored projects and they are not being assessed merely to circumvent the requirement that "all incomes in excess of costs" be used for historic preservation purposes 158

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
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Authority for SBA to leverage

Section 105(a)(15) of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. 5305(a)(15), authorizes Small Business Administration to leverage (match) Community Development Discretionary (Block) Grant funds invested in minority enterprise small business investment companies 210

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Public Law 87-695, 76 Stat. 595 (1962), permits the Three Affiliated Tribes of the Fort Berthold Reservation to graze livestock without charge on the former Indian lands acquired by the United States in connection with the Garrison Dam project. This privilege is limited to lands which were actually acquired from Indians and does not extend to lands that were acquired from non-Indians 139
Sioux benefits
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Double benefits prohibition
Sex-neutral standard adopted
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Eligibility determination
Date of original application *v.* date of application's approval
Where application for Sioux benefits—farm equipment and stock (or cash equivalent) granted to Sioux Indians—was disapproved on grounds now recognized as improper (for example, sex discrimination), and Indian now reapplies, Interior Department proposes to determine eligibility based on applicant's status at time of original application. Department suggests that two GAO decisions (A-19504, February 1, 1929, and 11 Comp. Gen. 469 (1932)) prevent implementation of proposal. Decisions, which require that eligibility be determined not as of date of application but as of date of approval, are overruled to extent they conflict with proposed exception. This decision also overrules in part 9 Comp. Gen. 371, A-61511, July 15, 1935, and A-98691, Oct. 28, 1938 212
Head of family determination
Sex-neutral standard adopted
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INDIAN AFFAIRS—Continued
Sioux benefits—Continued
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Vesting of rights
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Four statutes—1889, 1896, 1928, and 1934—govern award of Sioux benefits, farm equipment and stock (or cash equivalent) granted by law to eligible Sioux Indians. Under 1928 and 1934 statutes, applications must be approved during applicant's lifetime, or right lapses. Two GAO decisions (9 Comp. Gen. 371 (1930) and A-61511, July 15, 1935) held that limitation did not apply to benefits under 1889 law. Interior interprets 1928 and 1934 laws as making limitation applicable to *all* Sioux benefits. Language is ambiguous so GAO defers to administering agency's preferred interpretation and overrules cited decisions. This decision also overrules in part 11 Comp. Gen. 469, A-19504, Feb. 1, 1929, and A-98691, Oct. 28, 1938 212

INTEREST
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Federal law applicability
Claims originating in Federal law

As a general rule, interest is not allowed on claims brought against governmental entities unless expressly authorized by statute or stipulated to by contract. However, where a claim is inter-governmental in nature, and has its origin in Federal law, the liability of the debtor will depend on Federal law and not local law. If Federal law fails to resolve this question, then agencies must be guided by considerations of equity and public convenience and due regard should be paid to local institutions and interests including local law 710

INTERNATIONAL ORGANIZATIONS
Tranfer of Federal employees, etc.
Lump-sum leave payments
Rate payable

Employee of Nuclear Regulatory Commission transferred to international organization under 5 U.S.C. 3581, *et seq.* effective August 16, 1978, at which time he elected to retain annual leave to his credit pursuant to 5 U.S.C. 3582(a)(4). On January 22, 1980, also pursuant to 5 U.S.C. 3582(a)(4) and prior to reemployment, employee requested lump-sum payment for annual leave retained. Consistent with computation provisions of 5 U.S.C. 3583 and implementing regulations, computation of employee's payment is based on rate of pay attaching to his Federal agency position at time of his request for lump-sum leave payment under 5 U.S.C. 3582(a)(4), not the date of the transfer. Overrules B-155634, Dec. 10, 1964 409

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LABOR DEPARTMENT
Jurisdiction
Service Contract Act violations

Question regarding affiliation of individual on debarred bidders list for violation of Service Contract Act is not for review by GAO, because Service Contract Act provides that Federal agency head and Secretary of Labor are to enforce Act. Modifies B-193843, et al., Aug. 2, 1979 1

LABOR DEPARTMENT—Continued
Unfair labor practices
Committed by agency
Federal Labor Relations Authority's jurisdiction
Settlement of complaint
Failure to withhold union dues Page

Federal Labor Relations Authority has issued complaint charging Department of Labor with unfair labor practice in wrongfully terminating 40 dues allotments for AFGE Local 12 from March to June 1979. The Department proposes to settle by reimbursing the union for the amount of dues it should have received. Federal Labor-Management Relations Statute, 5 U.S.C. chapter 71, provides for dues allotments to unions and authorizes Authority to remedy unfair labor practices, including failure to comply with statute. We have no objection to settlement, if approved by the Regional Director of the Authority. Modifies B-180095, Oct. 2, 1975 93

LABOR-MANAGEMENT RELATIONS
Federal service
Requests for GAO decisions, etc.

Employee, nonexempt under Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* (1976), travelled for 6 hours on a nonworkday during his corresponding duty hours. Although such time is hours of work under FLSA, since he had a holiday off and he only worked 38 hours under FLSA during that workweek and he has already been compensated for 40 hours under title 5, U.S. Code, he is not entitled under FLSA to 6 hours pay at his regular rate in addition to the 40 hours basic pay he has received 493

Employee, whose claim for higher exposure environmental pay was denied by our Claims Group, requests reconsideration on basis of Arbitrator's award under labor-management agreement. In accordance with 4 C.F.R. 21.7(a) payments made pursuant to an arbitration award which is final and binding under 5 U.S.C. 7122 (a) or (b) are conclusive on GAO and this Office will not review or comment on the merits of the award. To the extent that the enployee's request places in issue the finality or propriety of implementation of Arbitrator's decision, GAO, under 4 C.F.R. 21.8, will not issue a decision. Those issues are more properly within the jurisdiction of the Federal Labor Relations Authority, pursuant to Chapter 71 of title 5, United States Code 578

Where an arbitrator has requested that the parties in dispute seek the Comptroller General's opinion as to the legality of a labor-management agreement provision, the Comptroller General will issue a decision to the parties on their request. 4 C.F.R. 22. 7(b) (1981) 668

LEAVES OF ABSENCE
Annual
Cancellation of approved annual leave
Resulting loss claims
Airline discounts

Employee who purchased "super-saver" airline ticket and arranged to take annual leave in anticipation of a personal trip may not be reimbursed for additional air travel expense incurred when employee's official duties caused him to make alternate flight reservations which disqualified him from receiving the "super-saver" fare since there is no legal basis for the claim 629

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Legal holidays Page
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Purpose of duty consideration
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Credit hours
Limitation on accrual
Under Title I (flexible schedules) of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, credit hours are hours of work performed at the employee's option and are distinguished from overtime hours in that they do not constitute overtime work which is officially ordered in advance by management. Therefore, since an employee was ordered to work 5 hours at the end of the pay period when she was scheduled to take off, and since she had already accumulated 10 credit hours, and since she had already worked 40 hours that week, the 5 hours of work are overtime---- 6
Effect
Overtime adjustment
An employee on a flexible schedule who is ordered to work 5 hours which are overtime hours at the end of a pay period may, on her request, receive compensatory time off for such time so long as she does not accrue more than 10 hours of compensatory time in lieu of payment for regularly or irregularly scheduled overtime work---- 6
Court
Jury duty
Commencing day
Reporting/returning to work duty
Administrative discretion
When it appears that an employee will be expected to perform jury duty for a substantial part of the day on the date stated in the summons commencing jury service, the employee is not required to report to work that same day. Once summoned by a court for jury duty an employee's primary responsibility is to the court. When it is apparent that an employee will be required to perform jury duty for less than a substantial part of the day, and when it is reasonable to do so, the employee's agency may require the employee to report for work prior to reporting for or after being excused from jury duty---- 412

LEAVES OF ABSENCE—Continued

Forfeiture

Restoration

Exigency of the public business

Jury duty Page

Employee of Department of Navy scheduled 40 hours annual leave in writing for December 1979, but he forfeited 16 hours of such leave at end of 1979 leave year because he performed jury duty. He is entitled to have such annual leave restored since performance of jury duty constitutes an exigency of the public business under 5 U.S.C. 6304(d)(1)(B). See 5 U.S.C. 6322, which prohibits loss of or reduction in annual leave where employee is summoned to perform jury service 598

Lump-sum payments

Transfer to international organizations. (*See* **INTERNATIONAL ORGANIZATIONS, Transfer of Federal employees, etc.**)

Military

Civilians on military duty. (*See* **LEAVES OF ABSENCE, Civilians on military duty**)

District of Columbia employees. (*See* **DISTRICT OF COLUMBIA, Employees, Leaves of absence, Military**)

Military personnel

Advance leave

Separation prior to leave accrual

Recoupment

Pay rate applicable

Collection for advance leave which becomes excess leave on discharge must be computed based on pay received by the member at the time the leave was taken and not on pay rates in effect at time of the member's discharge 51

Cancellation of leave

Travel expenses

Current regulations, which limit a service member's entitlement to return travel and transportation expenses upon recall from authorized leave of 5 days or more due to urgent unforeseen circumstances only if recall is within 24 hours of departure from the duty station, may be amended to authorize entitlement for recalls after 24 hours. Such amendment should set forth definite criteria to be followed if authorization of expenses is to be allowed after 24 hours. Modifies in part 46 Comp. Gen. 210 648

Excess leave

Indebtedness

A service may withhold from pay due a member, with the member's consent, amounts expected to become due to the United States because of paid bonuses and advance leave which are expected to become unearned bonuses and excess leave due to the member receiving an early separation from the service. However, such amounts may not be withheld from current pay without the member's consent since no actual debt exists until the member is discharged 51

Travel expenses. (*See* **TRAVEL EXPENSES, Military personnel, Leaves of absence**)

LEGAL SERVICES CORPORATION (*See* **CORPORATIONS, Legal Services Corporation**)

LICENSES
Government real property
Revocation, etc.
Estoppel doctrine applicability

Page

Civilian employee of Department of the Army claims that Government is estopped to adjust his Living Quarters Allowance in accordance with 1974 revision of Department of State Standardized Regulations (Government Civilians, Foreign Areas) because his entitlement to the allowance vested under terms and conditions of 1967 regulations. Claim is denied because doctrine of equitable estoppel does not apply in cases where, as here, the relationship between the Government and the employee is not contractual but appointive, and, pursuant to statute, allowance in question is ultimately discretionary and creates no permanent entitlement for any employee. Also, employee entered into licensing agreement, not a contract, when he constructed portable home on Government property, and such agreements are permissive, unassignable, and can be canceled at any time 243

LOANS
Government insured
Limitations
Two notes representing one loan
Different interest rates
Propriety

Economic Development Administration (EDA) has authority to allow guaranteed loans to be represented by two notes, with fully guaranteed note—representing 90 percent of loan amount, having a lower interest rate than unguaranteed note—representing remaining 10 percent of loan. Notwithstanding statements to contrary in B-194153, Sept. 6, 1979, in which we said two-note procedure could be used only if substantive terms of notes, including maturity dates and interest rates, were same, EDA is not prohibited from using split interest rates provided other substantive terms remain same 464

Loan guarantees
Rural development program
Obligation authority beyond fiscal year
Ceilings on loan amounts
Revision of loan agreement terms effect

Loan guarantee by FmHA initially charged against level of loan guarantee authority for particular fiscal year in which guarantee was first approved cannot continue to be charged against ceiling for that year when major changes to character of the project or loan terms occur during subsequent fiscal year. However, if less substantial changes are involved where the purpose and scope of the revised loan guarantee agreement are consistent with the purpose and scope of the original guarantee and the need for the project continues to exist, FmHA would have authority to charge amended loan guarantee against ceiling for fiscal year in which it was first approved 700

Substituted borrower effect

Loan guarantee by Farmers Home Administration (FmHA) initially charged against level of guarantee authority for particular fiscal year in which guarantee was first approved cannot, as general rule, continue to be charged against the authority for that year when entirely new bor-

LOANS—Continued
Loan guarantees—Continued
Rural developmet program—Continued
Obligation authority beyond fiscal year—Continued
Ceilings on loan amounts—Continued
Substituted borrower effect—Continued Page

rower is substituted in subsequent fiscal year, since determination of whether to approve guaranteed loan to particular borrower is an individual one requiring specific eligibility determination by FmHA. However, if substituted borrower bears close and genuine relationship to original borrower, such as would exist between corporation and partnership controlled by same individuals, and loan purpose remains substantially unchanged, FmHA would have authority to charge loan guarantee to substitute borrower against ceiling for fiscal year in which original guarantee was approved---------- 700

Substituted lender effect

Loan guarantee by FmHA initially charged against level of loan guarantee authority for particular fiscal year in which guarantee was first approved can continue to be charged against authority for that year if new guaranteed lender is substituted in subsequent fiscal year, provided the borrower, loan purpose, and loan term remain substantially unchanged. Although the guarantee is actually extended to the lender, the lender is merely a conduit through which FmHA provides assistance to an eligible borrower to achieve the statutory objectives. Therefore new lender can be designated without changing the essence of the agreement---------- 700

LOBBYING
Appropriation prohibition

Despite Legal Services Corporation (LSC) contentions to the contrary, the lobbying restriction in section 607(a) of the annual Treasury, Postal Service, and General Government Appropriation Act, that prohibits the use of funds in all appropriation acts for any given year, applies to funds appropriated for LSC. LSC is required to implement this provision and insure that no appropriated funds are used by the Corporation or recipients to engage in grass roots lobbying---------- 423

Legislation
Use of Federal funds

The Moorhead Amendment is a direct lobbying restriction included in the annual Legal Services Corporation (LSC) appropriation that prohibits LSC and recipients from expending Federal funds for grass roots lobbying activities. LSC has an obligation to implement this restriction and insure that its appropriations are not used for such lobbying activities. 423

MEALS
Furnishing
Temporary duty
Government procurement by contract

When a contracting officer procures lodgings or meals for an employee on temporary duty and furnishes either to the employee at no charge, the lodgings plus system is normally inappropriate and a flat per diem at a reduced rate should be established in advance---------- 181

MEALS—Continued
Reimbursement
Invitees participating in Government business Page
Internal Revenue Service may use appropriated funds to buy lunches for guest speakers on program held in observance of National Afro-American (Black) History Month, under 5 U.S.C. 5703, which provides authority for per diem or subsistence expenses for individuals serving without pay 303

MILEAGE
Travel by privately owned automobile
Between residence and headquarters
Transit strike
Employees of Urban Mass Transportation Administration are not eligible for reimbursement of excess cost of commuting by private or General Services Administration rental car over normal public transit fares, despite complete public transit shutdown during April 1980 strike. Cost of transportation to place of business is personal responsibility of employee except in limited emergency circumstances not applicable here. B-158931, May 26, 1966, and 54 Comp. Gen. 1066 (1975), are distinguished 420

Constructive cost
Taxicab travel
To and from common carrier terminals
Employee passenger in vehicle of other than Government employee
Employee on temporary duty was driven by friend in latter's automobile to airport for return flight to official duty station. Employee's claim for mileage and parking fee may be paid to the extent it does not exceed cost of taxicab fare and tip. Decisions limiting reimbursement for travel with private party to actual expenses paid to private party apply only to regular travel on temporary duty, not travel to and from common carrier terminals 339

Damages to automobile
Insurance
Section 5704 of title 5, which reimburses a Government employee who uses his own vehicle for official Government business on a mileage basis, includes in that basis the cost of insurance, if any. See 5 U.S.C. 5707. Therefore, reimbursement under 5 U.S.C. 5704 for damage to a vehicle of an employee officially authorized to use it is precluded. However, a claim for damage can be made under the Military Personnel and Civilian Employees' Claims Act of 1964, even if the employee is reimbursed on a mileage basis 633

Incident to transfer
Overseas employees
Between port and duty station, etc.
Army employee who is not expected to return to overseas assignment after training in United States may be reimbursed transportation costs for shipping privately owned vehicle by American flag vessel on Government bill of lading after training is completed, agreement is signed, and employee is assigned to new permanent duty station 478

MILITARY LEAVE

Civilians on military duty. (*See* **LEAVES OF ABSENCE, Civilians on military duty**)

MILITARY PERSONNEL

Allowances

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

Family. (*See* **FAMILY ALLOWANCES**)

Husband and wife both members

Dependent children

Different allowances claimed by each parent

Dual payment prohibition—inapplicability Page

When two service members marry, neither may claim the other as a "dependent" for military allowance purposes, but if they have a child, that child becomes their joint "dependent" for purposes of establishing entitlement to allowance payments. Although both parents may not claim their child as a dependent for the same allowance payment where dual payments would result, it is permissible for one parent to claim the child as a dependent for the purpose of one allowance and for the other parent to claim the child for other allowances. 37 U.S.C. 401, 420 154

Dependents

Proof of dependency for benefits

Children

Adopted

Where children are placed with a member of the uniformed services for adoption in the State of California by an agency of the State, the effective date for determining entitlement to dependency benefits is the date an order of adoption has been entered by a court of competent jurisdiction 170

Leaves of absence. (*See* **LEAVES OF ABSENCE, Military personnel**)

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

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

Record correction

Service credits

Discrepancies in a Navy officer's service records which make it unclear as to whether he is entitled to retirement credit for 11 days' additional active service is a matter for consideration by the Chief of Naval Personnel or the Board for the Correction of Naval Records 537

Reservists

Retirement

Qualifying service

Navy officer retired under 10 U.S.C. 6323 may receive credit in the multiplier used in computing his retired pay for the full 57 inactive service points he earned in a year in which he also served on active duty. While on active duty he was in an active status, not an inactive status, and regulations governing the maximum number of points which may be earned require prorating of maximum allowable only on the basis of excluding periods of inactive status 537

MILITARY PERSONNEL—Continued
Retired
Pay. (*See* PAY, Retired)
Selective reenlistment bonus. (*See* GRATUITIES, Selective reenlistment bonus)
Social Security. (*See* SOCIAL SECURITY, Military personnel)
Survivor Benefit Plan. (*See* PAY, Retired, Survivor Benefit Plan)
Survivorship annuities. (*See* PAY, Retired, Survivor Benefit Plan)
Temporary duty
Per diem. (*See* SUBSISTENCE, Per diem, Military personnel, Temporary duty)
Transportation
Dependents. (*See* TRANSPORTATION, Dependents)
Household effects. (*See* TRANSPORTATION, Household effects, Military personnel)
Travel expenses. (*See* TRAVEL EXPENSES, Military personnel)
NATIONAL GUARD
Employees of the District of Columbia
Military leave. (*See* DISTRICT OF COLUMBIA, Employees, Leaves of absence, Military)
NONAPPROPRIATED FUND ACTIVITIES
Sharing facilities, services, etc. with appropriated fund activity
Cost sharing basis for reimbursement
Personal services Page

Appropriated fund (AF) and non-appropriated fund (NAF) personnel on Army base operate separate billeting facilities in single hotel/motel type quarters. NAF and AF clerks, working alone, handle both NAF and AF transactions on their respective shifts. Certifying officer asks whether AF can reimburse NAF for AF work performed by NAF employees, in light of GAO decision 58 Comp. Gen. 94, that purchases of services from NAFs, when authorized, must be treated as procurements, and of finding that this procurement is unauthorized because it involves personal services. Reimbursement is authorized. Transaction should not be treated as procurement of personal services, but as method of allocating expenses of operating respective facilities on a cost sharing basis 476

NONDISCRIMINATION
Sex discrimination elimination
Compensation
Backpay and promotion

As a result of an employment discrimination suit brought by certain female employees, the Government Printing Office (GPO) was ordered in a court judgment to pay the plaintiffs back pay for past economic harm and an added increment of pay above that to which they were otherwise entitled, for continuing economic harm until a certain number of plaintiffs were promoted. The so-called award of "front pay" in this instance amounts to damages and should be paid from the permanent indefinite appropriations provided in 31 U.S.C. 724a. Agency appropriations are not available to pay compensation above the amount prescribed for the particular job level in question. 55 Comp. Gen. 1447 (1976) is distinguished 375

NORTH ATLANTIC TREATY ORGANIZATION

Procurements

Protests

Authority of GAO to consider. (*See* **CONTRACTS, Protests, Authority to consider, North Atlantic Treaty Organization (NATO), Procurements**)

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Authority of commissioners

Delegation to chairman

Administrative functions

Vacancy in chairmanship effect Page

The Chairman of the Occupational Safety and Health Review Commission is responsible for the administrative functions of the Commission. In the absence of a chairman such responsibilities rest with the remaining two commissioners. Therefore, if remaining two commissioners agree on administrative action, such action is valid. Accordingly, remaining two commissioners may execute lease for purpose of housing computer.... 627

OFFICE OF FEDERAL PROCUREMENT POLICY

Film and video services' procurement. (*See* **CONTRACTS, Film and and video services, Office of Federal Procurement Policy**)

OFFICE OF MANAGEMENT AND BUDGET

Circulars

No. A-34

Budgetary resources

What constitutes

The inventory in the General Services Administration's (GSA) General Supply Fund does not constitute a budgetary resource against which obligations may be incurred. The Antideficiency Act, 31 U.S.C. 665, is violated when obligations are incurred in excess of budgetary resources. 520

OFFICE OF PERSONNEL MANAGEMENT

Jurisdiction

Fair Labor Standards Act

Compliance determination

Review by GAO

Burden of proof

Employee filed Fair Labor Standards Act (FLSA) complaint and Office of Personnel Management (OPM) issued a compliance order requiring agency to pay 30 hours overtime compensation per year retroactive to May 1, 1974. Agency states that its records do not support award of 30 hours per year. General Accounting Office will not disturb OPM's findings unless clearly erroneous and the burden of proof lies with the party challenging the findings. Here, agency statement that it cannot

OFFICE OF PERSONNEL MANAGEMENT—Continued
Jurisdiction—Continued
Fair Labor Standards Act—Continued
Compliance determination—Continued
Review by GAO—Continued
Burden of proof—Continued Page

find travel vouchers to support OPM award does not satisfy burden of proof. Under FLSA, each agency is responsible for keeping adequate records of wages and hours. Once employee has provided sufficient evidence of hours worked, burden shifts to employing agency to come forward with evidence to contrary 354

Office of Personnel Management is correct in holding that certain Department of Agriculture red meat inspectors, who are required to wear protective clothing and equipment and to keep them clean, are involved in an integral and indispensable part of their principal activity under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* when they are engaged in clothes-changing and cleanup activities at their worksites. GAO will not disturb OPM's factual findings unless clearly erroneous. *Paul Spurr*, 60 Comp. Gen. 354 611

OFFICERS AND EMPLOYEES
Air travel
Foreign carrier. (*See* **TRAVEL EXPENSES, Air travel, Fly America Act**)
Appointments. (*See* **APPOINTMENTS**)
Backpay. (*See* **COMPENSATION, Removals, suspensions, etc., Backpay**)
Canal Zone Government. (*See* **PANAMA CANAL COMMISSION, Employees**)
Compensation. (*See* **COMPENSATION**)
Contracting with Government
Retired employees
Propriety of exclusion

Forest Service excluded retired employee from contract for architect and engineering services even though employee was highest-ranked competitor for services. Exclusion was improper since General Accounting Office is not aware of any basis for excluding retirees from obtaining Government contracts 298

Death or injury
Travel expenses

Employee of General Services Administration died while on temporary duty for which he was authorized per diem allowance. Payment of per diem in these circumstances is subject to same rule which governs payment of compensation to deceased employee; namely, payment may be made to one legally entitled to payment of per diem allowance due deceased employee of United States up to and including entire date of death, regardless of time during day that death occurs, but such payment may not be made for any date later than that. 59 Comp. Gen. 609 modified (extended) 53

OFFICERS AND EMPLOYEES—Continued
Downgrading
Saved compensation. (*See* **COMPENSATION, Downgrading, Saved compensation**)
Executive development programs
Civil Service Reform Act
Agencywide implementation
Pooling of appropriations
Authority Page

The appropriations made to various bureaus and offices within the Department of the Treasury may be pooled so as to permit implementation of the Legal Division's Executive Development Program, under the Civil Service Reform Act of 1978, on an agencywide basis---------- 686

Hours of work
Compensation
Fair Labor Standards Act. (*See* **COMPENSATION, Hours of work, Fair Labor Standards Act**)
Flexible hours of employment
Credit hours
Status
Maximum pay limitation purpose. (*See* **COMPENSATION, Aggregate limitation, Applicability to credit hours**)
Federal Employees Flexible and Compressed Work Schedules Act
Compensatory time limitation
Overtime adjustment

An employee on a flexible schedule who is ordered to work 5 hours which are overtime hours at the end of a pay period may, on her request, receive compensatory time off for such time so long as she does not accrue more than 10 hours of compensatory time in lieu of payment for regularly or irregularly scheduled overtime work---------- 6

Credit hours *v.* overtime hours

Under Title I (flexible schedules) of the Federal Employees Flexible and Compressed Work Schedules Act of 1978, credit hours are hours of work performed at the employee's option and are distinguished from overtime hours in that they do not constitute overtime work which is officially ordered in advance by management. Therefore, since an employee was ordered to work 5 hours at the end of the pay period when she was scheduled to take off, and since she had already accumulated 10 credit hours, and since she had already worked 40 hours that week, the 5 hours of work are overtime---------- 6

Household effects
Transportation. (*See* **TRANSPORTATION, Household effects**)
Inventions
Use by the Government
Licensing propriety
Conflict of interest avoidance

License contract for patent between Government employee-inventor and Air Force would not be legal or appropriate if employee is in position to order, influence, or induce use of invention pursuant to 28 U.S.C. 1498 (1976), even though employee's invention was not related to his official duties and there was no contribution of Government equipment, facilities, materials or information. If employee can be insulated from decision to use patented device so as to avoid violation of conflict of interest statutes and regulations, the Air Force may enter into license agreement. Neither DAR 1-302.6, 28 U.S.C. 1498 nor Executive Order 10096 would prohibit such an arrangement---------- 248

OFFICERS AND EMPLOYEES—Continued
Jury duty
Leave. (*See* **LEAVES OF ABSENCE, Court**)
Labor-management relations
Requesting GAO decisions, etc. (*See* **LABOR-MANAGEMENT RELATIONS, Federal service, Requests for GAO decisions, etc.**)
Leaves of absence. (*See* **LEAVES OF ABSENCE**)
New appointments
Relocation expense reimbursement and allowances
Non-entitlement
Position outside conterminous United States Page

Employee, who was hired as new appointee to position in the area formerly known as the Canal Zone, was erroneously authorized reimbursement for temporary quarters subsistence expenses although such reimbursement is not permitted under 5 U.S.C. 5723 and para. 2-1.5g(2)(c) of the Federal Travel Regulations (FPMR 101-7) (May 1973). Employee is not entitled to payment for temporary quarters as Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations. Employee must repay amounts erroneously paid as Government is not estopped from repudiating erroneous authorization of its agent. There is no authority for waiver under 5 U.S.C. 5584 71

Overpayments
Waiver
Debt collections. (*See* **DEBT COLLECTIONS, Waiver, Civilian employees**)
Overseas
Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)
Transportation
Household effects. (*See* **TRANSPORTATION, Household effects, Overseas employees**)
Overtime. (*See* **COMPENSATION, Overtime**)
Per diem. (*See* **SUBSISTENCE, Per diem**)
Promotions
Discrimination alleged

As a result of an employment discrimination suit brought by certain female employees, the Government Printing Office (GPO) was ordered in a court judgment to pay the plaintiffs back pay for past economic harm and an added increment of pay above that to which they were otherwise entitled, for continuing economic harm until a certain number of plaintiffs were promoted. The so-called award of "front pay" in this instance amounts to damages and should be paid from the permanent indefinite appropriations provided in 31 U.S.C. 724a. Agency appropriations are not available to pay compensation above the amount prescribed for the particular job level in question. 55 Comp. Gen. 1447 (1976) is distinguished 375

Relocation expenses
Executive Exchange Program. (*See* **PRESIDENT'S EXECUTIVE INTERCHANGE PROGRAM, Government participants, Entitlements, Travel or relocation expenses**)
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

OFFICERS AND EMPLOYEES—Continued
Senior Executive Service
Civil Service Reform Act of 1978
Inapplicability
Panama Canal Commission employees Page

Panama Canal Act of 1979 expressly excepts the appointment and compensation of all Panama Canal Commission positions from the provisions of the civil service laws and regulations. Additionally, provisions of the Panama Canal Treaty of 1977 would be in conflict with the implementation of the Senior Executive Service. The Treaty must be given priority over a subsequently enacted statute applicable to Federal agencies generally. Hence, the provisions of the Civil Service Reform Act of 1978 establishing a Senior Executive Service do not apply to the employees of the Panama Canal Commission 83

Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem**)
Training
Equal Employment Opportunity programs

Internal Revenue Service may certify payment for a live African dance troupe performance incident to agency sponsored Equal Employment Opportunity (EEO) Black history program because performance is legitimate part of employee training. Although our previous decisions considered such performance as a nonallowable entertainment expense, in this decision we have adopted guidelines developed by the Office of Personnel Management (OPM) that establish criteria under which such performances may be considered a legitimate part of the agency's EEO program. 58 Comp. Gen. 202 (1979), B–199387, Aug. 22, 1980, B–194433, July 18, 1979, and any previous decisions to the contrary are overruled 303

Transportation and/or per diem
Cost comparison requirement

Army employee on long-term training assignment may have orders retroactively amended to authorize per diem where cost comparison required by statute was not made prior to issuing orders authorizing transportation of dependents and household goods 478

Exceptions
Entitlements under service agreements

Army employee may have orders issued authorizing advance return of dependents and household goods. Cost studies need not be made when it is agency's intent not to allow dependent travel and transportation of household goods incident to the training assignment 478

Transfers
Expenses
Relocation *v.* training

Department of Army employee stationed in Germany and assigned to long-term training in United States is not entitled to full permanent change of station entitlements until the training is completed and he is transferred to a new permanent duty station 478

International organizations

Employee of Nuclear Regulatory Commission transferred to international organization under 5 U.S.C. 3581, *et seq.* effective August 16, 1978, at which time he elected to retain annual leave to his credit pursuant to 5 U.S.C. 3582(a)(4). On January 22, 1980, also pursuant to

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
International organizations—Continued Page
5 U.S.C. 3582(a)(4) and prior to reemployment, employee requested lump-sum payment for annual leave retained. Consistent with computation provisions of 5 U.S.C. 3583 and implementing regulations, computation of employee's payment is based on rate of pay attaching to his Federal agency position at time of his request for lump-sum leave payment under 5 U.S.C. 3582(a)(4), not the date of the transfer. Overrules B–155634, Dec. 10, 1964 409
Relocation expenses
Cooperatively owned dwelling
Condominiums/cooperatives
Membership fees
Employee may not be reimbursed a cooperative home membership fee required on purchase of home at new duty station. Such fees are personal and outside the scope of costs or expenses allowable as relocation expenses under the Federal Travel Regulations. Distinguished in part by 61 Comp. Gen. ——— (B–205614, Apr. 13, 1982) 451
Leases
Unexpired lease expense
Nonreimbursable if avoidable
Employee who enters into 1-year lease when on notice that he will be transferred in 4 to 6 months may not be reimbursed lease termination expenses payable under penalty clause of lease. Authority to reimburse lease termination expenses is intended to compensate costs employee did not intend to incur at time he executed lease and which he would not have incurred but for his transfer, not costs employee could have avoided or costs incurred knowingly after being advised that transfer would occur ... 528
Loan fees
House purchase. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, House purchase, Loan origination fee**)
Loan processing
Second mortgage on old residence
Proceeds applied to house purchase
Transferred employee obtained money from second mortgage on old residence to make downpayment on purchase of new residence. Second mortgage was on employee's old residence which he was unable to sell due to high interest rates, low availability of mortgage money, and high real estate prices. Transaction to obtain funds to make downpayment was not an "interim personal financing loan" but a loan upon employee's equity in old residence. Such transaction was thus essential to enable employee to make downpayment on residence at new duty station incident to transfer. Hence, expenses of second mortgage are reimbursable, if otherwise proper, 5 U.S.C. 5724a(a)(4) and FTR para. 2–6.2d 650
Miscellaneous expenses
Appliances
Disconnection and reinstallation
Transferred employee who had water line run from supply pipe to ice maker in refrigerator at new duty station may be reimbursed for the cost, including pipe used, under miscellaneous expenses allowance. Drilling hole in wall is not "structural alteration" since it is necessary for connection and proper functioning of refrigerator. Prior decisions to contrary will no longer be followed 285

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Miscellaneous expenses—Continued
Structural alteration or remodeling
Appliance reinstallation—"alteration" status Page

Transferred employee who had gas line connected to and vent pipe run from clothes dryer at new duty station may be reimbursed for the cost, including pipe used, under miscellaneous expenses allowance. Necessary holes in walls are not "structural alterations" since they are necessary for connection and proper functioning of dryer---------- 285

Telephone reinstallation
Comparable service

Where transferred employee at new duty station acquires level of telephone service comparable to what he had at old duty station, total installation charges may be reimbursed under miscellaneous expense allowance, even where "jacks" have been installed. Prior decisions to the contrary will no longer be followed---------- 285

Overseas employees
Transferred to U.S.

Employee who had fulfilled overseas service agreement with first agency transferred to position in the United States with another agency and thereafter breached service agreement with second agency. Notwithstanding violation of service agreement, employee is not required to refund transfer expenses paid by second agency where those were solely for transportation of household goods and employee's own travel, since he was entitled to such expenses as a consequence of having satisfied overseas service agreement with first agency---------- 308

Pro rata expense reimbursement
House purchase or sale
Two adjoining plots sold separately to one buyer

Transferred employee sold residence on one acre lot to single purchaser as two separate parcels to enable buyer to obtain financing on portion of land containing residence. Fact that portion of land not containing residence was too small to use as separate building site and fact that one-acre lot size was common acreage for single family residences in area rebut presumption raised by separate sale that smaller parcel was land in excess of that reasonably related to the residence site within meaning of paragraph 2-6.1h of the Federal Travel Regulations. Realtor's fees paid for sale of both parcels may be reimbursed---------- 384

Real estate expenses
Condominium purchase
Garage space acquisition

A transferred employee entitled to reimbursement of expenses required to be paid by him in connection with the purchase of a residence at his new duty station may be reimbursed under paragraph 26.1 of the Federal Travel Regulations for expenses incurred separately in obtaining garage parking space in connection with the purchase of a condominum, since garage parking was reasonably necessary and since it was obtained in conjunction with the condominium unit---------- 677

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Real estate expenses—Continued
Lump-sum payments
Third-party lending institution Page

Employee may not be reimbursed for lump-sum payment to third-party lending institution which prepared financial documents ultimately used by loan originating institution for conditioned purpose of extending credit to finance employee's purchase of home. Since fee paid to third-party lending institution was stated as lump-sum payment for expenses and overhead and is finance charge within the meaning of Regulation Z (12 C.F.R. Part 226), reimbursement is precluded absent itemization to show items excluded by 12 C.F.R. 226.4(e) from the definition of finance charge 531

Title in name of trust

Employee of Interior Department who transferred from Reno, Nevada, to Anchorage, Alaska, seeks reimbursement of real estate expenses incurred in sale and purchase of residences at old and new duty stations. Title to both residences was held in name of a trust established by last will and testament of deceased mother of employee's spouse. Since title to residences was held in name of trust which paid all expenses of real estate transactions, title requirements of 5 U.S.C. 5724a(a)(4) (1976) and para. 2-6.1c of Federal Travel Regulations were not met. Therefore, no entitlement to reimbursement exists 141

Temporary quarters
Subsistence expenses
Declining rate of reimbursement

Employee, who transferred to new duty station, occupied temporary quarters and was joined by his family during second 10-day period of temporary quarters at new station. He claims reimbursement for them based upon higher rate applicable during first 10-day period. Claim is denied since regulations governing temporary quarters provide for reimbursement based on 10-day periods beginning when either employee or a family member first occupies temporary quarters, irrespective of when other family members begin to occupy temporary quarters 281

Time limitation
Option to exclude departure/return days

Employee, who occupies temporary quarters at old duty station and interrupts occupancy for permanent change of station as permitted by Federal Travel Regulations para. 2-5.2a, may elect not to count the day of departure against his 30-day limit for temporary quarters. The principles established in 57 Comp. Gen. 696 (1978) and 57 Comp. Gen. 700 (1978) are applicable regardless of whether the employee interrupts his occupancy of temporary quarters for purposes of temporary duty or change of station travel 314

Training assignments

Department of Army employee stationed in Germany and assigned to long-term training in United States is not entitled to full permanent change of station entitlements until the training is completed and he is transferred to a new permanent duty station 478

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Training assignments—Continued Page

Director of FBI requests reconsideration of ruling in *Cecil M. Halcomb*, 58 Comp. Gen. 744, that new appointees assigned to training in Washington, D.C., may not have Washington designated as first permanent duty station so as to entitle them to travel and relocation expenses from Washington, D.C., when assigned to permanent duty station after training. No basis exists to alter this ruling since assignment for training is not a permanent assignment, and employee must bear expense of reporting to his first permanent duty station. 58 Comp. Gen. 744, amplified.. 569

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Return travel, etc. expense liability
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Travel by foreign air carriers. (*See* **TRAVEL EXPENSES, Air travel, Foreign air carriers, Prohibition, Availability of American carriers**)
Travel by privately owned automobile
Mileage. (*See* **MILEAGE, Travel by privately owned automobile**)
Travel expenses. (*See* **TRAVEL EXPENSES**)
Traveltime
Hours of travel
Regular *v.* nonduty hours

Our so-called "two-day per diem" rule merely governs payment of per diem when employee delays travel in order to travel during regularly scheduled working hours. Entitlement to overtime compensation, however, is determined by the distinct criteria under 5 U.S.C. 5542(b)(2) as interpreted by our decisions. Mere compliance with "two-day per diem" rule will not result in payment of overtime compensation since per diem and overtime are governed by different criteria. B–192839, May 3, 1979, overruled in part..... 681

Status for overtime compensation. (*See* **COMPENSATION, Overtime, Traveltime**)
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Employees
Civil Service Reform Act of 1978
Senior Executive Service
Inapplicability

Panama Canal Act of 1979 expressly excepts the appointment and compensation of all Panama Canal Commission positions from the provisions of the civil service laws and regulations. Additionally, provisions of the Panama Canal Treaty of 1977 would be in conflict with the implementation of the Senior Executive Service. The Treaty must be given priority over a subsequently enacted statute applicable to Federal agencies generally. Hence, the provisions of the Civil Service Reform Act of 1978 establishing a Senior Executive Service do not apply to the employees of the Panama Canal Commission 83

PANAMA CANAL ZONE
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Licenses
Government's purchase propriety
Employee inventions
Conflict of interest avoidance

License contract for patent between Government employee-inventor and Air Force would not be legal or appropriate if employee is in position to order, influence, or induce use of invention pursuant to 28 U.S.C. 1498 (1976), even though employee's invention was not related to his official duties and there was no contribution of Government equipment, facilities, materials or information. If employee can be insulated from decision to use patented device so as to avoid violation of conflict of interest statutes and regulations, the Air Force may enter into license agreement. Neither DAR 1–302.6, 28 U.S.C. 1498 nor Executive Order 10096 would prohibit such an arrangement 248

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Compensation. (*See* **COMPENSATION**)
Entitlement
Not a contractual right Page
The United States Supreme Court's opinion in *United States* v. *Larionoff*, 431 U.S. 864 (1977), concerning military reenlistment bonuses, did not alter the fundamental rules of law that (1) a service member's entitlement to military pay is governed by statue rather than ordinary contract principles, and (2) in the absence of specific statutory authority the Government is not liable for the negligent or erroneous acts of its agents; hence, the amount of any reenlistment bonus payable to a service member depends on the applicable statutes and regulations, and in no event can the bonus amount be established through private negotiation or contract between the member and his recruiter 257
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Public Health Service (PHS) officer who agreed to accept a commission in PHS in October 1973 and thereafter signed a memorandum of understanding for participation in the PHS Commissioned Officer Residency Deferred program in August 1974, whereby he received a deferral from active military duty under the Military Selective Service Act, should not be considered to have disqualifying active duty obligation for purposes of variable incentive pay authorized pursuant to 37 U.S.C. 313 (1976) since induction authority, with certain exceptions not relevant here, under Military Selective Service Act expired June 30, 1973 403
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A service member who was married and had children elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried, but died prior to the first anniversary of the remarriage. His surviving spouse, who was pregnant when he died, later gave birth to his posthumous child. Not only does the birth of a posthumous child qualify the surviving spouse as the eligible widow for annuity purposes, but such child immediately joins the member's other children in the class stipulated in 10 U.S.C. 1450(a)(2) as potential eligible beneficiaries to share the annuity should the eligible widow thereafter lose eligibility by remarriage before age 60 or death 240

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A service member who elected spouse and children coverage under the Survivor Benefit Plan at retirement was thereafter divorced and remarried but died prior to the first anniveraary of the remarriage. While his surviving spouse did not qualify for annuity purposes as his eligible widow at his death, she was pregnant. In view of the 10 U.S.C. 1540(a) provision that payment of the annuity will begin "the first day after the death," an annuity may be paid to his surviving dependent children of the prior marriage but must terminate on the date that the surviving spouse qualifies under 10 U.S.C. 1447(3)(B) for an annuity by the birth of his posthumous child 240

Remarriage of member
Spouse's annuity eligibility
Posthumous child effect

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Spouse
Social Security offset
Mother's benefit

A widow's Survivor Benefit Plan annuity payments were offset to the extent of the Social Security mother's benefit to which she would have been entitled based on the deceased service member's military Social Security coverage. However, she was actually receiving Social Security benefits based on her own work record and, therefore, received a reduced mother's benefit due to the benefits payable based on her own record. She is not entitled to reimbursement of the Survivor Benefit Plan annuity withheld for the difference between the mother's benefit to which she would have been entitled had the mother's benefit not been reduced in her case and the reduced mother's benefit which she actually received. 129

Selective reenlistment bonus. (*See* **GRATUITIES, Selective reenlistment bonus**)

Service credits
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Proration status

Navy officer retired under 10 U.S.C. 6323 may receive credit in the multiplier used in computing his retired pay for the full 57 inactive service points he earned in a year in which he also served on active duty. While on active duty he was in an active status, not an inactive status, and regulations governing the maximum number of points which may be earned require prorating of maximum allowable only on the basis of excluding periods of inactive status 537

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Medical and dental officers. (*See* **PAY, Medical and dental officers, "Variable Incentive Pay"**)
Withholding
Member's consent requirement
Anticipated indebtedness
Early discharge
Advance leave, unearned bonuses, etc. (Page

A service may withhold from pay due a member, with the member's consent, amounts expected to become due to the United States because of paid bonuses and advance leave which are expected to become unearned bonuses and excess leave due to the member receiving an early separation from the service. However, such amounts may not be withheld from current pay without the member's consent since no actual debt exists until the member is discharged---------- 51

PAYMENTS
Advance
Authority
Grant funds
Urban Mass Transportation Administration

Urban Mass Transportation Administration (UMTA) grant authority under 49 U.S.C. 1602(h) is sufficient to avoid the restrictions of 31 U.S.C. 529 on advance payments. 41 Comp. Gen. 394 (1961). Accordingly, UMTA can make advance payments to grantee under this authority before disbursement of required non-Federal matching share of grant costs---------- 208

Contracts. (*See,* **CONTRACTS, Payments, Advance**)
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Claimant, former Environmental Protection Agency (EPA) Assistant Regional Counsel, had notices published in newspapers without prior written authorization as required by 44 U.S.C. 3702 and EPA directives. Claimant paid newspapers from his own personal funds and sought reimbursement from EPA. Since EPA could not have paid claim by newspapers directly, and since employee may not create claim in his favor by voluntarily making payment from personal funds, claim must be denied---------- 379

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PERSONAL SERVICES
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Authority
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Protest against agency's determination to retain function in-house based on cost comparison with offers received in response to solicitation is sustained to extent that agency failed to follow prescribed guidelines in conducting comparison---------- 44

PLANTS, ART OBJECTS, ETC.
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PRESIDENT'S EXECUTIVE INTERCHANGE PROGRAM
Government participants
Entitlements
Travel or relocation expenses
Travel expenses
Per diem or commuting expenses Page

Federal Government employees assigned to the business sector under the Executive Exchange Program may be authorized relocation expenses or travel expenses not to exceed such relocation expense, whichever is determined more appropriate by the employing Federal agency. 54 Comp. Gen. 87, amplified. This decision was later clarified by B–201704, B–202015, Nov. 4, 1981 582

PRISONS AND PRISONERS
Federal Prison Industries
Prison Industries Fund
Status as permanent or continuing appropriation
Donable property purpose

Prison Industries Fund, established by 18 U.S.C. 4126 as operating fund of Federal Prison Industries (FPI), constitutes permanent or continuing appropriation even though amounts originally appropriated have been returned to Treasury and Fund is self-sufficient, in view of fact that statute authorizes deposit into Treasury to credit of Fund of receipts for prison industries products and services and authorizes use of such funds for operation of FPI. Surplus personal property acquired by the Fund thus is donable under 40 U.S.C. 484(j), since it does not constitute non-appropriated fund property within meaning of regulation excluding such property from donation (41 C.F.R. 101–44.001–3) 323

PROCUREMENT
In-house *v.* commerial sources

Where decision to retain function in-house is based on comparison of estimated in-house costs with offers received in competitive procurement, integrity of process dictates that comparison be supported by complete and comprehensive data, and that elements of comparison are clearly identifiable and verifiable 44

Method
Propriety
Automatic data processing equipment, etc.

Allegation that protester should have received award under proper application of solicitation provision stating that award would be made to technically acceptable proposal offering lowest systems life cost, subject to availability of funds for that method of acquisition, is without merit where agency reasonably concluded that funds were not available for exercise of purchase option under protester's lowest cost lease with option to purchase offer 331

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Damage, loss, etc.
Government liability
Commuting to work by auto
Transit strike Page

Government employees who were involved in accidents while commuting to and from work during New York transit strike did not damage their vehicles "incident to service" and cannot make a claim cognizable under the Military Personnel and Civilian Employees' Act of 1964. Commuting is a personal expense which in the absence of extremely unusal circumstances may not be borne from appropriated funds---- 633

Vehicle operated on Government business

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Absent specific statutory authority contracts for fire services are not authorized where a non-Federal governmental entity such as Rural Fire District is legally obligated under state or local law to provide fire service without compensation. Where no antecedent legal obligation exists, however, contracts may be executed---- 637

Mutual aid agreements

Mutual aid agreements are statutorily authorized in all jurisdictions as are actual cost reimbursements for losses incurred in fire suppression activities on Federal lands---- 637

Surplus
Federal Property and Administrative Services Act
Donations for historical preservation
Developer's payments in lieu of taxes

We are unaware of any basis for legally objecting to approval of Archives Preservation Corporation's (a wholly owned subsidiary of the New York State Urban Development Corporation) application for conveyance of the Federal Archives Building in New York City for historic monument purposes and revenue producing activities pursuant to 40 U.S.C. 484(k)(3). Even though the application requires the developer who will be restoring and maintaining the property to make payments in lieu of real estate and sales taxes, these are customary costs for UDC sponsored projects and they are not being assessed merely to circumvent the requirement that "all incomes in excess of costs" be used for historic preservation purposes---- 158

PROPERTY—Continued
Public—Continued
Surplus—Continued
Federal Property and Administrative Service Act—Continued
Donations for historical preservation—Continued
No ceiling on excess income generated Page

Nothing in 40 U.S.C. 484(k)(3) serves to limit amount of "incomes in excess of costs" which could be generated by revenue-producing activities. Legislative history indicates that Secretary of the Interior is to use as an important criteria, in approving financing plans under the statute, whether the plan will generate significant amount of income. It also indicates that strict limitations should not be placed on the amount of income which could be generated by a plan. Thus, the bill was amended to indicate that excess income in whatever amount generated be used primarily for public historic preservation purposes. This furthers the purpose of the law by permitting projects susceptible to generating income to assist in restoring and maintaining projects that are not---------- 158

Participating nonprofit corporations—cost reimbursement

New York Landmarks Conservancy, a nonprofit corporation which participated at the request of the General Services Administration and New York City in preparation of plan and selection of developer to implement plan for repair and maintenance of Federal Archives Building in New York City following donation to States pursuant to 40 U.S.C. 484(k)(3), may be paid a fee to reimburse the Conservancy its costs if the Secretary of the Interior finds it reasonable. Reimbursement may properly be considered project cost and not "incomes in excess of costs"- 158

State, etc. urban development corporations—cost reimbursement

New York Urban Development Corporation may be reimbursed fee representing costs it has incurred in participating in the development and implementation of plan for restoration and maintenance of Federal Archives Building in New York City pursuant to 40 U.S.C. 484(k)(3) if the Secretary of the Interior deems the fees to be reasonable (and we have no information that they are not) since it is UDC's custom to recover these costs from developers under projects it sponsors and these are valid costs of the project---------- 158

PUBLIC HEALTH SERVICE
Commissioned personnel
Pay, etc.
Variable Incentive Pay

Public Health Service (PHS) officer who agreed to accept a commission in PHS in October 1973 and thereafter signed a memorandum of understanding for participation in the PHS Commissioned Officer Residency Deferred program in August 1974, whereby he received a deferral from active military duty under the Military Selective Service Act, should not be considered to have disqualifying active duty obligation for purposes of variable incentive pay authorized pursuant to 37 U.S.C. 313 (1976) since induction authority, with certain exceptions not relevant here, under Military Selective Service Act expired June 30, 1973------ 403

PUBLIC LANDS
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Withdrawn lands
Relinquishment
"Interdepartmental waiver" doctrine inapplicability Page

Dept. of Interior requests GAO's views on applicability of the "interdepartmental waiver" doctrine when an executive department relinquishes a withdrawn area under the Federal Land Policy and Management Act of 1976 (Act) (43 U.S.C. 1701 *et seq.* (1976)) and on proposed amendment to the public land regulations (43 C.F.R. 2374.2(b)). Doctrine ordinarily requires that restoration costs for property of one department which has been used by another department be borne by the department retaining jurisdiction over the property since restoration would be for future use and benefit of loaning department. Interior does not benefit in the sense contemplated by the doctrine from restoration of public lands. Accordingly, doctrine does not apply to withdrawn property. 59 Comp. Gen. 93 (1979) is distinguished---------- 406

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Federal Supply Schedule
Purchase propriety

Request for quotations for dictation equipment available under multiple-award Federal Supply Schedule contract, one of which did not not inform quoters of life cycle evaluation factors and another which did not indicate that life cycle cost would be evaluated at all, are defective and, under circumstances, did not permit fair and equal competition---- 306

QUARTERS
Government furnished
Civilian employees
Temporary duty
Government procurement by contract

When a contracting officer procures lodgings or meals for an employee on temporary duty and furnishes either to the employee at no charge, the lodgings plus system is normally inappropriate and a flat per diem at a reduced rate should be established in advance---------- 181

Military personnel. (*See* **STATION ALLOWANCES**)
Military personnel
Generally. (*See* **QUARTERS ALLOWANCE**)
Temporary
Incident to employee transfers. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters**)

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Confinement in guard house, etc.
Conviction not overturned

Basic allowance for quarters (BAQ) is not authorized when a member, without dependents, is convicted by court-martial, which does not direct forfeiture of allowances, and the member is sentenced to confinement in a guardhouse, brig, correctional barracks or Federal penal institution, regardless of whether the member was receiving BAQ prior to confinement or his assigned quarters were terminated, provided the sentence is not overturned or set aside. 40 Comp. Gen. 169 (1960) and 40 *id.* 715 (1961), distinguished---------- 74

QUARTERS ALLOWANCE—Continued
Basic allowance for quarters (BAQ)—Continued
Dependents
Children
Adopted
Adoption not finalized Page

Where children are placed with a member of the uniformed services for adoption in the State of California by an agency of the State, the effective date for determining entitlement to dependency benefits is the date an order of adoption has been entered by a court of competent jurisdiction. 170

Husband and wife both members of armed services
One parent's entitlement
Other parent's eligibility for Family Separation Allowance

Marine Corps member separated from her child and husband while serving an unaccompanied tour of duty overseas may properly be regarded as a "member with dependents" under 37 U.S.C. 427(b)(1) and is entitled to a Family Separation Allowance, Type II–R, notwithstanding that her husband is also a Marine and is drawing a Basic Allowance for Quarters at the "with dependent" rate on behalf of the child, since their child is their joint dependent and since payment of the two allowances—each for a separate purpose—would not improperly result in dual payments of the same allowance for the same dependent 154

Eligibility
Different from that for family separation allowance

The statutory purpose of the Basic Allowance for Quarters authorized by 37 U.S.C. 403 is to reimburse a service member for personal expenses incurred in acquiring non-Government housing when rent-free Government quarters "adequate for himself, and his dependents," are not furnished. The Family Separation Allowance, Type II–R, authorized by 37 U.S.C. 427(b)(1) has a separate and distinct purpose, i.e., to provide reimbursement for miscellaneous expenses involved in running a split household when a member is separated from his dependents due to military orders, and it is payable irrespective of the member's eligibility for a quarters allowance 154

Termination
Members without dependents
Sea or field duty for 3 months or more
Sea duty interrupted by shore duty
Effect

A member forfeits basic allowance for quarters (BAQ) for any period of sea duty for 3 months or more, 37 U.S.C. 403(c). A member assigned to such sea duty is not entitled to receive BAQ when he begins temporary duty ashore, which interrupts his sea duty, unless the orders to perform shore duty effectively terminate the member's sea duty. When the shore duty is merely an adjunct to the sea duty and does not alter the nature of the temporary duty from sea duty to shore duty, then the entire period is considered sea duty. 59 Comp. Gen. 192, amplified 596

QUARTERS ALLOWANCE—Continued
Basic allowance for quarters (BAQ)—Continued
With dependent rate
Child support payments by divorced member
Both parents service members
Declination evidence acceptability Page

Where two Air Force members who are married to each other and who have one child are divorced with the male paying child support and the female having custody of the child, the male member receives increased basic allowance for quarters (BAQ) on account of the child, but the female member may claim increased BAQ on account of the child, if the male member declines to claim the child for BAQ purposes. When the male member acquires or has different dependents on which to base his claim for increased BAQ, it may be assumed (without a formal declination) that he is not claiming the common dependent for increased BAQ purposes---------- 399

Declination of claim effect

Where two Air Force members married to each other with one child are divorced, the male member paying child support and the female member having custody of the child, the male member is entitled to receive basic allowance for quarters (BAQ) at the with dependent rate. However, if the member receiving the increased BAQ does not claim the dependent child, the female member who has custody of the child may claim BAQ at the with dependent rate---------- 399

Declination of claim revocability

A declination to claim a dependent for increased basic allowance for quarters purposes should be in writing when possible but need not be and should not be considered irrevocable since as dependents change so should a member's ability to claim a dependent be changeable---------- 399

Dual payment prohibition for common dependents

Where two Air Force members married to each other with one child are divorced, the male member paying child support and the female member having custody of the child, the child is the dependent of both members under 37 U.S.C. 401; however, since only one member may receive basic allowance for quarters (BAQ) based on the child as a dependent, only the member paying child support (in this case the male member) receives BAQ at the with dependent rate---------- 399

Civilian overseas employees
Entitlement
Administrative discretion

Civilian employee of Department of the Army claims that Government is estopped to adjust his Living Quarters Allowance in accordance with 1974 revision of Department of State Standardized Regulations (Government Civilians, Foreign Areas) because his entitlement to the allowance vested under terms and conditions of 1967 regulations. Claim is denied because doctrine of equitable estoppel does not apply in cases where, as here, the relationship between the Government and the employee is not contractual but appointive, and, pursuant to statute, allowance in question is ultimately discretionary and creates no permanent entitlement for any employee. Also, employee entered into licensing agreement, not a contract, when he constructed portable home on Government property, and such agreements are permissive, uuassignable, and can be canceled at any time---------- 243

QUARTERS ALLOWANCE—Continued
Dependents
Children
Mother and father members of armed services
One parent's entitlement
Other parent's eligibility for Family Separation Allowance Page

Marine Corps member separated from her child and husband while serving an unaccompanied tour of duty overseas may properly be regarded as a "member with dependents" under 37 U.S.C. 427(b)(1) and is entitled to a Family Separation Allowance, Type II–R, notwithstanding that her husband is also a Marine and is drawing a Basic Allowance for Quarters at the "with dependent" rate on behalf of the child, since their child is their joint dependent and since payment of the two allowances—each for a separate purpose—would not improperly result in dual payments of the same allowance for the same dependent 154

REGULATIONS
General Accounting Office function

Although Administrator of General Services (GSA) is authorized to promulgate Federal Travel Regulations (FTR), the General Accounting Office (GAO) must interpret the laws and regulations in settling claims. Guidance issued by Assistant Administrator of General Services interpreting FTR does not bind agencies as do the FTR but GAO will accord great deference to such guidance. Since GSA employee relied on GSA guidance interpreting FTR as precluding application of 10 hour rule in case of actual subsistence reimbursement, and since decision B–184489, April 16, 1976, was similarly interpreted by a number of agencies, the 10 hour rule shall not be applied to employee or in cases of actual subsistence reimbursement prior to issuance of 58 Comp. Gen. 810, but the rule shall apply after September 27, 1979, the date of issuance of our decision 132

Travel
Joint
Military personnel
Amendment
Leave officially interrupted—travel expense

Current regulations, which limit a service member's entitlement to return travel and transportation expenses upon recall from authorized leave of 5 days or more due to urgent unforeseen circumstances only if recall is within 24 hours of departure from the duty station, may be amended to authorize entitlement for recalls after 24 hours. Such amendment should set forth definite criteria to be followed if authorization of expenses is to be allowed after 24 hours 648

Temporary duty pending transfer

A member of the uniformed services may be paid for travel from his temporary duty station to his old permanent duty station when permanent change of station follows a period of duty at a temporary duty station, but such payments may be made only if the Joint Travel Regulations are amended to authorize travel in such circumstances and only if authorization of return to old permanent station is based on the need to arrange transportation of dependents, household or personal effects or a privately owned conveyance and may not be authorized for purely personal reasons such as a visit or vacation. 57 Comp. Gen. 198, amplified 564

REGULATIONS—Continued
Travel—Continued
Joint—Continued
Miliary personnel—Continued
Amendment—Continued
Travel incident to home port changes Page
When the home port of a ship or other mobile unit to which a Navy member is being transferred is in the process of being changed the member may accompany his dependents or otherwise travel to the newly designated home port prior to reporting to the ship or other mobile unit if that travel is authorized by amendment to the Joint Travel Regulations, provided the travel is necessary to assist in the transportation of the member's dependents or property 561
Travel to "designated place" between military assignments
Dependents of a military member are located at a designated place away from his duty station because of the member's isolated duty, unusually arduous duty, or unaccompanied overseas tour. Travel by the member to the designated place upon assignment to the permanent duty station to which he is not authorized to take his dependents and upon his next permanent change of station at Government expense may be authorized by an amendment to the Joint Travel Regulations, but the authorization of travel to the designated place must be based on the member's need to assist in arranging for transportation of dependents, household or personal effects, or privately owned conveyance 562
Lodgings' expense reimbursement
Staying with friends, relatives, etc.
A claim by a member of the military for reimbursement of expenses incurred during temporary duty for lodging provided by a friend must be denied, even though the member paid his friend rent for the lodging, since Joint Travel Regulations para. M4205-1 provides that under such circumstances there may be no reimbursement for the cost of lodgings 57
Subsistence
Per diem
"Lodgings-plus"
Agency for International Development evacuees who had initially been authorized the special subsistence allowance on a flat rate basis were advised that the Secretary of State had authorized future payment on lodging-plus basis and that those who stayed with friends or relatives would not be reimbursed any amount for lodgings. Since regulations contemplate payment on per diem basis, Secretary acted properly in authorizing reimbursement based on the lodging-plus system now in effect. Secretary's determination to prohibit reimbursement for noncommercial lodgings is within his authority and consistent with per diem regulation of certain other Federal agencies 459
Travel agency use. (*See* **TRANSPORTATION, Travel agencies, Restriction on use, Applicable regulations**)
Waivers
Agency ignoring own regulations
Department of Energy
Department of Energy regulations, which create mechanism for persons injured by violations of price and allocation regulations to claim refunds, are mandatory. Department lacks authority to waive regulations in individual cases 15

RETIREMENT
Civilian
Contracting with Government. (*See* **OFFICERS AND EMPLOYEES, Contracting with Government, Retired employees**)

SET-OFF
Authority
State, etc. Government debts
Against Federal salary deductions for state, etc. income taxes
Public policy considerations Page

Government Printing Office (GPO) may not set off debts owed to it by District of Columbia against taxes withheld by GPO from wages of its employees for payment of employees' income taxes. The withheld taxes, while they constitute an employer indebtedness, are held in trust for the benefit of the District of Columbia. Strong public policy consideration precludes the setting off of debts against demands for payment of taxes in the absence of statutory authority 710

Contract payments
Assignments
Claim accuring but not matured prior to assignment
Right to and time for set-off

Where IRS (or other Federal entity) has claim against contractor-assignor which arose before assignment was completed under Assignment of Claims Act, amount of Federal claim may be set off against amounts otherwise due to assignee, assuming absence of no set-off clause in the contract. Assignee stands in shoes of assignor. Government's right to set off tax debts of assignor that were in existence, even if not yet mature, prior to date on which assignment became effective are not extinguished by assignment, although actual set-off cannot be made until tax debt matures. 56 Comp. Gen. 499, 37 *id.* 318, 20 *id.* 458, B–170454, Aug. 12, 1970, and similar cases are overruled in part 510

"No set-off" provision
Tax debts
Set-off precluded

If Government contract contains a "no set-off" clause, Government cannot set off tax debt of assignor under any circumstances. 56 Comp. Gen. 499, 37 *id.* 318, 20 *id.* 458, B–170454, Aug. 12, 1970, and similar cases are overruled in part 510

SMALL BUSINESS ADMINISTRATION
Contracts
Awards to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)
Management services
Obligation validity. (*See* **APPROPRIATIONS, Obligation, Validity, Agreements**)
Investment companies
Authority to invest in
Minority enterprise small business investment companies (MESBICs)
Leveraging propriety
Non-private fund matching

Section 105(a)(15) of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. 5305(a)(15), authorizes Small Business Administration to leverage (match) Community Development Discretionary (Block) Grant funds invested in minority enterprise small business investment companies 210

SOCIAL SECURITY
Military personnel
Retired
Survivor Benefit Plan
Offset
Formula Page

A widow's Survivor Benefit Plan annuity payments were offset to the extent of the Social Security mother's benefit to which she would have been entitled based on the deceased service member's military Social Security coverage. However, she was actually receiving Social Security benefits based on her own work record and, therefore, received a reduced mother's benefit due to the benefits payable based on her own record. She is not entitled to reimbursement of the Survivor Benefit Plan annuity withheld for the difference between the mother's benefit to which she would have been entitled had the mother's benefit not been reduced in her case and the reduced mother's benefit which she actually received.. 129

STATE LAWS
California
Child adoption

Where children are placed with a member of the uniformed services for adoption in the State of California by an agency of the State, the effective date for determining entitlement to dependency benefits is the date an order of adoption has been entered by a court of competent jurisdiction... 170

STATES
Federal aid, grants etc.
Amendment, etc.
Appropriation availability

Under section 502(e)(4) of Surface Mining Control Act of 1977, 30 U.S.C. 1252(e)(4), Secretary of the Interior is authorized to reimburse States for interim enforcement program costs not covered in prior grant award so long as payments are from currently available appropriations. Budget change to allow grant costs questioned solely because they exceed condition on budget flexibility may be allowed under existing obligation where change does not affect purpose or scope of grant award..... 540

Fire-fighting services
Local governments, etc.
Legal obligation to provide services without reimbursement
Services to Federal Government
Contracting authority

Absent specific statutory authority contracts for fire services are not authorized where a non-Federal governmental entity such as Rural Fire District is legally obligated under state or local law to provide fire service without compensation. Where no antecedent legal obligation exists, however, contracts may be executed..... 637

STATION ALLOWANCES
Military personnel
Dependents
Moving overseas
Not command-sponsored
Nonentitlement to allowances

A service member on an unaccompanied overseas tour of duty may not be paid military overseas housing and cost-of-living allowances on account of dependents who move to the overseas area, because in those circumstances the dependents' overseas residence is purely a matter of personal choice. 37 U.S.C. 405; 53 Comp. Gen. 339..... 689

STATION ALLOWANCES—Continued
Military personnel—Continued
Housing
Government quarters inadequate, etc.
Refusal to occupy
Nonentitlement to allowance Page

A service member may, if necessary, be involuntarily assigned to Government quarters classified as inadequate or substandard when reporting to an overseas duty station for a tour of duty he is to perform unaccompanied by his dependents. In such circumstances, he may not secure private housing near his duty station, decline the involuntary assignment to "inadequate" quarters, and thereby gain entitlement to overseas housing and cost-of-living allowances, which are payable under prescribed conditions to service members overseas when they are not furnished with Government quarters. 37 U.S.C. 405 ---- 689

Reassignment of quarters' effect

If a service member declines an assignment to Government quarters or elects to move out of his assigned quarters, the responsible installation commander may properly reassign the quarters to another person without thereby incurring any liability on behalf of the United States for payment of allowances to the member on the basis that Government quarters are then unavailable for assignment to him, since commanders of military installations have no obligation to maintain unoccupied quarters for service members who have voluntarily elected to reside elsewhere ---- 689

Members unaccompanied by dependents
Dependents individual-sponsored
Government quarters inadequate, etc.
Nonentitlement to certificate of unavailability

A Marine Corps officer serving an unaccompanied tour of duty in Okinawa chose to bring his family to Okinawa at personal expense, and he moved off base into private family housing. His Government quarters were reassigned to another, but he was offered substitute, substandard quarters for potential emergency use. He is not entitled to a certificate of nonavailability of quarters nor to payment of overseas housing and cost-of-living allowances on his own account based on a theory that he was thereby personally forced to reside and take his meals off base since his move was a matter of personal choice ---- 689

STATUTES OF LIMITATION
Accountable officers
Irregularities in accounts
Physical losses/shortages
Relief requests
No time bar

The long period of time between the year the theft occurred and the year in which relief was requested for the accountable officer is not a bar to consideration of relief in physical loss cases. The three year period prescribed in 31 U.S.C. 82i after which an accountable officer's accounts must be considered settled is not applicable in physical loss or shortage cases. Overrules in whole or in part B–197616, Feb. 24, 1981, B–201840, Apr. 6. 1981, and similar cases ---- 674

STATUTES OF LIMITATION—Continued
Claims
Compensation
Fair Labor Standards Act
Page
This Office has previously held that 6-year limitations period contained in 31 U.S.C. 71a and 237 applies to claims arising under section 204(f) of the FLSA, 29 U.S.C. 201, 204(f) (1976). Thus, where agency appeals OPM/FLSA compliance order to this Office, the 6-year limitations period continues to run until claim is received in this Office. Therefore, any portion of award under OPM compliance order which accrued more than 6 years prior to filing of claim in this Office may not be paid---- 354
General Accounting Office
Vietnam conflict
Member whose claim arose during active duty from June 30, 1970, to September 30, 1970, filed claim with Navy on September 14, 1979. Claim was forwarded to GAO on September 24, 1979. Member contends that claim is not barred as it arose during time of war (Vietnam conflict) and under the proviso in 31 U.S.C. 71a he has 5 years after peace is established to file claim. Even under that proviso a decision of when peace is established is dependent on political acts and, for Vietnam conflict, a political act which established peace took place on January 27, 1973. Therefore, proviso would not operate to alter untimeliness of this claim---- 200
Ten year period for filing
Reduced to six
Member performed active duty from June 30, 1970, to September 30, 1970, and filed claim with Navy for basic allowance for quarters for this period on September 14, 1979. The claim was forwarded to General Accounting Office (GAO) on September 24, 1979, as a possible time barred claim. Under provisions of 31 U.S.C. 71a as amended in 1975, member had 6 years, not 10 years, from date claim accrued to file in GAO. Accordingly, claim is barred---- 200

STATUTORY CONSTRUCTION
Spceial statute as affected by later general statute
Panama Canal Act of 1979 expressly excepts the appointment and compensation of all Panama Canal Commission positions from the provisions of the civil service laws and regulations. Additionally, provisions of the Panama Canal Treaty of 1977 would be In conflict with the implementation of the Senior Executive Service. The Treaty must be given priority over a subsequently enacted statute applicable to Federal agencies generally. Hence, the provisions of the Civil Service Reform Act of 1978 establishing a Senior Executive Service do not apply to the employees of the Panama Canal Commission---- 83

STORAGE
Household effects
Overseas employees
Nontemporary
Training periods
Army employee may not be reimbursed for nontemporary storage expenses incident to training. However, agency has broad discretion to authorize period of time expenses can be allowed---- 478

STORAGE—Continued
Household effects—Continued
Overseas employees—Continued
Nontemporary—Continued
Weight limitation
Renewal agreement at same post Page

When maximum weight allowance for transportation or nontemporary storage of household goods for transferred employees without immediate family is increased during overseas employee's tour of duty, employee who enters into renewal agreement at same post may be authorized increased weight allowance at time of renewal for nontemporary storage or shipment of household goods up to new maximum less initial shipment.. 30

STRIKES
Vehicle damage
Government commuters. (*See* **VEHICLES, Damage claims**)

SUBSISTENCE
Actual expenses
Hours of departure, etc.
Excursion rates
Delay in travel to obtain

Employee who traveled on a nonworkday in order to take advantage of a reduced air fare may be considered in a travel status and authorized and paid an extra day's actual subsistence where the cost of subsistence is more than offset by the savings to the Government through use of the reduced fare. Agency's bulletin, to the extent that it is inconsistent with the Federal Travel Regulations, need not be followed..... 295

Per diem
Actual expenses
Fractional days
Ten hours or less
High-rate area travel

Although Administrator of General Service (GSA) is authorized to promulgate Federal Travel Regulations (FTR), the General Accounting Office (GAO) must interpret the laws and regulations in settling claims. Guidance issued by Assistant Administrator of General Services interpreting FTR does not bind agencies as do the FTR but GAO will accord great deference to such guidance. Since GSA employee relied on GSA guidance interpreting FTR as precluding application of 10 hour rule in case of actual subsistence reimbursement, and since decision B-184489, April 16, 1976, was similarly interpreted by a number of agencies, the 10 hour rule shall not be applied to employee or in cases of actual subsistence reimbursement prior to issuance of 58 Comp. Gen. 810, but the rule shall apply after September 27, 1979, the date of issuance of our decision..... 132

Death of employee on temporary duty
Prepaid expenses
Reimbursement basis

Where application of rule stated in this decision in regard to termination of deceased employee's per diem entitlement precludes reimbursement for authorized expenses actually incurred by employee and definitely intended for coverage by the per diem entitlement, agency may find that employee's death comes within the scope of our decision *Snodgrass and VanRonk*, 59 Comp. Gen. 609. Accordingly, prepaid expenses incurred

SUBSISTANCE—Continued
Per diem—Continued
Death of employee on temporary duty—Continued
Prepaid expenses—Continued
Reimbursement basis—Continued Page

by a deceased employee may be reimbursed by his agency to the same extent as if the temporary duty had been cancelled or curtailed. 59 Comp. Gen. 609, modified (extended)---- 53

Rule for payment

Employee of General Services Administration died while on temporary duty for which he was authorized per diem allowance. Payment of per diem in these circumstances is subject to same rule which governs payment of compensation to deceased employee; namely, payment may be made to one legally entitled to payment of per diem allowance due deceased employee of United States up to and including entire date of death, regardless of time during day that death occurs, but such payment may not be made for any date later than that. 59 Comp. Gen. 609, modified (extended)---- 53

Delays
To avoid travel after duty hours
"Two-day per diem" rule
Effect on overtime compensation entitlement

Our so-called "two-day per diem" rule merely governs payment of per diem when employee delays travel in order to travel during regularly scheduled working hours. Entitlement to overtime compensation, however, is determined by the distinct criteria under 5 U.S.C. 5542(b)(2) as interpreted by our decisions. Mere compliance with "two-day per diem" rule will not result in payment of overtime compensation since per diem and overtime are governed by different criteria. B–192839, May 3, 1979, overruled in part---- 681

Executive Exchange Program. (*See* **PRESIDENT'S EXECUTIVE INTERCHANGE PROGRAM, Government participants, Entitlements, Travel or relocation expenses**)

"Lodging plus" basis
Staying with friends, relatives, etc.
Evacuated employees
Agency for International Development

Agency for International Development evacuees who had initially been authorized the special subsistence allowance on a flat rate basis were advised that the Secretary of State had authorized future payment on lodging-plus basis and that those who stayed with friends or relatives would not be reimbursed any amount for lodgings. Since regulations contemplate payment on per diem basis, Secretary acted properly in authorizing reimbursement based on the lodging-plus system now in effect. Secretary's determination to prohibit reimbursement for noncommercial lodgings is within his authority and consistent with per diem regulation of certain other Federal agencies---- 459

Use propriety
Meals/lodgings furnished free
Contracting officer procurement

When a contracting officer procures lodgings or meals for an employee on temporary duty and furnishes either to the employee at no charge, the lodgings plus system is normally inappropriate and a flat per diem at a reduced rate should be established in advance---- 181

SUBSISTANCE—Continued
Per diem—Continued
Military personnel
Temporary duty
"Lodgings-plus" system
Staying with friends, relatives, etc. Page

A claim by a member of the military for reimbursement of expenses incurred during temporary duty for lodging provided by a friend must be denied, even though the member paid his friend rent for the lodging, since Joint Travel Regulations para. M4205-1 provides that under such circumstances there may be no reimbursement for the cost of lodgings------ 57

Prior to transfer
Return to old station

A member of the uniformed service is detached from his permanent duty station upon being assigned to temporary duty and the new permanent duty station is not designated until the end of temporary duty assignment. Member may be authorized travel at Government expense from the temporary duty station to the old duty station for the purpose of arranging for relocation of dependents and personal effects resulting from the permanent change of station and then travel to the new permanent duty station. The date of the detachment from the old permanent duty station does not affect this entitlement. 57 Comp. Gen. 198, amplified---------- 564

Rates
Lodging costs
Average cost
More than one trip on voucher

When an employee submits a travel voucher which includes three different trips, the average cost of lodging is determined by dividing the total amount paid for lodging by the traveler during the three trips by the number of nights lodging that was or would have been required---- 181

Temporary duty
Dual lodgings

An individual (employed as a pilot) through no fault of his own and in circumstances beyond his control spent the night away from the temporary duty location to which he expected to return. Lodging expenses both at and away from that temporary duty station may be paid. Also, lodging costs may be paid if the pilot unexpectedly remains overnight at his permanent station. Payments in these cases must be based on a determination by the appropriate agency official that the employee acted reasonably in retaining the lodgings at his temporary duty station. 55 Comp. Gen. 690, B–164228, June 17, 1968, and similar cases are overruled; 59 Comp. Gen. 609, 59 *id.* 612, and 51 *id.* 12 are modified (extended)---------- 630

Training periods
Initial post of duty

Dircetor of FBI requests reconsideration of ruling in *Cecil M. Halcomb*, 58 Comp. Gen. 744, that new appointees assigned to training in Washington, D.C., may not have Washington designated as first permanent duty station so as to entitle them to travel and relocation expenses from Washington, D.C., when assigned to permanent duty station after training. No basis exists to alter this ruling since assignment for training is not a permanent assignment, and employee must bear expense of reporting to his first permanent duty station. 58 Comp. Gen. 744, amplified---------- 569

SUBSISTENCE—Continued
Per diem—Continued
Transferred employees Page
Employee, who occupies temporary quarters at old duty station and interrupts occupancy for permanent change of station as permitted by Federal Travel Regulations para. 2-5.2a, may elect not to count the day of departure against his 30-day limit for temporary quarters. The principles established in 57 Comp. Gen. 696 (1978) and 57 Comp. Gen. 700 (1978) are applicable regardless of whether the employee interrupts his occupancy of temporary quarters for purposes of temporary duty or change of station travel 314

SUBSISTENCE ALLOWANCE
Evacuated employees. (*See* **SUBSISTENCE, Per diem, "Lodgings plus" basis)**

SURFACE MINING CONTROL AND RECLAMATION ACT
Program authority
Appropriation availability. (*See* **APPROPRIATIONS, Interior Department, Availability, Grants)**

SYNTHETIC FUELS
Procurement
National defense needs
Defense Production Act
Presidential authority
Appropriation sufficiency
Under section 305 of Defense Production Act of 1950, as amended, President or delegate may enter into contracts for purchase or commitment to purchase synthetic fuels as long as there are sufficient appropriations in advance to pay the amount by which the contract price exceeds the estimated market price for the fuel at the time for performance 86

TAXES
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Payment in lieu of taxes
Federal lands
Locally provided services
Fire fighting
Absent specific statutory authority contracts for fire services are not authorized where a non-Federal governmental entity such as Rural Fire District is legally obligated under state or local law to provide fire service without compensation. Where no antecedent legal obligation exists, however, contracts may be executed 637

TELEPHONES
Furnished by Government
Without charge
Private organizations
Non-entitlement
Federal credit unions
Federal agency may not provide telephone services, on a reimbursable basis, to Federal employees' credit union which has been allocated space by the agency pursuant to 12 U.S.C. 1770. Such use, absent authority similar to that provided by 12 U.S.C. 1770, would violate 31 U.S.C. 628, which makes appropriations available solely for the objects for which they are made. 58 Comp. Gen. 610, modified in part 653

TELEPHONES—Continued
Private residences
Prohibition
Inapplicability
Government-leased quarters overseas
Nonoccupancy pending staff change
Accrued charges Page

Because of necessity to ensure telephone service in the Air Deputy's residence upon his occupancy of quarters in Norway, telephone service is secured by the U.S. Government under long-term lease. For 2 months, between incumbents, the residence was vacant but the telephone charges continued to accrue. Although 31 U.S.C. 679 prohibits using appropriated funds for telephone service in a private residence, the statute is not to be applied here where neither the outgoing nor incoming Air Deputy occupied the premises during the period covered by the charges. 11 Comp. Gen. 365 (1932), modified 490

TORTS
Claims under Federal Tort Claims Act
Applicability of Act
Claimant's status

Section 5704 of title 5, which reimburses a Government employee who uses his own vehicle for official Government business on a mileage basis includes in that basis the cost of insurance, if any. See 5 U.S.C. 5707. Therefore, reimbursement under 5 U.S.C. 5704 for damage to a vehicle of an employee officially authorized to use it is precluded. However, a claim for damage can be made under the Military Personnel and Civilian Employees' Claims Act of 1964, even if the employee is reimbursed on a mileage basis 633

TRANSPORTATION
Air carriers
Foreign
American carrier availability
First-class travel restriction

With the limited exceptions defined at paragraph 1–3.3 of the Federal Travel Regulations, Government travelers are required to use less than first-class accommodations for air travel. In view of this policy, a U.S. air carrier able to furnish only first-class accommodations to Government travelers where less than first-class accommodations are available on a foreign air carrier will be considered "unavailable" since it cannot provide the "air transportation needed by the agency" within the meaning of paragraph 2 of the Comptroller General's guidelines implementing the Fly America Act 34

Reserve space voluntarily released
Compensation
Employee *v.* Government's entitlement
Travel before September 3, 1978

Employee, while traveling on official business on May 23, 1976, received $174.07 for voluntarily vacating his seat on an overbooked air flight. Our decisions which allow an employee to keep voluntary payments do not apply prior to September 3, 1978, the effective date of the Civil Aeronautics Board regulations encouraging payment for voluntarily vacating a seat on an overbooked flight. The payment, which was turned over to the Government, may not be returned to the employee 9

TRANSPORTATION—Continued
Automobiles
Overseas employees
Reimbursement basis
Return to U.S. for training prior to transfer Page
Army employee who is not expected to return to overseas assignment after training in United States may be reimbursed transportation costs for shipping privately owned vehicle by American flag vessel on Government bill of lading after training is completed, agreement is signed, and employee is assigned to new permanent duty station ---- 478
Bills
Payment
Proper carrier to receive
"Last" carrier identification
Evidence in GBL
In determining whether billing carrier is last (delivering) carrier in privity with contract of carriage, and entitled to payment of transportation charges under 41 CFR 101-41.302-3(a)(1) and 101-41.310-4(a)(1), General Services Administration (GSA) regulations authorize Government agency to look to properly accomplished, covering Government bi l of lading (GBL) ---- 81
Bills of lading
Accomplishment
What constitutes
Transportation Payment Act, 1972
Billing carrier *v.* consignee's certification
Under Transportation Payment Act of 1972, 49 U.S.C. 66(c) (1976), and Government payment regulations, "Properly accomplished" GBL is one on which billing *carrier* certifies that it made delivery, there being no need for *consignee's* certificate ---- 81
Dependents
Overseas employees
Return to United States
Advance travel
Army employee may have orders issued authorizing advance return of of dependents and household goods. Cost studies need not be made when it is agency's intent not to allow dependent travel and transportation of household goods incident to the training assignment ---- 478
Drayage
Reimbursement basis
A civilian employee of the Air Force was authorized local drayage of household goods incident to his moving from local economy to Government quarters. The maximum weight which may be drayed at Government expense and charged as an operating expense of the installation concerned should not exceed 11,000 pounds consistent with 5 U.S.C. 5724(a)(2). Where the household goods shipment of the employee exceeds the maximum limitation as determined by an appropriate official, then the employee is liable for the excess costs ---- 336
Freight
Charges
Payment. (*See* **TRANSPORTATION, Payment** *and* **TRANSPORTATION, Bills, Payment**)

TRANSPORTATION—Continued

Household effects

Commutation

Documentation to support reimbursement claim Page

Employee had his household goods transported by private independent trucker with 40-foot freight hauling trailer for which employee paid $1,610 in cash. Employee submitted notarized statement of trucker attesting to shipment and also trucker's receipt for cash payment. In accordance with applicable provisions of the Federal Travel Regulations evidence submitted is not sufficient to establish constructive weight of goods for reimbursement on commuted rate basis, nor does it establish estimated weight approximating actual weight for reimbursement of actual expenses incurred 148

Military personnel

"Do It Yourself" movement

Benefits entitlement

Non-change-of-station moves

Properly directed moves without a change in duty station by military members under 37 U.S.C. 406(e) are not precluded from the do-it-yourself household goods movement program authorized by section 747, Department of Defense Authorization Act, 1976. Section 747 refers only to 37 U.S.C. 406(b) (change of station moves); however, transportation of household goods under section 406(e) is that authorized under section 406(b) and neither the legislative history nor implementing regulations show an intent to preclude section 406(e) moves from the program 145

Weight evidence

The military services' requirement, that in order to qualify for an incentive payment unde the do-it-yourself household goods moving program a member must have certified scale weight certificates establishing the weight of the goods, is in accordance with the law and implementing regulations. Therefore, although the move may have been only a short distance, was accomplished without a motor vehicle, and the use of a commercial scale was impractical and a Government scale was not available at the time of the move, the incentive payment may not be made without the weight certificates. In the absence of a change in regulations, the weight certificate requirement will be applied since this is a matter for administrative determination 145

Procurement of services

Deviations from DAR. (*See* **DEFENSE ACQUISITION REGULATION, Deviations**)

Overseas employees

Multiple-location shipments

Reimbursement basis

Employee entitled to ship household goods to overseas duty post may ship goods from or to any locations he wishes but maximum expense borne by Government is limited to cost of a single shipment by the most economical route from employee's last official station to his new official station 30

TRANSPORTATION—Continued
Household effects—Continued
Overseas employees—Continued
Transfers
Advance shipments
Incident to completion of service agreement Page

An employee of Dept. of the Army serving in Korea returned 5,189 pounds of his household goods to his place of actual residence in New York prior to his transfer from Korea. Upon a subsequent permanent change of station he shipped 350 pounds of unaccompanied baggage from Korea to new duty station in Virginia and requested reimbursement for shipment of 10,860 pounds from New York to new duty station. His prior shipment of household goods from Korea to place of actual residence is authorized under 5 U.S.C. 5729(a) and Federal Travel Regs. but was in lieu of, not in addition to, his later entitlement upon his transfer to Virginia. Shipment of unaccompanied baggage from Korea and household goods from New York to new duty station on subsequent change of station is authorized by 5 U.S.C. 5724 and Federal Travel Regs., but may not exceed cost of direct shipment from Korea to new duty station less the amount previously paid for prior shipment from Korea to actual residence in New York State under 5 U.S.C. 5729 517

Agency within the U.S.
Shipment to other than new duty station

Army employee may be reimbursed constructive cost of transportation from his old to his new duty station, less the cost of transportation from his old duty station to his place of residence 478

Increases
Renewal agreement at same post

When maximum weight allowance for transportation or nontemporary storge of household goods for transferred employees without immediate family is increased during overseas employee's tour of duty, employee who enters into renewal agreement at same post may be authorized increased weight allowance at time of renewal for nontemporary storage or shipment of household goods up to new maximum less initial shipment ... 30

Return travel for separation

Employee who fulfills period of service at overseas post or who is excused from this by agency is entitled to ship weight of household goods up to maximum weight under laws and regulations at time he separates. Travel and transportation rights and liabilities vest at time it is necessary to perform directed travel and transportation; therefore, laws and regulations in effect at time employee reports for duty have no applicability to return travel and transportation at a later date 30

Weight limitation
Local movement

A civilian employee of the Air Force was authorized local drayage of household goods incident to his moving from local economy to Government quarters. The maximum weight which may be drayed at Government expense and charged as an operating expense of the installation concerned should not exceed 11,000 pounds consistent with 5 U.S.C. 5724 (a)(2). Where the household goods shipment of the employee exceeds the maximum limitation as determined by an appropriate official, then the employee is liable for the excess costs 336

TRANSPORTATION—Continued
Household effects—Continued
Storage. (*See* **STORAGE, Household effects**)
Weight
Net
Determination
Containerized *v.* craterized shipments Page

Lift vans and overflow box are "containers" within meaning of paragraph 2-8. 2b (3) of Federal Travel Regulations (FTR); thus net weight of household goods shipment is determined by applying 85 percent to gross weight and subtracting weight of containers---- 300

Packing materials' inclusion
Containerized shipment

Under usual household goods carriers' Tender of Service net weight of containerized shipment contains weight of packing and household goods---- 300

Tare
Determination

When tare (container) weight is not on Government bill of lading (GBL), it is determined by subtracting net weight from gross weight---- 300

Weight limitation
Administrative determination

The question of whether and to what extent authorized weights have been exceeded in the shipment of household effects is a question of fact considered to be a matter primarily for administrative determination and ordinarily will not be questioned in the absence of evidence showing it to be clearly in error. The Air Force has correctly made that determination based on regulations which provide for constructive weight based on 7 pounds per cubic foot of properly loaded van space. Lower cubic foot measurement of 5.7 pounds within Germany pertains only to military members and is not applicable here---- 336

Excess cost liability

Assessment of excess weight against employee was improper where excess weight was determined on basis of net weight shown on GBL; proper formula for determining net weight of containerized shipment in paragraph 2-8.2b(3) of FTR results in net weight below employee's authorized maximum weight---- 300

Gross *v.* net limitation

Lift vans and overflow box are "containers" within meaning of paragraph 2-8.2b(3) of Federal Travel Regulations (FTR); thus net weight of household goods shipment is determined by applying 85 percent to gross weight and subtracting weight of containers---- 300

Overseas employees. (*See* **TRANSPORTATION, Household effects, Overseas employees, Weight limitation**)
Two shipments
Overseas and storage in U.S.

A civilian employee of the Air Force was authorized local drayage of household goods incident to his moving from local economy to Government quarters. The maximum weight which may be drayed at Government expense and charged as an operating expense of the installation concerned should not exceed 11,000 pounds consistent with 5 U.S.C. 5724 (a)(2). Where the household goods shipment of the employee exceeds the maximum limitation as determined by an appropriate official, then the employee is liable for the excess costs---- 336

TRANSPORTATION—Continued

Payment

To other than destination carrier Page

Where billing carrier was issued GBL, it actually performed major part of transportation services, and presented properly accomplished GBL showing it as delivering carrier, Government agency correctly paid origin (billing) carrier, even though claimant actually performed delivery 81

Rates

Less than truckload (LTL)

Applicability to various LTL quantities

Abbreviation "LTL," under "scale" column of tariff's rate table, means quantity of freight of less than 500 pounds; "LTL," as well as other weight groups, expressly made subject to LTL classes 135

What constitutes

Governing Classification's definition

General Services Administration properly based deduction action on quotation which offers rates on all less than truckload quantities, as term is defined in governing Classification 135

Section 22 quotations

Construction

"LTL rate or class"

Quotation expressly subject to NMFC

Definition of less than truckload, "LTL," as published in National Motor Freight Classification, controls interpretation of "LTL rate or class" in quotation, since quotation is expressly governed by Classification 135

Less than truckload (LTL) quantities

Applicability of LTL class rate to various LTL quantities

Applicability of quotation, referring to "currently applicable class 55 LTL rates" in tariff, is not limited to class 55 LTL rates on "LTL" weight line of rate table but extends to class 55 LTL rates corresponding to any weight scale of less than truckload quantity 135

Travel agencies

Restriction on use

Applicable regulations

Notice status

Civilian employees of Dept. of Defense

Civilian employee of Department of Army who purchased transportation with personal funds from travel agent in connection with official travel may be reimbursed under principle of this Office embodied in paragraph C2207–4 of Vol. 2, Joint Travel Regulations, that a Government employee, unaware of the general prohibition against use of travel agents, who inadvertently purchases transportation with personal funds from a travel agent, may be paid for travel costs which would have been properly chargeable had requested service been obtained by traveler directly from carrier. 59 Comp. Gen. 433 is modified 445

Violations by Government travelers

Reimbursement claims

Criteria for allowance

In the future this Office will review claims of Government travelers who violate the general prohibition by purchasing transportation with personal funds from a travel agent and claim reimbursement under exceptions such as that provided in paragraph C2207–4 of Vol. 2, Joint Travel Regulations, to determine not only that the use of the travel

TRANSPORTATION—Continued
Travel agencies—Continued
Restriction on use—Continued
Violations by Government travelers—Continued
Reimbursement claims—Continued
Criteria for allowance—Continued Page

agent was inadvertent and resulted from a lack of notice of the general prohibition, but also that these contentions regarding the use of the travel agent were themselves reasonable in the circumstances of the individual traveler's claim. 59 Comp. Gen. 433 is modified 445

TRANSPORTATION DEPARTMENT
Regulations
Hazardous materials
Compliance determination
Military procurements

Protest that solicitation item description eliminates cylinder safety test requirements and allows use of cylinders not designed, manufactured, marked, or shipped in accordance with Department of Transportation (DOT) regulations on hazardous material is denied. Contracting activity has provided for adequate testing, and DOT regulations provide that material consigned to Department of Defense (DOD) must be packaged either according to DOT regulations or in container (cylinder) of equal or greater strength and efficiency, as required by DOD regulations. Contracting agency has determined that cylinders meet or exceed DOT requirements and need not apply for DOT exemption 504

TRAVEL AGENCIES (*See* **TRANSPORTATION, Travel agencies**)

TRAVEL EXPENSES
Actual expenses
Reimbursement basis
Death of employee on temporary duty

Where application of rule stated in this decision in regard to termination of deceased employee's per diem entitlement precludes reimbursement for authorized expenses actually incurred by employee and definitely intended for coverage by the per diem entitlement, agency may find that employee's death comes within the scope of our decision *Snodgrass and VanRonk*, 59 Comp. Gen. 609. Accordingly, prepaid expenses incurred by a deceased employee may be reimbursed by his agency to the same extent as if the temporary duty had been cancelled or curtailed. 59 Comp. Gen. 609, modified (extended) 53

Lodging
Dual
Emergency, etc. conditions

An individual (employed as a pilot) through no fault of his own and in circumstances beyond his control spent the night away from the temporary duty location to which he expected to return. Lodging expenses both at and away from that temporary duty station may be paid. Also, lodging costs may be paid if the pilot unexpectedly remains overnight at his permanent station. Payments in these cases must be based on a determination by the appropriate agency official that the employee acted reasonably in retaining the lodgings at his temporary duty station. 55 Comp. Gen. 690, B–164228, June 17, 1968, and similar cases are overruled; 59 Comp. Gen. 609, 59 *id.* 612, and 51 *id.* 12 are modified (extended) 630

TRAVEL EXPENSES—Continued
Actual expenses—Continued
Reimbursement basis—Continued
Ten-hour rule
Applicability
High-rate area travel Page

Although Administrator of General Services (GSA) is authorized to promulgate Federal Travel Regulations (FTR), the General Accounting Office (GAO) must interpret the laws and regulations in settling claims. Guidance issued by Assistant Administrator of General Services interpreting FTR does not bind agencies as do the FTR but GAO will accord great deference to such guidance. Since GSA employee relied on GSA guidance interpreting FTR as precluding application of 10 hour rule in case of actual subsistence reimbursement, and since decision B–184489, April 16, 1976, was similarly interpreted by a number of agencies, the 10 hour rule shall not be applied to employee or in cases of actual subsistence reimbursement prior to issuance of 58 Comp. Gen. 810, but the rule shall apply after September 27, 1979, the date of issuance of our decision 132

Air travel
Excursion rates
Delay in travel to obtain

Employee who traveled on a nonworkday in order to take advantage of a reduced air fare may be considered in a travel status and authorized and paid an extra day's actual subsistence where the cost of subsistence is more than offset by the savings to the Government through use of the reduced fare. Agency's bulletin, to the extent that it is inconsistent with the Federal Travel Regulations, need not be followed 295

Fly America Act
Applicability
Exceptions
Repatriation loan cases

The "Fly America Act," 49 U.S.C. 1517, does not require the use of United States air carriers in repatriation cases where the individuals are loaned funds by the Department of State for their subsistence and repatriation. Transportation procured by the individual with funds borrowed from an executive department is not Government-financed transportation to which the "Fly America Act" applies 716

Employees' liability
Travel by noncertificated air carriers
Government-contractor booking error

Employees who travel overseas on foreign air carrier when service by U.S. air carriers is available in violation of Fly America Act are personally liable for cost even though they may have been ignorant of the Act and relied upon arrangements made by Government contractor. However, if contract contains provision by which contractor may be held accountable for such scheduling errors, employee's liability may be shifted to contractor 718

TRAVEL EXPENSES—Continued
Air travel—Continued
Foreign air carriers
Prohibition
Availability of American carriers
First-class travel restriction Page

With the limited exceptions defined at paragraph 1–3.3 of the Federal Travel Regulations, Government travelers are required to use less than first-class accommodations for air travel. In view of this policy, a U.S. air carrier able to furnish only first-class accommodations to Government travelers where less than first-class accommodations are available on a foreign air carrier will be considered "unavailable" since it cannot provide the "air transportation needed by the agency" within the meaning of paragraph 2 of the Comptroller General's guidelines implementing the Fly America Act..... 34

Reservation penalties *v.* voluntary space release
Compensation
Employee *v.* Government's entitlement
Travel before September 3, 1978

Employee, while traveling on official business on May 23, 1976, received $174.07 for voluntarily vacating his seat on an overbooked air flight. Our decisions which allow an employee to keep voluntary payments do not apply prior to September 3, 1978, the effective date of the Civil Aeronautics Board regulations encouraging payment for voluntarily vacating a seat on an overbooked flight. The payment, which was turned over to the Government, may not be returned to the employee.. 9

Constructive travel costs
Commercial rental vehicle use not authorized

Under travel orders authorizing travel by common carrier, employee performed portion of renewal agreement travel by rent-a-car. Employee may be reimbursed expenses for unauthorized mode of travel limited to constructive cost of travel by common carrier. Since travel was not performed by privately owned vehicle (POV), reimbursement for rental car expenses is not limited to the lower cost of mileage for travel by POV even though Department of Defense regulation provides that, where less costly than common carrier, renewal agreement travel by POV will be considered advantageous to the Government..... 38

Fares
Taxicabs
To and from common carrier terminals
Constructive cost reimbursement

Employee on temporary duty was driven by friend in latter's automobile to airport for return flight to official duty station. Employee's claim for mileage and parking fee may be paid to the extent it does not exceed cost of taxicab fare and tip. Decisions limiting reimbursement for travel with private party to actual expenses paid to private party apply only to regular travel on temporary duty, not travel to and from common carrier terminals..... 339

TRAVEL EXPENSES—Continued

First duty station

Reimbursement

Appointment to former Canal Zone Page

Employee, who was hired as new appointee to position in the area formerly known as the Canal Zone, was erroneously authorized reimbursement for temporary quarters subsistance expenses although such reimbursement is not permitted under 5 U.S.C. 5723 and para. 2–1.5g (2) (c) of the Federal Travel Regulations (FPMR 101–7) (May 1973). Employee is not entitled to payment for temporary quarters as Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations. Employee must repay amounts erroneously paid as Government is not estopped from repudiating erroneous authorization of its agent. There is no authority for waiver under 5 U.S.C. 5584 ---- 71

Training duty prior to reporting

Designation as permanent station

Propriety

Director of FBI requests reconsideration of ruling in *Cecil M. Halcomb*, 58 Comp. Gen. 744, that new appointees assigned to training in Washington, D.C., may not have Washington designated as first permanent duty station so as to entitle them to travel and relocation expenses from Washington, D.C., when assigned to permanent duty station after training. No basis exists to alter this ruling since assignment for training is not a permanent assignment, and employee must bear expense of reporting to his first permanent duty station. 58 Comp. Gen. 744, amplified ---- 569

What constitutes

Brief assignment to home office following training

Permanent *v.* temporary duty status

New appointees initially assigned to training in Washington, D.C., are responsible for bearing expense of reporting to their first permanent duty assignments following training. FBI may not lessen that responsibility by assigning them to 1 month of so-called "permanent duty" at convenient location following completion of training and prior to intended permanent duty assignment. One month assignment following training should be treated as temporary duty en route to first duty station. 58 Comp. Gen. 744, amplified ---- 569

Headquarters

Inadequacy of transportation

Public transportation strike

Employees of Urban Mass Transportation Administration are not eligible for reimbursement of excess cost of commuting by private or General Services Administration rental car over normal public transit fares, despite complete public transit shutdown during April 1980 strike. Cost of transportation to place of business is personal responsibility of employee except in limited emergency circumstances not applicable here. B-158931, May 26, 1966, and 54 Comp. Gen. 1066 (1975), are distinguished ---- 420

TRAVEL EXPENSES—Continued

Interviews, qualifications, determinations, etc.

Competitive service positions

Reimbursement prohibition

Civil Service Reform Act effect Page

Office of Personnel Management (OPM) requests that we modify our rule which prohibits agencies from paying preemployment interview travel expenses of applicants for the competitive service except in limited circumstances. In view of the increasing delegation by OPM of personnel management responsibilities to agencies under the Civil Service Reform Act of 1978, and since our decisions limiting the payment of preemployment interview travel expenses rely on outmoded concepts of an agency's management responsibility, we now hold agencies may pay the preemployment interview travel expenses of applicants for the competitive service subject to guidelines or standards imposed by OPM. 54 Comp. Gen. 554, 31 *id.* 175, and B-172279, May 20, 1971, overruled 235

Leaves of absence

Personal expenditures

Employee who purchased "super-saver" airline ticket and arranged to take annual leave in anticipation of a personal trip may not be reimbursed for additional air travel expense incurred when employee's official duties caused him to make alternate flight reservations which disqualified him from receiving the "super-saver" fare since there is no legal basis for the claim 629

Military personnel

Change of station status

Member's return to old station

To complete moving arrangements, etc.

A member of the uniformed services may be paid for travel from his temporary duty station to his old permanent duty station when permanent change of station follows a period of duty at a temporary duty station, but such payments may be made only if the Joint Travel Regulations are amended to authorize travel in such circumstances and only if authorization of return to old permanent station is based on the need to arrange transportation of dependents, household or personal effects or a privately owned conveyance and may not be authorized for purely personal reasons such as a visit or vacation. 57 Comp. Gen. 198, amplified 564

Leaves of absence

Officially interrupted

Application of 24-hour rule

Current regulations, which limit a service member's entitlement to return travel and transportation expenses upon recall from authorized leave of 5 days or more due to urgent unforeseen circumstances only if recall is within 24 hours of departure from the duty station, may be amended to authorize entitlement for recalls after 24 hours. Such amendment should set forth definite criteria to be followed if authorization of expenses is to be allowed after 24 hours. Modifies in part 46 Comp. Gen. 210 648

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

TRAVEL EXPENSES—Continued
Military personnel—Continued
Release from active duty
"Place from which ordered to acive duty" determination
Service academies, etc. status Page

For the purpose of travel and transportation allowances under 37 U.S.C. 404, and implementing regulations, on separation the place from which ordered to active duty, in the case of a midshipman or cadet at a service academy or civilian college or university, is the place where he attains a military status or where he enters the service, and generally this would be at the academic institution and not his home of record, since up to the time he is appointed a cadet or midshipman he is a civilian..... 142

Restricted station assignments
Travel to "designated place" between military assignments
Moving arrangement, etc. purpose
Regulation authority

Dependents of a military member are located at a designated place away from his duty station because of the member's isolated duty, unusually arduous duty, or unaccompanied overseas tour. Travel by the member to the designated place upon assignment to the permanent duty station to which he is not authorized to take his dependents and upon his next permanent change of station at Government expense may be authorized by an amendment to the Joint Travel Regulations, but the authorization of travel to the designated place must be based on the member's need to assist in arranging for transportation of dependents, household or personal effects, or privately owned conveyance..... 562

Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Temporary duty
Reimbursement
"Lodgings-plus" system. (*See* **SUBSISTENCE, Per diem, Military personnel, Temporary duty, "Lodgings-plus" system**)
Transfer pending
Return to old station
Moving arrangements, etc. purpose

A member of the uniformed service is detached from his permanent duty station upon being assigned to temporary duty and the new permanent duty station is not designated until the end of temporary duty assignment. Member may be authorized travel at Government expense from the temporary duty station to the old duty station for the purpose of arranging for relocation of dependents and personal effects resulting from the permanent change of station and then travel to the new permanent duty station. The date of the detachment from the old permanent duty station does not affect this entitlement. 57 Comp. Gen. 198, amplified.... 564

Transfers
To ship or other mobile unit
After home port change announcement
Travel entitlements

When the home port of a ship or other mobile unit to which a Navy member is being transferred is in the process of being changed the member may accompany his dependents or otherwise travel to the newly designated home port prior to reporting to the ship or other mobile unit if that travel is authorized by amendment to the Joint Travel Regulations, provided the travel is necessary to assist in the transportation of the member's dependents or property..... 561

TRAVEL EXPENSES—Continued

Overseas employees

Renewal agreement travel

Unauthorized mode

Rented car

Constructive cost basis of reimbursement Page

Under travel orders authorizing travel by common carrier, employee performed portion of renewal agreement travel by rent-a-car. Employee may be reimbursed expenses for unauthorized mode of travel limited to constructive cost of travel by common carrier. Since travel was not performed by privately owned vehicle (POV), reimbursement for rental car expenses is not limited to the lower cost of mileage for travel by POV even though Department of Defense regulation provides that, where less costly than common carrier, renewal agreement travel by POV will be considered advantageous to the Government 38

Return for other than leave

Separation

Laws and regulations applicable

Travel and transportation rights

Employee who fulfills period of service at overseas post or who is excused from this by agency is entitled to ship weight of household goods up to maximum weight under laws and regulations at time he separates. Travel and transportation rights and liabilities vest at time it is necessary to perform directed travel and transportation; therefore, laws and regulations in effect at time employee reports for duty have no applicability to return travel and transportation at a later date 30

Transfers

Agency within U.S.

Employee who had fulfilled overseas service agreement with first agency transferred to position in the United States with another agency and thereafter breached service agreement with second agency. Notwithstanding violation of service agreement, employee is not required to refund transfer expenses paid by second agency where those were solely for transportation of household goods and employee's own travel, since he was entitled to such expenses as a consequence of having satisfied overseas service agreement with first agency 308

Private parties

Invitational travel on Federal Government business

Internal Revenue Service may use appropriated funds to buy lunches for guest speakers on program held in observance of National Afro-American (Black) History Month, under 5 U.S.C. 5703, which provides authority for per diem or subsistence expenses for individuals serving without pay 303

Temporary duty

Dual lodgings

Reimbursement basis

Emergency, etc. conditions

An individual (employed as a pilot) though no fault of his own and in circumstances beyond his control spent the night away from the temporary duty location to which he expected to return. Lodging expenses both at and away from that temporary duty station may be paid. Also, lodging costs may be paid if the pilot unexpectedly remains overnight at his permanent station. Payments in these cases must be based on a determination by the appropriate agency official that the employee acted reasonably in retaining the lodgings at his temporary duty station. 55 Comp. Gen. 690, B–164228, June 17, 1968, and similar cases are overruled; 59 Comp. Gen. 609, 59 *id.* 612, and 51 *id.* 12 are modified (extended) 630

TRAVEL EXPENSES—Continued
Temporary duty—Continued
Lodgings and/or meals
Procured by contracting officer
Appropriations limitation Page

A Government contracting officer may contract for rooms or meals for employees traveling on temporary duty. Appropriated funds are not available, however, to pay per diem or actual subsistence expense in excess of that allowed by statute or regulations, whether by direct reimbursement to the employee or indirectly by furnishing the employee rooms or meals procured by contract. Because of the absence of clear precedent, the appropriations limitation will be applied only to travel performed after the date of this decision ---------- 181

Furnished without charge
Per diem rate establishment

When a contracting officer procures lodgings or meals for an employee on temporary duty and furnishes either to the employee at no charge, the lodgings plus system is normally inappropriate and a flat per diem at a reduced rate should be established in advance ---------- 181

Transfers
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Travel agencies. (*See* **TRANSPORTATION, Travel agencies**)
Vouchers and invoices. (*See* **VOUCHERS AND INVOICES, Travel**)

UNIFORMS
Government Printing Office
Security police
Acquisition time
Overtime compensation status

Security police employees of the United States Government Printing Office who, as a result of their work schedule, must acquire their uniforms during their off-duty hours are not entitled to overtime compensation for the time spent in acquiring their uniforms. The time involved does not constitute "overtime work" for the purposes of 5 U.S.C. 5544 (1976). In addition, the time spent by the employees is not compensable as overtime hours worked under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq*--- 431

UNIONS
Agreements
Wage increases
Supervisory employees' entitlements

Long-standing practice of paying double overtime to foremen whose pay is not negotiated but is fixed at 112.5 percent of negotiated journeyman base pay was discontinued because 57 Comp. Gen. 259 held that overtime is limited by 5 U.S.C. 5544 to time and a half, notwithstanding section 9(b) of Public Law 92-392 preserving previously negotiated benefits. Foremen claim restoration of double overtime because section 704(b) of Public Law 95-454 overturned holding and permitted double overtime for nonsupervisory employees who negotiate wages. While not directly covered by sections 9(b) or 704(b), foremen may continue to receive double overtime since broad purpose of these statutory provisions was to preserve prevailing rate practices existing before their enactment. Modifies (extends) 59 Comp. Gen. 583 (1980) ---------- 58

UNIONS—Continued
Federal service
Dues
Allotment for
Agency's wrongful discontinuance
Settlement of unfair labor practice complaint Page

If an employee authorizes the deduction of union dues from his pay, a Federal agency is obligated to withhold the amount from the employee and pay it over to the union. The payment of the dues is a personal obligation of the employee, and where the agency wrongfully fails to withhold the dues and later reimburses the union pursuant to the settlement of unfair labor practice charges, the agency must either collect the dues from the employee or waive collection of the debt. Modifies B–180095, Oct. 2, 1975 93

VEHICLES
Damage claims
Commuting to work
Transit strike

Government employees who were involved in accidents while commuting to and from work during New York transit strike did not damage their vehicles "incident to service" and cannot make a claim cognizable under the Military Personnel and Civilian Employee's Act of 1964. Commuting is a personal expense which in the absence of extremely unusual circumstances may not be borne from appropriated funds 633
Rental
Unauthorized
Constructive cost basis of reimbursement

Under travel orders authorizing travel by common carrier, employee performed portion of renewal agreement travel by rent-a-car. Employee may be reimbursed expenses for unauthorized mode of travel limited to constructive cost of travel by common carrier. Since travel was not performed by privately owned vehicle (POV), reimbursement for rental car expenses is not limited to the lower cost of mileage for travel by POV even though Department of Defense regulation provides that, where less costly than common carrier, renewal agreement travel by POV will be considered advantageous to the Government 38

VOLUNTARY SERVICES
Prohibition against accepting

In the absence of specific statutory authority, Federal agencies are prohibited from accepting voluntary service from individuals except in certain emergencies. Whenever an agency is authorized by statute to accept voluntary personal services as an exception to that prohibition, the specific terms of the particular statutory authorization govern the conditions of the arrangement, including the scope of services which may be performed by the volunteers and the matter of whether the agency may pay for the volunteers' transportation, meals, and lodgings. 31 U.S.C. 665(b) 456

VOLUNTARY SERVICES—Continued
Prohibition against accepting—Continued
Statutory exceptions
Civil Service Reform Act of 1978
Student volunteers Page

Section 301(a) of the Civil Service Reform Act of 1978, 5 U.S.C. 3111, authorizes a limited exception to the prohibition against the acceptance of voluntary service by Federal agencies, by allowing agencies to establish certain education programs for high school and college student volunteers. Sponsoring agencies may not pay for the student volunteers' traveling or living expenses, since the statute and its legislative history make no provision for payment of those expenses, and the statute specifically excludes the volunteers from being considered Federal employees for most purposes including travel and transportation entitlements 456

VOUCHERS AND INVOICES
Travel
False or fraudulent claims

Since acquittal on criminal charges may merely involve a finding of lack of requisite intent or failure to meet the higher standard of proof beyond reasonable doubt, doctrine of *res judicata* does not bar the Government from claiming in later civil or administrative proceeding that certain items on employee's voucher were fraudulent 357

WAIVERS
Debt collections. (*See* **DEBT COLLECTIONS, Waiver**)

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
Grant-funded procurements
Competition requirement
Subway project
Lease/purchase agreement
Merits of complaint

Where each offeror's proposal deviated from mandatory, material, additional-rent requirement of grantee's prospectus, grantee should not have considered any proposal as acceptable. Since grantee is willing to accept proposals with such conditions, grantee should so revise prospectus and permit offerors to compete on common basis. In view of this conclusion, other bases of complaint need not be decided; however, several matters to be considered by grantee prior to reopening competition are pointed out 618

WORDS AND PHRASES
"Active status"

Navy officer retired under 10 U.S.C. 6323 may receive credit in the multiplier used in computing his retired pay for the full 57 inactive service points he earned in a year in which he also served on active duty. While on active duty he was in an active status, not an inactive status, and regulations governing the maximum number of points which may be earned require prorating of maximum allowable only on the basis of excluding periods of inactive status 537

Benchmarking

When benchmark programs appear to represent system workload and, combined with functional demonstration, provide reasonable basis for identifying offeror with lowest life-cycle cost, use of benchmark as evaluation tool is within discretion of procuring agency 113

WORDS AND PHRASES—Continued

"Budgetary resource"

The inventory in the General Services Administration's (GSA) General Supply Fund does not constitute a budgetary resource against which obligations may be incurred. The Antideficiency Act, 31 U.S.C. 665, is violated when obligations are incurred in excess of budgetary resources 520

"Descriptive literature" definition

Decision is affirmed upon reconsideration where protester has failed to show that decision was as matter of law incorrect in holding that descriptive literature may be required only in connection with products and not services since applicable regulations and General Accounting Office decisions are clear on this point 28

"Encampment"

Employee of the District of Columbia was ordered to perform 20 days of full-time training duty and 15 days of annual field training as a member of the District of Columbia National Guard. Since full-time training duty directed under the authority of 32 U.S.C. 502 is active duty, employee is entitled to military leave under 5 U.S.C. 6323(a) for 15 of the 20 days of such duty. Because the additional 15 days of annual field training was ordered under the authority of title 39 of the District of Columbia Code, applicable specifically to the District of Columbia National Guard, he is entitled to military leave for that encampment under 5 U.S.C. 6323(c) 381

"Front pay"

As a result of an employment discrimination suit brought by certain female employees, the Government Printing Office (GPO) was ordered in a court judgment to pay the plaintiffs back pay for past economic harm and an added increment of pay above that to which they were otherwise entitled, for continuing economic harm until a certain number of plaintiffs were promoted. The so-called award of "front pay" in this instance amounts to damages and should be paid from the permanent indefinite appropriations provided in 31 U.S.C. 724a. Agency appropriations are not available to pay compensation above the amount prescribed for the particular job level in question. 55 Comp. Gen. 1447 (1976) is distinguished 375

"Interdepartmental waiver" doctrine

Dept. of Interior requests GAO's views on applicability of the "interdepartmental waiver" doctrine when an executive department relinquishes a withdrawn area under the Federal Land Policy and Management Act of 1976 (Act) (43 U.S.C. 1701 *et seq.* (1976)) and on proposed amendment to the public land regulations (43 C.F.R. 2374.2(b)). Doctrine ordinarily requires that restoration costs for property of one department which has been used by another department be borne by the department retaining jurisdiction over the property since restoration would be for future use and benefit of loaning department. Interior does not benefit in the sense contemplated by the doctrine from restoration of public lands. Accordingly, doctrine does not apply to withdrawn property. 59 Comp. Gen. 93 (1979) is distinguished 406

"Less than truckload (LTL)"

Definition of less than truckload, "LTL," as published in National Motor Freight Classification, controls interpretation of "LTL rate or class" in quotation, since quotation is expressly governed by Classification 135

WORDS AND PHRASES—Continued

"Place from which ordered to active duty"

For the purpose of travel and transportation allowances under 37 U.S.C. 404, and implementing regulations, on separation the place from which ordered to active duty, in the case of a midshipman or cadet at a service academy or civilian college or university, is the place where he attains a military status or where he enters the service, and generally this would be at the academic institution and not his home of record, since up to the time he is appointed a cadet or midshipman he is a civilian. 142

Restitution: what constitutes

In distributing funds it has received under consent order with alleged violator of petroleum price and allocation regulations, Department of Energy must attempt to return funds to those actually injured by overcharges. Energy has no authority to implement plan to distribute funds to class of individuals not shown to have been likely victims of overcharges 15

Secretary of State's Confidential Fund

The "Fly America Act," 49 U.S.C. 1517, does not require the use of United States air carriers in repatriation cases where the individuals are loaned funds by the Department of State for their subsistence and repatriation. Transportation procured by the individual with funds borrowed from an executive department is not Government-financed transportation to which the "Fly America Act" applies 716

Tare weight—what constitutes and how determined

When tare (container) weight is not on Government bill of lading (GBL), it is determined by subtracting net weight from gross weight 300

"Workweek"

Three Navy employees completed temporary duty in Scotland on Friday, the last day of their "regularly scheduled administrative workweek," and returned to United States on Saturday, a nonworkday. Travel on nonworkday which is within 7-day workweek is compensable under Fair Labor Standards Act. "Regularly scheduled administrative workweek" is a concept under title 5, United States Code, and has no application to the FLSA 90

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