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[B-206209]

Buy American Act—Bids—Evaluation—Foreign Product Proposed—Responsiveness of Bid

Buy American Act, as implemented by the Defense Acquisition Regulation, provides a preference for suppliers of domestic end products, but does not require that bidders offering foreign end products be rejected as nonresponsive.

Buy American Act—Applicability—Waiver—Public Interest—Agreements With Foreign Countries—Place of Production *v.* Bidder's Nationality

Buy American Act is concerned with the place of manufacture, mining, or production, and not with the nationality of bidders. When determination and findings to waive the Act refers to items that are "produced" in a particular country, the waiver also will depend upon the place of production, not ownership or control of the firms bidding.

Buy American Act—Applicability—Waiver—Public Interest—Administrative Discretion—Defense Procurement

Decision to waive the Buy American Act is vested in the discretion of department heads.

Buy American Act—Foreign Bidders—Competitive Advantage—Equalization—Not Required

While foreign bidders may enjoy competitive advantages because they are exempt from U.S. requirements concerning equal opportunity, environmental protection, and the like, there is no Federal law which seeks to equalize such competition.

Contracts—Protests—Buy American Act Applicability—Awards to Foreign Firms—Policy Considerations

General Accounting Office will not review arguments in bid protest that award to a foreign bidder will adversely affect U.S. industrial preparedness base in the absence of any statute or regulation requiring award to domestic bidders.

Matter of: E-Systems, Inc., June 4, 1982:

E-Systems, Inc. protests the Army's proposed award of a contract to an Israeli firm, Tadiran Israeli Electronics Industries, Inc., because, among other things, it allegedly would violate the Buy American Act, 41 U.S.C. § 10a-d (1976), and injure the U.S. industrial preparedness base. We deny the protest in part and dismiss the remainder.

The Communications-Electronics Command, Fort Monmouth, New Jersey, issued invitation for bids No. DAAB07-81-B-0206 on August 20, 1981; it covered domestic and foreign military sales requirements for receivers and receiver/transmitters for radio sets in a series designated AN/VRC 12, as well as related technical data. Of 46 firms solicited, three responded; at opening on January 15, 1982, their prices were as follows:

Tadiran Israel Electronics Industries, Ltd	$38,994,797
E-Systems, Inc., Memcor Division	46,976,944
Cincinnati Electronics Corporation	64,864,491

E-Systems is the incumbent contractor for this equipment. Its first ground of protest is that the low bid should be considered nonresponsive because Tadiran is not offering a domestic end product,[1] as required by the Buy American Act. (The fact that Tadiran will produce the radio sets in Israel, with at least 50 percent foreign components, is not disputed.) The Act states that unless a department head determines that their purchase is inconsistent with the public interest or that their cost is unreasonable, domestic end products must be acquired for public use in the United States.

Alternatively, E-Systems argues that the Army should evaluate the low bid by adding a 50 percent differential to it, in accord with Defense Acquisition Regulation (DAR) § 6-104.4(b)(1) (Defense Acquisition Circular (DAC) No. 76-25, October 31, 1980). This would result in a total evaluated price of $58,492,195 for Tadiran, and would make E-Systems the low bidder.

The Army, however, has found Tadiran's bid responsive and has waived application of the 50 percent factor because of a 1979 Memorandum of Agreement between the U.S. and Israel which states that when certain listed defense services or supplies are to be provided, each country will evaluate offers from the other "without applying price differentials resulting from Buy National laws and regulations."

E-Systems argues that although Tadiran is incorporated and physically located in Israel, it does not qualify for the waiver because it is a subsidiary of General Telephone and Electronics [GTE] International. According to E-Systems, GTE owns 44 percent of Tadiran's voting stock and hence is in a position to control appointment of its general manager and managing director. Under these circumstances, E-Systems contends, Tadiran is a U.S. firm offering a foreign end product and must be evaluated accordingly.

E-Systems further argues that Tadiran's bid is either nonresponsive or ambiguous because the firm completed certifications regarding equal opportunity and affirmative action, clean air and water, and performance in a labor surplus area as "not applicable." E-Systems contends that the Army cannot enforce these requirements if Tadiran subcontracts in this country and cannot properly deter-

[1] Defined as an unmanufactured end product which has been mined or produced in the United States or an end product, manufactured in the United States, in which the cost of its qualifying country components and its components which are mined, produced, or manufactured in the United States exceeds 50 percent of all its components. *See* DAR § 6-001.1(c) (DAC 76-25).

mine, after bid opening, whether Tadiran intends to require its subcontractors to comply, since completion of the certifications makes this a matter of responsiveness, not responsibility.

E-Systems also argues that Tadiran will be unable to comply with or will escape the cost of complying with numerous other mandatory contract clauses, including the wage and hour provisions of the Walsh-Healey Act (41 U.S. Code 35 note); recovery of non-recurring costs in commercial sales; priorities, allocations, and allotments; pricing of adjustments; and affirmative action for disabled and Vietnam veterans and handicapped workers. E-Systems states that any foreign firm which is not subject to these socio-economic requirements gains an unfair competitive advantage and is, in effect, subsidized to the extent that it does not have to pay the cost of compliance. In addition, E-Systems argues that certain foreign military sales customers may refuse to accept Israeli products.

Finally, E-Systems argues that an award to Tadiran would injure the U.S. industrial preparedness base. E-Systems points out that the radio sets involved carry a No. 1 priority on the industrial preparedness planning list, and that E-Systems is both a planned producer and the only U.S. firm currently manufacturing this item. Contracts now being performed will be completed in 1983, the firm continues, and if E-Systems does not receive this award, startup time and costs for it or any other U.S. manufacturer to begin production in the future will far outweigh any savings that might be realized by an award to Tadiran.

Once it became apparent that a foreign firm was the low bidder, E-Systems argues, the Secretary of Defense should have negotiated a contract with E-Systems under authority of 10 U.S.C. § 2304(a)(16), which permits such action in the interest of national defense or industrial mobilization.

The Army and Tadiran have submitted lengthy responses to this protest, invoking treaties and law review articles as well as numerous cases which they believe support their points of view. Generally, we agree that E-Systems' protest is without legal merit.

With regard to the Buy American Act, we note first that the Act, as implemented by the DAR, provides a preference for suppliers of domestic end products by requiring application if an evaluation factor [2] to offers of foreign end products from all but qualifying countries.[3] Neither the Act nor the regulation, however, requires

[2] The evaluation factor to be applied is 50 percent of the offer, excluding duty, or 6 percent of the offer, including duty, whichever is greater; in some instances, not present here, a 12 percent factor is to be applied. *See* DAR § 6-104.4(b)(1).

[3] Qualifying countries are NATO nations and others with whom the U.S. has memorandums of understanding, defense cooperation agreements (such as that with Israel), or foreign military sale offset agreements. DAR § 6-001.5. The Secretary of Defense has determined that purchase of domestic end products would be either unreasonable as to cost or inconsistent with the public interest if the low evaluated bid results in the acquisition of foreign end products from a qualifying country. DAR § 6-104.4(a).

that a bidder offering a foreign end product be rejected. See generally *Air Plastics, Inc.,* 59 Comp. Gen. 678 (1980), 80-2 CPD 141.

In describing the domestic end products which qualify for preference, the Act refers to articles, materials, and supplies which have been "mined, produced, or manufactured" in the U.S. We therefore have held that the Act is concerned with the place of manufacture (or mining or production) and not with the nationality of the bidder. *Patterson Pump Company; Allis Chalmers Corporation,* B-200165 and B-200165.2, December 31, 1980, 80-2 CPD 453.

To determine the legality of the Army's waiver of the evaluation factor, E-Systems would have us look only to the memorandum of agreement, set forth at DAR § 6-1504.1, which refers to the desire of the two countries to provide "Israeli sources" improved opportunities to compete for Department of Defense procurements. We need not interpret the memorandum of agreement, in our opinion, because the determination and findings (D&F) of the Secretary of Defense must be controlling. See *Dosimeter Corporation of America,* B-189733, July 14, 1978, 78-2 CPD 35. Here, the Secretary's determination is that it would be inconsistent with the public interest to apply the restrictions imposed by the Buy American Act to "items *produced* in Israel" which are listed in an attachment to the memorandum of agreement (added). The three line items involved in the protest are on that list.

We believe the language of the D&F confirms the Secretary's intent to have any waiver of the Buy American Act depend upon the place of manufacture or production; it is the only construction that is consistent with the Act itself. Further, we note that the DAR section on foreign acquisitions does not consider ownership or control in determining whether a firm is a domestic or foreign concern; rather, it depends upon incorporation and principal place of business. *See* DAR § 6-001.7 (DAC 76-08, July 15, 1981).

E-Systems' arguments with regard to the Act's policies favoring use of American materials and labor, which it believes will be adversely affected, ignore the fact that there are countervailing foreign policies expressed in the determination and findings, which state that the agreement "will help to ameliorate the imbalance in defense trade" between the U.S. and Israel. A decision to waive or not to waive the Buy American Act, we have stated, often requires balancing of such conflicting policies, but in any event is vested in the discretion of the Secretary. *Dosimeter Corporation of America, supra*; see also *Self-Powered Lighting, Ltd.* 59 Comp. Gen. 298 (1980), 80-1 CPD 195.

We also find E-Systems' second broad basis of protest—the fact that Tadiran completed certain certifications as "not applicable"—without legal merit. The first of the certifications complained about, K.13, Preference for Labor Surplus Area Concerns, states that the procurement is not set aside for such concerns, but that an offeror's status as a labor surplus area concern may affect its enti-

tlement to award in case of a tie in evaluated offers. Tadiran, performing in Israel, obviously is not a labor surplus area concern and by not completing the certification it merely precluded consideration of itself as a labor surplus area concern.

Section K.19, Affirmative Action Compliance, and section K.20, Previous Contracts and Compliance Reports, require bidders to indicate whether they have developed and filed affirmative action programs or that they have not previously had contracts requiring such programs. In addition, if bidders have participated in previous contracts which were subject to equal opportunity clauses, they must indicate whether they have filed all required compliance reports. Section K.20 also requires bidders to represent that their proposed subcontractors will sign representations indicating submission of required compliance reports. However, the section specifically states that these representations "need not be submitted in connection with contracts of subcontracts which are exempt from the [equal opportunity] clause." Under DAR § 12-808(b) (DAC 75-20, September 17, 1979), contracts and subcontracts which are performed outside the United States, by employees who were not recruited within the United States, are exempt from equal opportunity requirements.

Section K.56, Clean Air and Water Certification, requires bidders to certify to three things: whether facilities to be utilized in performing the proposed contract are on the Environmental Protection Agency list of violating facilities; that the contracting officer will be notified of any notice of violation received before award; and that these same certifications will be included in every nonexempt subcontract. Under DAR § 1-2304.4(d) (1976 ed.), however, the requirements of the Clean Air Act and the Federal Water Pollution and Control Act do not apply to facilities located outside the United States.

We do not believe that Tadiran's insertion of "not applicable" is evidence of anything except its awareness of these exemptions, as applied to itself or to Israeli subcontractors. In its subcontracts with U.S. firms, it is bound by the general provisions of Section I of the solicitation, to which it has taken no exception. Section I.30 incorporates by reference DAR § 7-103.18(a), Equal Opportunity; under this clause, equal opportunity provisions must be included in every nonexempt subcontract or purchase order, so that they will be binding upon each subcontractor or vendor. Section I.42 incorporates by reference DAR § 7-103.29, Clean Air and Water; under this clause, the contractor is required to insert the substance of the clean air and water provisions in any nonexempt contract. Thus, when read in its entirety we believe the Tadiran bid is neither ambiguous nor nonresponsive.

As for E-Systems' arguments that domestic bidders, who must comply with socio-economic requirements, are treated unequally, there is no Federal law which seeks to equalize the competitive ad-

vantage which a foreign firm may possess because it is exempt from these requirements. *Fire & Technical Equipment Corp.*, B-203858, September 29, 1981, 81-2 CPD 266. Moreover, as Tadiran points out, it must comply with comparable Israeli laws and regulations, many of which may be equally as stringent as those in force here. Responding to similar arguments in *Self-Powered Lighting, Ltd.*, v. *United States*, 492 F. Supp. 1267, 1274 (S.D. N.Y. 1980), the court found them "merely a veiled contention that none of the exceptions to the Buy American Act should ever be applied." Surely, the court concluded, this was not the Congress' intention when it authorized exceptions to the Buy American Act, or the Secretary's when he exercised one of those exceptions. We believe the same analysis is applicable here.

On the foreign military sales issue, the Army states that unless a customer specifies a particular source, its agreements generally permit the Army to determine the supplier of items to be provided. The Army states that there is no evidence that any foreign military sales customer will refuse or has reserved the right to refuse Israeli goods. In any event, this is not a matter involving the legality of the proposed award.

E-Systems further agrues that the industrial preparedness base of the U.S. will be adversely affected by an award to Tadiran and that the Secretary of Defense should have negotiated with E-Systems upon finding that a foreign firm was the low bidder. (We note that for purposes of this argument, the protester considers Tadiran to be a foreign firm.) These arguments are not for our review.

The record includes a letter from the Deputy Secretary of Defense stating that the Army is conducting a complete review of the AN/VRC-12 industrial base. The Communications-Electronics Command and the Materiel Development and Readiness Command unequivocally state that the award to Tadiran will not have an adverse effect on industrial preparedness. The two commands point out that these particular radio sets are not included on the list of defense items in Dar § 6-1405 (DAC 76-25) which must be obtained from domestic sources; moreover, they state, planning agreements with E-Systems and three other firms for this item have expired, although they are being renegotiated. Accordingly, there is no legal requirement which would restrict award of this contract to a U.S. firm.

To the extent that the protester believes such a requirement should exist, this is a matter for consideration by the Congress, not our Office. Our review of bid protests is limited to determining whether procuring agencies adhere to the policies and procedures prescribed by existing laws and regulations. See *Hawaiian Dredging & Construction Company, a Dillingham Company; Gibbs & Hill, Inc.*, B-195101 and B-195101.2, April 8, 1980, 80-1 CPD 258, in which we rejected similar arguments that an award to a foreign firm *per se* would have a significant impact on U.S. energy policy.

After the requirements of the Buy American Act have been satisfied—or if the foreign bidder qualifies for a waiver—so long as the foreign bidder remains low, is found responsible, and its bid is responsive, there are no further barriers to award. *Fire & Technical Equipment Corp., supra.*

The decision to negotiate under 10 U.S.C. § 2304(a)(16) should have been made, if at all, before the Army issued an unrestricted invitation for bids. E-Systems is untimely in objecting to the decision to advertise, since under our procedures, any protest on this basis should have been filed before bid opening. 4 C.F.R. § 21.2 (1981). We cannot accept E-Systems' alternate argument that the Army should have decided to negotiate with it—on a sole-source basis—when it became apparent that Tadiran was the low bidder. The integrity of the competitive bidding system is hardly served by the Government's issuing an open invitation and, after a foreign firm has entered and won the competition, determining that it should be excluded.

The protest is dismissed with regard to the industrial preparedness and negotiation issues, and denied as to the remainder.

[B-196722.3]

Contracts—Negotiation—Offers or Proposals—Revisions—Late *v.* Revised Proposal—Line Item Addition

Where request for reconsideration of decision denying bid protest provides no basis to alter that decision, decision is affirmed.

Matter of: Control Data Corporation and KET, Incorporated—Reconsideration, June 7, 1982:

Control Data Corporation requests that we reconsider our decision, *Control Data Corporation and KET, Incorporated,* 60 Comp. Gen. 548 (1981), 81-1 CPD 531, in which we denied two protests against an Internal Revenue Service (IRS) award to Centennial Systems, Inc. (CSI) for peripheral equipment to support the IRS's Integrated Data Retrieval System.

We affirm our decision.

The procurement was for five line items of equipment: disk, tape, card reader, card punch, and line printer equipment. The request for proposals (RFP) permitted an offeror to propose an all-or-none price to furnish all line items provided it also priced all items individually. CSI initially offered to furnish disk and tape equipment. Its proposal was determined to be in the competitive range along with Control Data's proposal. Control Data priced all items and additionally quoted an all-or-none price.

Award to CSI, however, was based on an all-or-none price added in its best and final offer, in which that firm amended its proposal by furnishing prices for used Control Data card punch, card reader and line printer equipment. CSI did not address in detail how it

would maintain this equipment; it simply stated that it was offering Control Data equipment "with CDC [Control Data] maintenance."

Because the original protest presented a number of issues which no longer are contested, we summarize those on which Control Data's request for reconsideration is founded. Control Data protested that CSI's offer of the card punches, card readers and line printers constituted a late proposal. Control Data further asserted that CSI's best and final offer did not contain a required express certification that the equipment proposed complied with the RFP and did not include adequate information on how CSI would maintain the card punch, card reader and line printer equipment. As a result, Control Data complained, CSI was able to avoid a technical evaluation of the added portion of its offer, and discussions concerning it, forcing the IRS to continue discussions with CSI after the award. The maintenance problem, Control Data maintained, was resolved only because Control Data ultimately agreed to service any CSI-furnished Control Data equipment.

In denying the first of these bases of protest, we stated:

> We find Control Data's argument that the IRS's consideration of the CSI best and final offer must be limited to two line items unconvincing. The existence of the late proposal clause in the RFP establishes a cut-off date for the receipt of initial proposals, defining the field of competitors who may participate further in the procurement. * * * CSI's initial proposal * * * did respond to what was minimally acceptable and its proposal was considered by the IRS to be within the competitive range; CSI survived the initial round and was free in our view to make or to submit an alternate best and final offer which it believed would enhance its competitive position. We are aware of nothing which precluded CSI from doing so, provided it was willing to take the risk that the changes might result in rejection of its proposal. * * *
>
> Moreover, Control Data has not shown that it suffered any legal prejudice as a result of CSI's action. Control Data should not have known before the closing date for receipt of best and final offers, and presumably did not know, who its competition was, or whether its competitors had offered all five or only some of the RFP line items. Control Data was afforded an opportunity to submit a best and final offer and could have made any changes to its proposal which it believed necessary. Thus, it was placed at no disadvantage.

Regarding maintenance of the three items of equipment added in CSI's best and final offer, we pointed out that CSI offered the same type of card punches, card readers and line printers that Control Data offered and which IRS had been using for a number of years. We concluded that by the terms of CSI's offer, CSI had obligated itself to furnish Control Data maintenance meeting the RFP maintenance requirements. We saw no reason why the IRS should have questioned CSI's proposal. We concluded that Control Data's complaint essentially questioned CSI's responsibility, *i.e.,* the firm's ability to meet its commitment to furnish Control Data maintenance, and we stated our settled position that this Office will not review affirmative determinations of responsibility except in circumstances which did not apply to Control Data's protest.

Control Data's request for reconsideration reiterates its position that it was improper for the IRS to consider CSI's allegedly "late"

offer of the card punch, card reader, and line printer equipment. Control Data disagrees with our reasoning in our prior decision that, having survived the initial round of evaluation by the IRS, CSI was free to make or submit an alternate best and final offer which, by expanding the scope of its offer, would enhance its competitive positions. Control Data contends that CSI should not have been permitted to add items in its best and final offer because, even though CSI could revise any offer which existed, there was no prior offer with respect to these items. Moreover, Control Data seeks to distinguish the cases cited in our prior decision by arguing, in effect, that none of them directly refutes its belief that an offer for each line item had to be included in the initial proposal.

These contentions add little to Control Data's previous arguments. Whether line items may be added in a best and final offer is logically dependent upon whether individual line items should be understood as independent proposals which stand alone. Control Data continues to assert that they are independent, so that all must be offered initially. We do not agree.

As an initial matter, the late proposal rule, Federal Procurement Regulations (FPR) § 1-3.802-1(b) (1964 ed.), addresses only when a proposal is late and what consequences follow if it is. The rule does not define what is a proposal for purposes of the late proposal rule or state when, if ever, an offeror's submission in response to a multi-item request for proposals is to be treated as a series of separate proposals for purposes of applying the late proposal rule. Control Data, moreover, does not cite and our research has not disclosed any previously decided case which is controlling on this issue. (Thus, Control Data's argument that cases cited in our prior decision to illustrate general aspects of the negotiated procurement process were not controlling, while true, is inapposite.)

Our conclusion in our prior decision that CSI's best and final offer was not late is rooted in our view that we should avoid a construction of the late proposal rule which would require that we treat as separate proposals each offeror's response to every separate line item. In common usage, the term "proposal" is understood as embracing all that an offeror submits, regardless of the number of line items he addresses, unless he has indicated otherwise. Moreover, FPR § 1-3.802-1(d) states that:

> The normal revisions of proposals by offerors selected for discussion during the usual conduct of negotiations with such offerors are not to be considered as late proposals or later modifications to proposals * * *.

Revisions normally serve to enhance the attractiveness of a proposal by improving it. They are an accepted part of the negotiation process which benefits the Government because they permit changes to be made that result in a more favorable contract. We see no point in imposing constraints on the revision process that are not required by a specific regulation but which would prevent

an agency from considering beneficial changes that it is able to evaluate.

Control Data also reiterates its contention that the IRS's acceptance of CSI's all-or-none proposal was improper because CSI did not provide sufficient information to permit evaluation of the three items in isssue. Control Data argues that the IRS's acceptance of the proposal in effect improperly allowed CSI to avoid technical evaluation of and discussion concerning the equipment added.

First, we point out that to the extent Control Data believes the IRS was required to conduct an *initial* technical evaluation concerning all five line items (and that it was not sufficient to evaluate some initially, and evaluate others at a later time when they were proposed), its argument is merely an extension of its contention that CSI's proposal was late. As stated above, we conclude that CSI properly could add the line items to its proposal. The IRS in fact did evaluate CSI's best and final offer, and considered it to be acceptable with respect to the three added line items.

Second, concerning discussions, agencies are required to conduct discussions with offerors to permit them to learn of and correct deficiencies in their own proposals. *Logistic Systems, Incorporated,* 59 Comp. Gen. 548 (1980), 80-1 CPD 442. Discussions may afford agencies a better understanding of an offeror's proposal. However, we are aware of no requirement that permits one offeror to complain that an agency failed to conduct adequate discussions with its competitor.

Further, although as Control Data points out the RFP stated that offerors were to submit sufficient information with their proposals to permit the agency to evaluate them, this did not permit, much less require, the IRS to reject a proposal that left out information which the IRS concluded it did not need. CSI offered equipment for the three line items added in its best and final offer that was identical to that identified in the solicitation as acceptable and was the same equipment as the IRS had been using. It was, moreover, the same equipment as Control Data proposed. In the circumstances, as discussed in our prior decision, we believe that the IRS acted properly in this regard.

Control Data also argues that CSI promised maintenance which CSI could not have delivered because it had no subcontract with Control Data at the time. This fact did not, as our prior decision indicated, relieve CSI of its contractual duty to furnish the maintenance it promised; whether it could meet its obligation was a matter of responsibility which, as indicated, we do not consider except in limited circumstances.

Finally, Control Data contends that CSI's offer to furnish 24-hour per day on-call maintenance was not sufficient because the IRS had requested pricing on an 8-hour day, 5-day per week as well as 24-hour per day 7-day per week basis. Control Data asserts that CSI's

proposal restricted the Government's right to vary the extent of maintenance provided.

There is no merit to Control Data's position. Award was based on price; CSI's proposal was evaluated as low assuming maximum coverage, *i.e.,* 24 hours per day 7 days per week. Control Data thus was not prejudiced by CSI's selection.

In the circumstances, we see no basis to alter our original decision, which was affirmed. *Southwestern Bell Telephone Co.—Request for Reconsiderations,* B-202031, October 9, 1981, 81-2 CPD 291.

[B-205400]

Pay—Retired—Survivor Benefit Plan—Non-Regular Service—Retired Pay Eligiblity Loss—Effect on SBP Coverage Prior to Retirement

An Air Force Reserve officer elected Survivor Benefit Plan coverage for his children under new provisions added by Pub. L. 95-397 when he was notified of his eligiblity (except that he had not reached age 60) for non-Regular retired pay under 10 U.S.C. chapter 67. Subsequently he became eligible for retirement under 10 U.S.C. 8911 but was not retired. Later he was killed while on active duty for training. Although he lost eligibility for retired pay under chapter 67 upon becoming eligible for retirement under section 8911, his original election of coverage for his children continued in effect since he had not retired under section 8911 when he died. Therefore, the children are entitled to a Survivor Benefit Plan annuity under that election.

Pay—Retired—Survivor Benefit Plan—Non-Regular Service—Retired Pay Eligibility Loss—Reelection of SBP Coverage After Retirement

Under provisions added to the Survivor Benefit Plan by Pub. L. 95-397, members notified of their eligibility (except for not having reached age 60) for non-Regular retired pay under 10 U.S.C. chapter 67 may elect immediate coverage for dependents. If such a member becomes entitled to retired pay under another law the member losses eligibility for chapter 67 retired pay, but the Survivor Benefit Plan election remains effective until the member actually retires. He is then covered by other provisions of the Plan and may make a new election.

Matter of: Lieutenant Colonel Gene J. Petty, USAFR, Deceased, June 7, 1982:

This is in response to the request of the Deputy Chief, Accounting and Finance Division, Air Force Accounting and Finance Center, for an advance decision concerning the propriety of paying annuity payments under the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, to the children of Lieutenant Colonel Gene J. Petty, USAFR, Deceased. We find that the annuity payments may be made in this case.

The matter has been assigned submission No. DO-AF-1379 by the Department of Defense Military Pay and Allowance Committee.

Colonel Petty, a Reserve officer, apparently was notified in 1979 that he had completed the years of service (but had not reached the

age) required for retired pay under 10 U.S.C. chapter 67 (§§ 1331-1337), which provides for retired pay for non-Regular service. However, since he had not then reached age 60, as required to receive retired pay under chapter 67, he did not then begin receiving such pay. On October 3, 1979, Colonel Petty elected immediate coverage, for his children only, under the Reserve components provisions of the Survivor Benefit Plan which apply to members eligible for retirement for non-Regular service pursuant to 10 U.S.C. chapter 67. Thereafter, on January 3, 1980, he contacted the Air Reserve Personnel Center to determine whether he was eligible for retirement under 10 U.S.C. § 8911 which authorizes officers' retirement with 20 years' service. However, he was advised that he did not meet the qualifications for retirement under 10 U.S.C. § 8911 until January 10, 1980. On January 14, 1980, after having qualified for retirement under section 8911 but not having been retired, Colonel Petty was killed while on active duty for training. At the time, he did not have an eligible spouse beneficiary for the purposes of 10 U.S.C. § 1448(d), which provides a Survivor Benefit Plan annuity for an eligible spouse beneficiary (but not the children) of a member who dies on active duty, under certain circumstances. In light of the above, the Air Force submits two questions for our resolution.

1. Did Colonel Petty's election into the Survivor Benefit Plan under the Reserve components provisions become null and void when he qualified for retirement under [10 U.S.C. § 8911] a law other than 10 U.S.C. chapter 67, although he had not applied for or been granted retired pay?

2. Would the answer be the same if he had applied for and was receiving retired pay under a law other than 10 U.S.C. chapter 67?

The qualifications for participation in the Survivor Benefit Plan are contained in 10 U.S.C. § 1448(a)(1) (Supp. III, 1979), which provides in part that the following persons are "eligible to participate:"

(A) Persons entitled to retired or retainer pay.

(B) Persons who would be eligible for retired pay under chapter 67 of this title but for the fact that they are under 60 years of age.

(2) The Plan applies—

(A) to a person who is eligible to participate in the Plan under paragraph (1)(A) and who is married or has a dependent child when he becomes entitled to retired or retainer pay, unless he elects not to participate in the Plan before the first day for which he is eligible for that pay; and

(B) to a person who (i) is eligible to participate in the Plan under paragraph (1)(B), (ii) is married or has a dependent child when he is notified under section 1331(d) of this title that he had completed the years of service required for eligibility for retired pay under chapter 67 of this title, and (iii) elects to participate in the Plan (and makes a designation under subsection (e)) before the end of the 90-day period beginning on the date he receives such notification. A person described in subclauses (i) and (ii) of clause (B) who does not elect to participate in the Plan before the end of the 90-day period referred to in such clause shall remain eligible, upon reaching 60 years of age and otherwise becoming entitled to retired pay, to participate in the Plan in accordance with eligibility under paragraph (1)(A).

At the time Colonel Petty submitted his election to participate in the Plan in October 1979, he was eligible under section 1448(a)(1)(B)

and the Plan applied to him under section 1448(a)(2)(B). That is, he was eligible for retired pay under chapter 67 except that he had not reached age 60. Although Colonel Petty subsequently became eligible for retirement under 10 U.S.C. § 8911 shortly before his death, he was not retired under that provision nor any other, and thus was not entitled to retired pay. Therefore, at the time of his death he was not eligible for participation in the Plan under section 1448(a)(1)(A).

Although Colonel Petty's election to participate was effective when he submitted it in 1979, the question arises as to whether it remained effective once he qualified for retirement in January 1980 under 10 U.S.C. § 8911. That is because upon qualifying for retirement under section 8911, although not retired, he was no longer eligible for retired pay under 10 U.S.C. chapter 67 since one of the criteria a member must meet in order to be entitled to retired pay under chapter 67 is that:

> He is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve. 10 U.S.C. § 1331(a)(4).

See 41 Comp. Gen. 458 (1962), and B-161673, August 2, 1967.

The statutory provisions discussed here providing Survivor Benefit Plan coverage for a member eligible for retired pay under 10 U.S.C. chapter 67, except that he has not yet reached age 60, were added to the Plan in 1978. See Title II, Uniformed Services Survivors' Benefits Amendments of 1978, Public Law 95-397, September 30, 1978, 92 Stat. 843-848. The annuities provided and the charges to the member under the new provisions differ in amount from the other annuities and charges under the Plan. See 10 U.S.C. §§ 1451(a)(1)(B), 1451(b)(2), 1451(d), 1452(a)(2), and 1452(c)(2). Prior to the adoption of these provisions, a member eligible for chapter 67 retired pay could not provide Survivor Benefit Plan coverage for dependents until the member reached age 60 and began receiving retired pay.

Neither the statutory provisions nor the legislative history specifically address a situation such as is involved in Colonel Petty's case. However, it is clear that it was the overall intention to provide the opportunity for a member who meets the eligibility requirements for retired pay under chapter 67, except for age, to elect coverage for dependents before reaching age 60. In answer to the Air Force's two questions, it would not be in keeping with the legislative intent to hold that a member's election to participate, which was valid under 10 U.S.C. §§ 1448(a)(1)(B) and 1448(a)(2)(B) when it was made, becomes void when the member loses eligibility for chapter 67 retired pay by qualifying for retirement under another statute. Rather, it is our view that such an election remains effective until the member is actually retired and becomes entitled to retired pay under the other statute. At that time the member's eligibility for Survivor Benefit Plan protection would come under

the provisions of 10 U.S.C. §§ 1448(a)(1)(A) and 1448(a)(2)(A). He should then be given the opportunity to make a new election under those provisions, just as would any other retiring member, since the amounts of and charges for annuities flowing from those provisions are different.

In accordance with the above, since Colonel Petty had not been retired under 10 U.S.C. § 8911 at the time of his death, the Survivor Benefit Plan coverage he had elected for his dependent children remained in effect at the time of his death. Therefore, payment of the annuity to them is authorized, computed in accordance with 10 U.S.C. §§ 1451(a)(1)(B) and 1451(d).

The vouchers submitted are being returned for computation and payment in accordance with the above.

[B-205611]

Contracts—Small Business Concerns—Awards—Self Certification—Erroneous—Responsibility or Responsiveness Matter

Question regarding bidder's status as small business under total small business set-aside for rental and maintenance of laundry equipment is not matter of bid responsiveness since question does not relate to bidder's commitment or obligation to provide required services in conformance with material terms of solicitation, but rather to bidder's status and eligibility for award. Thus, contracting agency was correct in permitting bidder to correct erroneous certification indicating bidder was large business in order to reflect bidder's actual status as small business.

Bids—Unbalanced—Propriety of Unbalance—"Mathematically Unbalanced Bids"—Materiality of Unbalance

Although low bid was higher on contract for 10-month base period than it was for two 1-year options, thus appearing to be mathematically unbalanced, bid may be accepted because material unbalancing is not present since there is no reasonable doubt that award will not result in lowest ultimate cost to Government.

Bids—Invitation for Bids—Specifications—Deviations—Form *v.* Substance—Price Establishment

Insertion in low bid of unit prices per appliance, instead of monthly unit price as required by invitation for bids, was not material deviation requiring rejection of bid as nonresponsive, but was matter of form having no effect on services being procured, since the correct total prices were entered for each period and monthly unit price was easily ascertainable by simple arithmetical calculation.

Matter of: Jimmy's Appliance, June 7, 1982:

Jimmy's Appliance (J.A.) protests the award of a contract to Lane Good Housekeeping Store (Lane) under invitation for bids (IFB) No. F29651-81-B-0069 issued by the Air Force. The IFB, a total small business set-aside, was for rental and maintenance of washers and dryers at Holloman Air Force Base, New Mexico, for a base 10-month period with 2 option years.

J.A. asserts that Lane was nonresponsive because it certified in its bid that it was not a small business and that the Air Force improperly permitted Lane to amend its bid after bid opening to

change this certification. J.A. further asserts that Lane's bid was unbalanced and that J.A., not Lane, was the low bidder under a proper evaluation of the bids and that Lane's bid was also nonresponsive because it indicated what appears to be the number of appliances to be supplied rather than the performance periods required under the unit designation in the IFB.

Based on the following, we deny the protest.

Lane certified in its bid that it was not a small business and that it was provided goods manufactured by other than a small business. The Air Force contracting officer suspected a mistake in Lane's representation that it was not a small business and, pursuant to Defense Acquisition Regulation (DAR) § 2-406.1 (1976 ed.), requested Lane to verify its small business status. Lane responded that it had mistakenly certified, since it was a small business. The contracting officer permitted Lane to correct its bid as a clerical error.

After learning that the correction was permitted, J.A. filed a protest with the Air Force asserting that Lane had submitted a below-cost bid, that Lane was nonresponsive because it had certified itself to be other than a small business and that, in view of its various affiliations, it was likely that Lane was, in fact, not a small business. The Air Force denied the protest on the grounds that it had no reason to believe that Lane could not perform the contract at the stated price and that the large business status representation was properly corrected as a clerical error in view of the contracting officer's knowledge that under prior transactions Lane had always represented that it was a small business. J.A. then filed its protest with our Office.

The solicitation in this case was issued on standard form 33, which provides:

> The offeror represents as part of his offer that:
> 1. SMALL BUSINESS * * * He ☐ is, ☐ is not, a small business concern. If offeror is a small business concern and is not the manufacturer of the supplies offered, he also represents that all supplies to be furnished hereunder ☐ will, ☐ will not, be manufactured or produced by a small business concern in the United States, its possessions, or Puerto Rico.

The bidder must first represent whether it is a small business concern. While a bidder must be small in order to be eligible for award under a small business set-aside, once the award has been made, the first representation imposes no contractual requirement which the Government would have the right to enforce during contract performance. Any question concerning the accuracy of the representation, which affects the bidder's eligibility for award, may be decided by the SBA on the basis of information outside the bid. Therefore, we do not believe the first representation by itself properly should be viewed as involving a matter of responsiveness.

The second representation applies only to contracts for the furnishing of supplies and not to contracts, as here, for services. Unlike the first representation, this portion of the "Small Busi-

ness" clause does concern a performance obligation of the bidder, should it become the contractor, enforceable by the Government. It reflects the view that, when a contract for supplies is awarded under a small business set-aside, the socio-economic aims of the set-aside program are served only if the supplies are manufactured by a small business concern. There, bidders on small business set-asides for supplies must obligate themselves, in their bids, to provide supplies manufactured by a small business concern. A bidder's failure to make such a commitment in its bid renders the bid nonresponsive because without such a commitment the Government would not be able to require the bidder, even though it is a small business, to supply items manufactured by a small business as required by the solicitation.

In the case at hand, however, there is no solicitation or contract small business-related requirement which the Government would have the right to enforce during contract performance. The only requirement in this type of procurement is that the bidder actually be small to be eligible for award.

Here, there is no question concerning Lane's obligation to provide the required service in accordance with the material terms and conditions of the solicitation. Rather, the only question which exists is whether Lane is a small business under the size standards established by the SBA. *See* 13 C.F.R. § 121.3, *et seq.* (1981). This question relates solely to Lane's status and its eligibility for award under the set-aside and does not reflect upon Lane's commitment to provide the required service. *See generally Northern Virginia Chapter, Associated Builders and Contractors, Inc.—Reconsideration* B-202510.2 August 3, 1981, 81-2 CPD 85; *Anderson-Cottonwood Disposal,* 58 Comp. Gen. 713 (1979), 79-2 CPD 98.

However, when a bidder asserts that it erroneously certified itself as a large business on a small business set-aside, we believe there is enough doubt as to the bidder's actual status to warrant referral of the matter to the SBA, which is empowered to make conclusive determinations regarding the size status of bidders under 15 U.S.C. § 637(b)(6) (1976). See *Cabrillo Food Service Inc.,* B-185172, August 2, 1976, 76-2 CPD 107. In this instance, we note that the matter was submitted to the SBA, which concluded that there was no specific evidence to question Lane's size status. J.A. was advised of this determination and of its right of appeal to the Size Appeals Board, but it apparently declined to exercise this right. Consequently, the SBA determination in this respect is conclusive. *Alliance Properties, Inc.,* B-205253, November 10, 1981, 81-2 CPD 398.

J.A.'s allegation that it, not Lane, was actually the low bidder is based on the argument that the agency should not have considered the option year prices in evaluating the bids. In this respect, the IFB included the following proviso from DAR § 7-2003.11(b) (1976 ed.):

A. Bids and proposals will be evaluated for purposes of award by adding the total price for all option quantities to the total price for the basic quantity. Evaluation of options will not obligate the Government to exercise the option or options.

B. Any bid or proposal which is materially unbalanced as to prices for basic and option quantities may be rejected as non-responsive. An unbalanced bid or proposal is one which is based on prices significantly less than cost for some work and prices which are significantly overstated for other work.

Lane's bid was $44,627.08 for the 10-month base period, $9,674.31 for the first option year, and $10,674.31 for the second option year for a total of $64,975.70. J.A.'s bid was $34, 149.50 for the 10-month base period, $40,779.40 for the first option year, and $40,779.40 for the second option year for a total of $115,708.30. J.A. argues that, since the award was for the first year only, it offered the lowest bid. It argues also that Lane's bid is materially unbalanced.

In particular, J.A. contends that the evaluation of price based on base plus option year was improper. This is an untimely allegation that the price evaluation format contained in the solicitation is defective. J.A. did not file its protest until after bid opening. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1981), require that protests based upon alleged improprieties in any type of solicitation apparent prior to bid opening be filed prior to bid opening.

Regarding J.A.'s allegation that the Lane bid was unbalanced, our Office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect—material unbalancing—involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. Consequently, only a bid found to be materially unbalanced may not be accepted. *Propserv Incorporated,* B-192154, February 28, 1979, 79-1 CPD 138; *Mobilease Corporation,* 54 Comp. Gen. 242 (1974), 74-2 CPD 185. In the present case, the contracting officer found that J.A.'s first year bid properly reflected its proportional share of the cost of the total contract, since it included equipment and setup costs. However, even if it were mathematically unbalanced, it is reasonably certain that the final cost to the Government will be $64,975.70, after exercise of the option years, which will be significantly lower than the next low, J.A., bid, which was for a total of $115,708.30; thus Lane's bid is not materially unbalanced. *Reliable Trash Service,* B-194760, August 9, 1979, 79-2 CPD 107.

Finally, J.A. asserts that Lane's bid is nonresponsive because it contains what appears to be the number of appliances in place of performance periods. The solicitation requested unit prices per month with a total price entry for 10 months in the base period and for 12 months in each option year. Lane entered the number of

appliances being supplied as the "unit," instead of monthly units, then entered a price per appliance as the unit price and multiplied to arrive at the total entered price for each period. There is no question regarding the total prices, and the intended monthly "unit" price is easily determined simply by dividing the price entered by Lane's as the total for any given period by the number of months stated to be applicable to the period. Thus, since Lane's total price is clearly entered and its unit price is obvious and readily ascertainable from the face of its bid, Lane's failure to enter monthly unit prices is merely a matter of form which has no material effect on its price. *Building Maintenance Corporation*, B–190642, February 17, 1978, CPD 143.

The protest is denied.

[B-205058]

Travel Expenses—Overseas Employees—Renewal Agreement Travel—Delays—Rest Stopover

Employee who performed renewal agreement travel from Kwajalein, Marshall Islands, to Huntsville, Ala., arrived at Hickam Air Force Base, Hawaii, at 6:30 p.m. after 5½ hour flight and continued on to Los Angeles by flight departing from Honolulu at 11:30 p.m., 2 days later. Employee's entitlement to per diem should not be based on constructive schedule which requires him to continue on from Hawaii by flight departing at 11:30 p.m. on same night as his arrival at Hickam AFB. The fact that the employee traveled at a late hour following 2 days of rest does not warrant departure from constructive travel schedule otherwise applicable which would permit him to continue on at a reasonable hour the following morning.

Matter of: William F. Beierle, June 8, 1982:

The Finance and Accounting Office, U.S. Army Missile Command, Redstone Arsenal, Alabama, has requested an advance decision as to whether Mr. William F. Beierle, a civilian employee, is entitled to payment of additional per diem together with payment of taxi fares and costs of baggage handling in connection with an overnight stopover in Honolulu, Hawaii, incident to renewal agreement travel from Kwajalein, Marshall Islands, to Huntsville, Alabama. The submission has been forwarded to our Office by the Per Diem, Travel and Transportation Allowance Committee under PDTATAC Control No. 81-28.

For the reasons stated below the employee is entitled to the payment of additional per diem for himself and other allowable expenses incident to his overnight stop in Honolulu.

Mr. Beierle states that in accordance with his travel order dated August 29, 1979, he and his wife embarked upon renewal agreement travel on October 24, 1979. Having arrived at the airport at Kwajalein at 9 a.m. (local time), they departed at 11 a.m. and after a 5½ hour flight arrived at Hickam Air Force Base, Hawaii, at 6:30 p.m. (local time). At 8 p.m. he and his wife departed for Honolulu where they remained overnight in a hotel. Mr. Beierle states that the next day he purchased tickets for the remainder of the flight.

On October 26, he and his wife departed Honolulu, Hawaii, at 11:30 p.m. and arrived at their final destination, Huntsville, Alabama, on October 27 at 4 p.m. (local time).

Mr. Beierle has claimed additional per diem, taxi fare and luggage handling costs incident to their overnight stay in Honolulu. The Army has disallowed Mr. Beierle's claim on the basis of a constructive travel schedule that does not provide for any delay in the performance of onward travel from Hawaii. In explaining its determination the Redstone Arsenal advised Mr. Beierle that a traveler en route from Kwajalein normally would not be expected to continue his travel aboard a flight that departed at 11:30 p.m. following arrival in Hawaii 5 hours earlier. However, because they actually traveled aboard an air carrier that departed at that hour 2 days later, the 11:30 p.m. departure time on October 24 was used for constructive cost purposes. Thus, the Army reconstructed Mr. Beierle's travel from Kwajalein to Huntsville and determined his per diem entitlement on the basis of a constructive schedule continuing on from Honolulu at 11:30 p.m. on October 24 with connections in Los Angeles and arriving in Huntsville the following afternoon. This schedule would have required Mr. and Mrs. Beierle to remain in a travel status for 21 hours without interruption.

As the Army indicates an employee should not be required to travel between the hours of midnight and 6 a.m. where a more reasonable schedule is available. While language reflecting this travel principle is included in paragraph C4464-2a of Volume 2 of the Joint Travel Regulations (2 JTR) applicable specifically to temporary duty travel, the principle itself is one of broader application. The language of paragraph C4464-2 (formerly C1051-2) was intended as a guideline for use in determining whether the traveler has acted in a reasonable manner and thus within the requirement set forth at paragraph C4464-1 (formerly C1051-1) that an employee traveling on official business exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business. 51 Comp. Gen. 364 (1971). At the time of that decision, both regulations appeared among the Joint Travel Regulations "General Provisions" and consistent with the governing language of paragraphs 1-1.3 and 2-2.1 of the Federal Travel Regulations (FTR) (FPMR 101-7) (May 1973, as amended) their context made it clear that the "prudent person" rule is not restricted to travel on temporary duty. The prudent person rule continues to apply to permanent duty and renewal agreement travel notwithstanding the fact that the specific and more detailed discussion of the rule is now in 2 JTR, Chapter 4, Part J, which is applicable only to temporary duty travel.

Thus, the issue presented in Mr. Beierle's case is whether the constructive travel schedule used to determine his per diem entitlement should be based on an itinerary that reflects the guidance of paragraph C4464-2a concerning reasonable hours of travel or

whether that schedule should be modified to reflect the fact that Mr. Beierle and his wife actually traveled aboard an air carrier that departed shortly before midnight.

Essentially the same question was addressed in *Matter of Bray,* B-200305, April 23, 1981. In holding that the constructive travel itinerary used to determine Mr. Bray's transportation and per diem entitlements should be based on a Friday morning departure from his temporary duty station, we held that his willingness to take a later flight on Thursday night in order to indirectly route his return travel did not warrant a modification in that intinerary. We pointed out that it would be unreasonable to assume that he would have scheduled his return travel at a late hour if he had not taken leave but returned to work that day.

In Mr. Beierle's case the late night departure from Honolulu does not warrant the conclusion that it would be reasonable to schedule his travel at that hour 2 days earlier for the purpose of establishing his entitlement to per diem on a constructive cost basis. Specifically, it is appropriate to take into account the fact that Mr. and Mrs. Beierle's actual departure followed 2 days of rest, a circumstance that most certainly affected their willingness and ability to travel on their own time during hours normally allocated to rest. Mr. Beierle's per diem entitlement, therefore, should be determined on the basis of the constructive itinerary, including departure, from Honolulu at 9 a.m. on October 25, which the Army has indicated it would normally apply to travel from Kwajalein by way of Hawaii. Mr. Beierle also may be reimbursed for taxi fares and baggage handling costs otherwise allowable in connection with an overnight stop in Hawaii.

[B-204187]

Officers and Employees—Debts to U.S.—Liquidation—Employees' Compensation Fund—Erroneous Payments—Interagency Reimbursement Effect

Payments to an Air Force employee from the Department of Labor's Employees' Compensation Fund are repaid to the Fund by the Air Force pursuant to 5 U.S.C. 8147. An overpayment by the Fund becomes an overpayment within the meaning of 5 U.S.C. 5514 when the agency is billed for the payment by the Department of Labor. Therefore, an overpayment by the Fund to the employee may be collected by the Air Force under 5 U.S.C. 5514 as if it had been made directly by the Air Force.

Matter of: Employees' Compensation Fund Overpayments, June 9, 1982:

By a letter dated July 23, 1981, the Deputy Assistant Secretary of the Air Force (Accounting and Internal Audit) requested an advance decision regarding the propriety of withholding under the provisions of 5 U.S.C. § 5514 (1976) an Air Force employee's pay to collect overpayments made to that employee by the Department of Labor's Office of Workers' Compensation Programs. The payments

in question are from the Employees' Compensation Fund which is administered by the Office of Worker's Compensation Programs. Pursuant to 5 U.S.C. § 8147, payments from the Fund to Air Force employees are repaid to the Fund by the Air Force on an annual basis.

Section 5514 of title 5, United States Code, permits collection from an employee's pay by his agency "(w)hen the head of an agency concerned or his designee determines that an employee * * * is indebted to the United States because of an erroneous payment made by the agency to or on behalf of the individual * * *." Since payments to Air Force employees from the Employees' Compensation Fund are not made directly by the Air Force, the Air Force inquires whether an overpayment from the fund constitutes an overpayment under section 5514.

For the following reasons we find that overpayments to the Air Force employees from the Fund constitute payments within the meaning of 5 U.S.C. § 5514 once the Air Force is billed by the Fund for the overpayments.

The Federal Employees' Compensation Act, as amended, 5 U.S.C. § 8101 *et seq.*, provides for the payment of workers' compensation benefits to civil officers and employees of all branches of the Federal Government. The Act among other things provides for the payment of dollar benefits to enumerated classes of persons who are injured or disabled while in the performance of their duties in service to the United States. The Act is administered by the Secretary of Labor or his designee pursuant to 5 U.S.C. § 8145. Section 8129 contains specific provisions for the recovery of overpayments while an individual is receiving compensation. However, the Act contains no provisions regarding recovery of overpayments to individuals who have returned to the work force. The Secretary of Labor has issued regulations in this regard found at 20 C.F.R. 10.314(b) (1981) as follows:

> (b) Where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law such individual, as soon as the mistake is discovered or his attention is called to the same, shall refund to the Office any amount so paid, or upon failure to make such refund the Office may proceed to recover the same.

This question arises because the Department of Labor has asked the Air Force to assist in collecting an overpayment from the Fund which was made to an Air Force employee.

We have long held that the Government cannot withhold the current salary of employees to satisfy general debts owed to the Government without the employee's consent. See 58 Comp. Gen. 501 (1979); 29 *id.* 99 (1949); 24 *id.* 334, 338 (1944). However, under 5 U.S.C. § 5514 a Government agency may use the setoff procedure against an employee's current salary to collect a debt which arises from an erroneous payment made "by the agency to or on behalf of" the employee. We have also held that withholdings under 5

U.S.C. § 5514 are not authorized where the pay to be withheld and the erroneous payment did not arise in the same department or agency. See 34 Comp. Gen. 170, 173 (1954).

In this case an employee of the Air Force received an overpayment paid out of the Employees' Compensation Fund administered by the Department of Labor. The payment was made incident to his employment by the Air Force, and the Air Force was required by 5 U.S.C. § 8147 to reimburse the Fund for the payment. This situation does not clearly fall within any category of overpayments in the discussion above. We find no reasonable basis, however, for an interpretation which would take the individual concerned outside the scope of section 5514. The controlling factor as we see it is that the Air Force pursuant to 5 U.S.C. § 8147 is required to reimburse the Department of Labor for funds expended on behalf of its employees. That is, while the Department of Labor administers the program, ultimately the payments are financed by the employee's agency—in this case the Air Force.

We have held that the overpayment of travel advances to members of the Armed Forces detailed to a civilian agency and made by the borrowing agency could be collected under section 5514 by the Armed Forces as if the individual had not been on detail. See 51 Comp. Gen. 303 (1971). Since the individuals, while on detail, remained members of the Armed Forces, their pay and allowances were the obligation of the Armed Forces, not the borrowing agency. Similarly in the circumstances here, we hold that the payments in question from the Employees' Compensation Fund which are ultimately paid by the employing agency are subject to recovery under 5 U.S.C. § 5514. Accordingly, the Air Force may recover the overpayment by deduction from the employee's current pay without the need for the employee's consent. Although the Air Force or other employing agency ultimately pays the money dispensed through the Employees' Compensation Fund, the Fund initially dispenses payments at the time the employee is injured and bills the agency on an annual basis for payments so made. Because of the indirect manner in which the payments are made by the employing agency and because the Department of Labor also has authority to collect overpayments, the employing agency should not initiate collection under section 5514 until the Department of Labor bills it for money dispensed by the Fund on behalf of the agency's employees.

[B-202582]

Transportation—Household Effects—Weight—Net—Computation Formula—Containerized Shipments

Civilian employee of Dept. of the Army had household goods shipped from McLean, Va., to the Canal Zone (now Republic of Panama) incident to an official change of duty station in 1975. Employee was authorized shipment of maximum household goods at a net weight of 3,750 pounds, but he exceeded that weight and now owes the Government the difference between the authorized net weight and the actual

net weight. The issue considered is how to determine actual net weight under para. 2-8.2b(3) of the Federal Travel Regulations. We conclude that net weight under para. 2-8.2b(3) is determined by subtracting the container weight from the gross weight of the goods shipped and multiplying the resulting figure by 0.85. Stated as an equation: n = .85(g-c). The computational method applied in our decision *Wayne I. Tucker,* 60 Comp. Gen. 300 will no longer be followed.

Matter of: David M. Selner—Computation of Excess Weight Charges—Household Goods, June 14, 1982:

In considering the claim of the United States against Mr. David M. Selner, the issue to be decided is what is the proper method of determining the net weight of a household goods shipment under paragraph 2-8.2b(3), of the Federal Travel Regulations (FTR) (FPMR 101-7, May 1973).

BACKGROUND

In connection with the permanent change of official station of Mr. David M. Selner, a civilian employee of the Department of the Army, the Government arranged for the transportation of his household goods from McLean, Virginia, to Albrook AFS, Canal Zone (now, Republic of Panama) in 1975. In accordance with 5 U.S.C § 5724(a), and paragraph 2-8.2a of the FTR, Mr. Selner was authorized shipment of a maximum net weight of 3,750 pounds. The employee's voucher was originally paid on the net weight shown on the Government Bill of Lading (GBL), 5,096 pounds; therefore, the cost of excess weight was assessed in the amount of $808.29. Subsequently, the agency amended the voucher to permit a 15 percent weight reduction in accordance with paragraph 2-8.2b(3) of the FTR (paragraph C7050-2b of Volume 2, Joint Travel Regulations (JTR) (changes 111, January 1, 1975)). This resulted in a revised net weight of 4,332 pounds and concomitant excess weight charges of $409.08. Mr. Selner continues to dispute the amount of the claim and contends the amount in question is being erroneously computed. His method of computation would reduce the amount of the Government's claim to $271.44.

STATEMENT OF THE ISSUE

The question concerns what mathematical formula is consistent with the applicable language and intention of paragraph C7050-2b of the Joint Travel Regulations. The pertinent regulation, now found at 2 JTR para. C8000-2C (change 142, August 1, 1977) and identical in substance to paragraph 2-8.2b(3) of the Federal Travel Regulations provides:

Containerized shipments When special containers * * * are used and known tare weight does not include the weight of the interior bracing and padding materials but only the weight of the container, *the net weight of the household goods shall be 85 percent of the gross weight less the weight of the constainer.* [Italic supplied.]

The Army has applied the following formula to implement this regulation: Net weight = .85 (Gross weight – Container weight).

Mr. Selner, however, contends that the proper formula to implement the regulation is: Net weight = .85 (Gross weight) – Container weight.

These different formulas yield different results. Applying each formula to Mr. Selner's circumstances, where the gross weight is 6,528 pounds and the container weight is 1,432 pounds produces the following:

(1) Army's computation:
Net weight = .85 (Gross – Container)
Net weight = .85 (6,528 – 1,432)
Net weight = .85 (5,096)
Net weight = 4,332 (rounded)

With these figures, Mr. Selner's debt is $409.08

(2) Mr. Selner's computation:
Net weight = .85 (6,528) – 1,432
Net weight = 5,549 – 1,432
Net weight = 4,117 (rounded)

With these figures, Mr. Selner's debt is $271.44.

In a recent decision involving the proper method for determining the net weight of a household goods shipment under paragraph 2-8.2b(3) of the FTR we applied the formulation represented by Mr. Selner's approach. See *Wayne I. Tucker,* 60 Comp. Gen. 300 (1981). To the extent that the agency's method of computation is obviously different, we believe that the language in paragraph 2-8.2b(3) of the FTR and the corresponding provision in 2 JTR may be read and interpreted to support both procedural formulas.

VIEWS OF THE GENERAL SERVICES ADMINISTRATION

In furtherance of our deliberations on the proper interpretation of the net weight formula we requested the views of the General Services Administration (GSA—whose Federal Travel Regulations implement the statutory entitlement to relocation expenses including transportation of household goods.

By letter dated July 8, 1981, the Assistant General Counsel, Transportation and Public Utilities, GSA, responded to our request, in large part as follows:

> Without considering the regulatory history of paragraph 2-8.2b(3), Mr. Selner's position is arguable. If the equation sponsored by the Army were transposed, the 85 percent figure is multiplied not only by the gross weight amount, but also by the container weight figure. In calculating the net weight, an employee, it could be argued, should receive the benefit of a full deduction for the weight of the container, not just 85 percent of it.
>
> If paragraph 2-8.2b(3) were to be interpreted as Mr. Selner interprets it however, the drafters could have inserted a comma between the words "weight" and "less" in the phrase quoted above. While the drafters could have chosen clearer language and more precise grammar to express their intentions, the absence of a comma and the history of the provision suggest that they opted for the formula used by the Army.
>
> In the drafting of regulations to implement certain provisions of the Overseas Differentials and Allowances Act, Pub. L. 86-707, the Bureau of the Budget (now the Office of Management and Budget or OMB), amended Title I, Section 6(b) of its

"Regulations Governing Payment of Travel and Transportation Expenses of Civilian Officers and Employees of The United States When Transferred From One Official Station to Another for Permanent Duty," Circular No. A-4, Transmittal Memorandum No. 2, Attachment A dated April 3, 1961. This Amendment to Title I Section 6(b) of Circular No. A-4 specified that when "specially designed containers, normally for repeated use" such as "collapsible containers, household goods shipping boxes, lift vans, or conex transporters" are used, then "The net weight shall be computed at *85% of the difference between the gross weight and the tare weight of the container.*"

In a later superseding version of the same provision as that quoted from Attachment A to Circular No. A-4 above, at section 6.2b(2) of Attachment A to the Bureau of the Budget Circular No. A-56, dated October 12, 1966, the Bureau of the Budget again specified that the "the net weight is 85 percent of the *difference between the gross and tare weights*" in the containerized household goods shipment situation.

In 1971, Circular No. A-56 was again revised, but this time the language was changed at section 6.2b and a new subsection (3), which was virtually identical to the provision now found at paragraph 2-8.2b(3) FTR, was added. See Attachment A to OMB Circular A-56, Revised, at section 6.2b(3), dated August 17, 1971, effective September 1, 1971. Despite the change in wording, the purpose of the revision seems to have been for clarification only: "Provisions of 6.2b have been restated extensively for clarification," and 6.2b(2) and (3) were separated "to clearly distinguish crated and containerized shipment and the weight rules applicable to each." (See Summary of Changes, p. 4-5, Attachment to Circular No. A-56, Revised, August 17, 1971). The regulations contained in OMB Circular A-56 were adopted by the Administrator of General Services effective October 21, 1971 (Federal Property Management Regulations, Temporary Regulation A-8, paragraph 5b dated October 20, 1971) and section 6.2b(3) of Attachment A to the old OMB Circular A-56 became (with a few grammatical changes and a nonrelevant addition at the end of the paragraph) paragraph 2-8.2b(3) of the Federal Travel Regulations, FPMR 101-7 on April 30, 1973. This provision has remained substantially unchanged since that time.

In light of the aforementioned absence of a comma between the words "weight" and "less," and given the foregoing history of paragraph 2-8.2b(3), we believe that the interpretation of the Department of the Army is correct * * *. [Italic supplied.]

CONCLUSION

We conclude that the net weight of a household goods shipment under paragraph 2-8.2b(3) is determined by first subtracting the container weight from the gross weight of the goods shipped and then multiplying the resulting figure by 0.85. Stated as an equation the correct formula is: $n = .85(g-c)$.

While GSA's long history explains the origin of the discrepancy between the two dissimilar formulas, we believe the other formula, proposed by Mr. Selner and applied in our *Tucker* decision, provides an illogical result since it would credit travelers with an excessive allowance for the weight of the external containers in addition to the 15 percent allowance for the weight of the interior bracing and padding materials.

Accordingly, in Mr. Selner's case we shall apply the formula $n = .85(g-c)$ to determine the net weight of his household goods shipment, and the resulting debt for excess charges is $409.08. The computational method applied in our decision *Wayne I. Tucker,* 60 Comp. Gen. 300 (1981), will no longer be followed.

[B-203608]

Bonds—Bid—Surety—More Than One—Net Worth Requirements—Propriety

Agency's requirement that both individual sureties on a bid bond have net worths in excess of their total outstanding surety obligations in order to be deemed acceptable sureties is unobjectionable since it is reasonably related to the purpose for which a bid guarantee is intended, namely, to protect the Government's financial interest in the event of default on the bid.

Bonds—Bid—Surety—Affidavit (Standard Form 28)—Deficiencies—Responsiveness *v.* Responsibility Matter

Questions concerning an individual surety's financial acceptability are matters of responsibility rather than responsiveness.

Bonds—Bid—Surety—Unacceptable—Substitutions After Bid Opening Precluded

Although questions concerning an individual surety's acceptability are matters of responsibility, a bidder may not after bid opening substitute an acceptable individual surety for one deemed unacceptable because such a substitution would alter the sureties' joint and several liability under the bid bond, the principal factor in determining the bid's responsiveness to the bid guarantee requirement.

Contracts—Small Business Concerns—Awards—Small Business Administration's Authority—Certificate of Competency—Sureties on Bid Bonds Status

Bidder nonresponsibility determinations based on the unacceptability of an individual surety on a required bid bond need not be referred to the Small Business Administration (SBA) for review under the Certificate of Competency procedures; such determinations are based solely on the qualifications of the individual surety and there is no indication that Congress intended the Small Business Act to bring surety qualifications under the scrutiny of SBA.

Matter of: Clear Thru Maintenance, Inc., June 15, 1982:

Clear Thru Maintenance, Inc. protests the award of a contract to Suburban Industrial Maintenance under invitation for bids (IFB) No. GS-03-81-B-0054, issued by the General Service Administration (GSA) for custodial services at the Social Security Payment Center in Philadelphia, Pennsylvania. The protest stems from the rejection of Clear Thru's bid as nonresponsive based on the financial inadequacy of one of the individual sureties listed on Clear Thru's bid bond. GSA takes the position that, contrary to a number of our decisions, the question of surety acceptability relates to bid responsiveness rather than responsibility. The agency further maintains that notwithstanding whether the issue is one of responsiveness or responsibility, its method of determining the surety unacceptable was reasonable.

We agree with GSA that its evaluation of the surety's net worth was reasonable. We do not agree, however, that the issue of surety acceptability is a matter of bid responsiveness.

Clear Thru submitted the low bid while Suburban's bid was second low of the eleven bids opened on May 1, 1981. The solicita-

tion required that a bid guarantee in the amount of 20 percent of the total one year bid price be submitted with each bid. Clear Thru complied with this requirement, submitting a bid bond listing two individual sureties. The penal amount of the bond was $83,809.20. The affidavits of Individual Surety (Standard Form 28), completed by the sureties and furnished with the bond, indicated net worths of $468,500 and $483,000, respectively. Also, item 10 of the affidavits indicated that each had outstanding surety obligations of $315,493.96.

During the preaward survey the agency reviewed Clear Thru's financial capability, which included examination of the information relating to the bid bond. The agency discovered that both sureties had neglected to list, under item 10 of the affidavits, certain surety obligations on other procurements. The penal amount on one of these undisclosed bonds was $160,046.63 which, when added to one of the individual's surety obligations of $315,493.96 listed in his affidavit, increased his total outstanding obligations above his net worth by $7,040.59. GSA considered this "deficit security situation" unsatisfactory.

Upon learning that the sufficiency of his net worth *vis-a-vis* his surety obligations was in question, the surety submitted a new bond and affidavit substituting a different surety for himself. The contracting officer refused to accept the substitution, however, based on his determination that this inadequacy of an individual surety rendered Clear Thru's bid bond unacceptable and its bid, thus, nonresponsive. He therefore rejected Clear Thru's bid by letter of May 28, and awarded the contract to Suburban. GSA reports it has subsequently learned that both the individual sureties were overextended, having pledged their net worths against at least $2,000,000 in undisclosed surety obligations.

Clear Thru takes issue, principally, with the manner in which GSA determined the financial adequacy of its individual sureties. Specifically, it charges that it is unreasonable for GSA to accept only sureties with net worths in excess of their total outstanding surety obligations. The protester concedes that Federal Procurement Regulations (FPR) § 1-10.203(a) compels the contracting officer to consider the nature and amounts of a surety's outstanding surety obligations, but believes this consideration should entail a more thorough analysis than merely reducing net worth by the total amount of surety obligations. Clear Thru believes that the standard used by GSA is unnecessarily strict because it fails to take into account several factors which mitigate the Government's financial risk under a bid bond, such as the unlikelihood of default on a bid (based on past experience), and the contingent nature of surety obligations. It also argues that where the sureties are both obligated on another bond, the penal amount of that bond should at most be deducted from the net worth of only one of the sureties for the purpose of the contracting officer's analysis. Predicting that

GSA's continued application of this acceptability standard will make it difficult for some bidders to secure adequate bonding, Clear Thru asks that we direct GSA to relax this standard and find that the sureties on its bid bond were acceptable.

The regulations require that a bid bond be executed by two individual sureties, each having a net worth not less than the penal amount of the bond. FPR § 1-10.203(a). That section entitled "Individual sureties" provides further that—

> * * * The number and amounts of other bonds upon which a proposed surety is bound, and the status of the contracts in connection with which such bonds were furnished, must be considered [by the contracting officer] in determining the acceptability of the individual surety.

Because the contracting officer is not required to consider a surety's other bonds in any specific manner, he has discretion to determine how much weight to accord these bonds. In view of this discretion, we will not object to the contracting officer's treatment of a surety's other bonding obligations unless it appears to have been unreasonable. *See Jets Services, Inc., et al.,* B-180554, June 6, 1974, 74-1 CPD 307, concerning the treatment of the same information under Defense Acquisition Regulation (DAR) § 10-201.2, which specifies that the contracting officer may decide whether the total, a portion or none of the surety's other bonding obligations should be deducted from its net worth.

GSA contends that the method it used to determine surety acceptability—subtracting the total penal amount of the surety's outstanding bond obligations from his net worth—was within the contracting officer's authority and reasonable in view of the agency's prior experience. While bidder defaults and bankruptcies (the two most likely situations where GSA will try to recover under a bid bond) may occur relatively infrequently, GSA explains it has been necessary to go against sureties on service contract bid guarantees on several prior occasions. GSA notes further that many sureties, including the individual sureties in this case, underwrite large numbers of bonds for only a few principals, so the bankruptcy of one bidder could necessitate recovery against the same surety under several bonds. GSA has adopted the surety acceptability standard in question to help assure that sureties in such a situation will have sufficient resources to fully satisfy their obligations to the Government. It is GSA's view, furthermore, that each surety must meet the standard if the two surety requirement in FPR § 1-10.203(a) is to be given effect.

We find no legal basis upon which to object to GSA's rejection of the individual here as an unacceptable surety. The purpose of the bid guarantee requirement is to protect the Government's financial interests in the event the bidder fails to execute the required contract documents and deliver the required performance and payment bonds. *See* 52 Comp. Gen. 223 (1972). GSA's requirement that both sureties have net worths at least equal to their total surety

obligations clearly is calculated to achieve this purpose. While we agree with the protester that the strictness of GSA's standard may make it more difficult for some bidders to secure adequate bonding, this speculation alone does not support a conclusion that the standard is unreasonable. We note again that the corresponding DAR provision specifically permits the contracting officer to deduct the total of the surety's other bonding obligations from its net worth. *See* DAR § 10-201.2.

GSA has raised the question whether surety acceptability relates to bid responsiveness or bidder responsibility. GSA maintains it is a matter of responsiveness and that Clear Thru's bid was thus properly rejected once the contracting officer determined that one of the individuals was an unacceptable surety. GSA argues in the alternative that Clear Thru would have been rejected as nonresponsible in any event since the individual's surety obligations exceeded his net worth on the date of award. GSA submits further that, regardless of our determination as to this acceptability issue, both sureties' failure here to list numerous outstanding obligations as required under item 10 of the surety affidavit was an appropriate factor for consideration in the surety acceptability determination.

We disagree with GSA's view that the determination of an individual's acceptability as a surety on a bid bond is a matter of responsiveness. The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the invitation's material terms and conditions. 49 Comp. Gen. 553, 556 (1970). This determination of responsiveness must be made from the bid documents at the time of bid opening. *Peter Gordon Company, Inc.,* B-196370, July 18, 1980, 80-2 CPD 45. We have held that a solicitation provision calling for a bid guarantee is a material requirement which cannot be waived. 38 Comp. Gen. 532 (1959). We have also recognized that a bid is nonresponsive where either the required bond is not submitted, *de Weaver and Associates,* B-200541, January 6, 1981, 81-1 CPD 6, or the submitted bond contains a deficiency which detracts from the joint and several liability of the sureties on the bond. See *Structural Finishing, Inc.,* B-201614, April 21, 1981, 81-1 CPD 303, and *Southland Construction Co.,* B-196297, March 14, 1980, 80-1 CPD 199 (bid nonresponsive where bond was altered without any evidence of approval by the surety); *Cassidy Cleaning, Inc.,* B-191279, April 27, 1978, 78-1 CPD 331 (blank bid bond submitted).

The bid bond furnished by Clear Thru at bid opening was duly executed by two individual sureties whose affidavits indicated that they both had net worths at least equal to the penal amount of the bond, and was not otherwise defective on its face. The bond thus met the solicitation's bonding requirement and was legally suffi-

cient to establish the joint and several liability of the sureties in the event of default on the bid by Clear Thru.

In our decision at 52 Comp. Gen. 184 (1972), recognizing that the failure of an individual surety to show on its surety affidavit at bid opening a net worth at least equal to the penal sum of the bid bond did not detract from the joint and several liability of the sureties, we stated—

> * * * the matter of the net worth of an individual surety on a bid bond is not one relating to the responsiveness of a bid but rather to the responsibility of the surety. The fact that an affidavit of an individual surety either has not been filed timely or has been filed timely but discloses assets insufficient to cover the penal amount of the bond does not affect the actual net worth of the surety. Since completion of the surety affidavit is solely for the benefit of the Government to disclose facts concerning the responsibility of the surety, we see no reason why contracting officials should not be able to ascertain, after bid opening but subject to the time restraints of the procurement, the acceptability of an individual surety based on required net worth. * * * 52 Comp. Gen. 184, 187.

In the instant case, the individual surety showed a sufficient net worth on his affidavit at bid opening and was found unacceptable only because after bid opening the agency determined that he had other bonding obligations not listed in his affidavit to the extent that his total obligations exceeded his net worth. This clearly was a matter of responsibility. See also *Jets, Inc.,* B-194017, April 16, 1979, 79-1 CPD 269; *Cassidy Cleaning, Inc., supra; Jets Services, Inc., et al., supra.*

Although acceptability of an individual surety, as a matter of responsibility, ordinarily may be established, time permitting, any time prior to award, *Henry Spen & Company, Inc.,* B-183164, January 27, 1976, 76-1 CPD 46, replacement of an unacceptable surety after bid opening is not an allowable means for achieving this end. Such a substitution necessarily would alter the joint and several liability of the sureties under the bid bond, the principal factor in determining the responsiveness of the bid to the guarantee requirement. Elements of a bid which go to the bid's responsiveness cannot be changed after bid opening. *S. Livingston & Son, Inc.,* 54 Comp. Gen. 593 (1975), 75-1 CPD 24. We therefore agree with GSA's refusal to permit the surety substitution proposed in this case.

GSA asks whether bidder nonresponsibility determinations based on the unacceptability of an individual surety must be referred to the Small Business Administration (SBA) under the Certificate of Competency (COC) procedure. 13 C.F.R. §125.5 *et seq.;* FPR § 1-1.708.1. We do not believe such a referral is required. The Small Business Act was amended in 1977 (Pub. L. 95-89, 15 U.S. Code 633) to broaden the concept of "responsibility" for which SBA was to certify small businesses. Prior to 1977, SBA certification was limited to matters involving a bidder's capacity or credit. The Act, as amended, empowers SBA—

> * * * To certify to Government procurement officers, * * * with respect to all elements of responsibility, including, but not limited to, capability, competency, capac-

ity, credit, integrity, perseverence, and tenacity, of any small business concern * * * to receive and perform a specific Government contract. A Government procurement officer may not, for any reason specified in the preceding sentence preclude any small business concern * * * from being awarded such contract without referring the matter for a final disposition to the Administration.

Although the language of this provision is quite broad, it does not appear to encompass the rejection of an otherwise responsible bidder based solely on the unacceptability of a proposed individual surety. Indeed, as the Court of Claims noted in a recent decision, the legislative history of the amendment indicates that this provision was enacted by Congress to abate continuing discrimination against small businesses "solely because of their smallness and disabilities allegedly resulting from that fact." *Siller Brothers, Incorporated* v. *United States,* 655 F. 2d 1039, 1044 (Ct. Cl. 1981), *petition for cert. filed* (No. 81-1216). Congress' intent is clearly reflected in the concerns raised in the House Report on the 1977 amendment:

* * * Small business can and has been denied Government contracts because the procuring activity has determined that the small business lacked the requisite "tenacity, perseverance or integrity" to perform a specific Government contract. Such a finding results in the small firm being branded "nonresponsible." Resort to the COC procedure in such cases is not available since capacity and credit are, purportedly, not involved. * * *

H.R. Rep. No. 95-1, 95th Cong. 1st Sess. 13, reprinted in [1977] U.S. Code Cong. & Ad. News 821, 833.

While rejection of a bidder due to the inadequacy of a proposed individual surety is, technically, a matter of responsibility, the bidder itself is in no way "branded" since such determinations are based exclusively on the qualifications of the surety. We find no indication that Congress ever intended the Small Business Act to bring the qualifications of individual sureties under the scrutiny of SBA, and SBA's regulations do not specifically address the point. We accordingly conclude that such determinations need not be referred to SBA under the COC procedure.

The protest is denied.

[B-205339]

Pay—Service Credits—Constructive—Medical/Dental Officer Education—Statutory Repeal—Scope of Applicability

The Defense Officer Personnel Management Act, Pub. L. 96-513, repealed 37 U.S.C. 205(a)(7) and (8), which had authorized constructive longevity of service credit for medical and dental officers of the uniformed services based on their years of professional education. The constructive service credit was terminated because the Congress had concluded that it resulted in an anomalous receipt of elevated basic and retired pay by medical and dental officers, and inaptly encouraged their early retirement. Also, the Congress had developed a special pay system for all uniformed health professionals to increase their current income, and it was concluded that the constructive service credit for medical and dental officers was therefore no longer appropriate.

Statutory Construction—Persons and Things Enumerated—Omissions

A statutory saving clause generally preserves rights under repealed legislation only to the extent that those rights are enumerated in its provisions. Statutory provisions with unambiguous language and specific directions may not be construed in any manner that will alter or extend their plain meaning, and if persons and things to which a statute refers are specifically and unambiguously designated, it is to be inferred that all omissions were intended. However, if giving effect to the plain meaning of words in a statute leads to an absurd result that is clearly unintended and at variance with the policy of the legislation as a whole, the purpose of the statute rather than its literal words will be followed.

Pay—Service Credits—Constructive—Medical/Dental Officer Education—Statutory Repeal—Saving Clause Interpretation

The Defense Officer Personnel Management Act repealed constructive longevity of service credit for medical and dental officers of the uniformed services effective Sept. 15, 1981, and it contained a saving clause with plain and unambiguous language specifically preserving the credit only for service members who on that date were already medical and dental officers, or were enrolled in the Uniformed Services University of the Health Sciences or the Armed Forces Health Professions Scholarship Program (10 U.S.C. ch. 104 and 105). The saving clause may not be extended to participants in the National Health Service Corps Scholarship Program or the Senior Commissioned Officer Student Training and Extern Program (42 U.S.C. 294t, 218a), since there is no justification for a conclusion that their omission was clearly inadvertent and would lead to an absurd result.

Pay—Service Credits—Constructive—Medical/Dental Officer Education—Statutory Repeal—Effect on Statutory Contract Entitlements

Participants in the National Health Service Corps Scholarship Program enter into a "written contract" prescribed by 42 U.S.C. 294t(f) in which they become eligible for a scholarship in return for their agreement to serve after their graduation from professional school with the Dept. of Health and Human Services "in a health manpower shortage area," either as civilians, or as officers of the Public Health Service if they elect to apply for a commission and are accepted. The terms of this statutory contract do not give rise to an entitlement for program participants commissioned as medical and dental officers of the Public Health Service after Sept. 15, 1981, to constructive service credit under the provisions of 37 U.S.C. 205(a)(7) and (8) which were repealed on that date.

Agents—Government—Government Liability for Negligent or Erroneous Act—Military Matters—Erroneous Information Regarding Pay

It is fundamental that the pay and allowance entitlements of members of the uniformed services are completely dependent upon rights prescribed by statute and that common law contract principles have no place in the determination of their pay entitlements. Hence, the United States is not bound by the advice or promises of service recruiters concerning pay entitlements, if that advice does not conform to the governing provisions of statute.

Pay—Service Credits—Public Health Service—Constructive Longevity of Service—Statutory Repeal Effect

Participants in the National Health Service Corps Scholarship Program and the Senior Commissioned Officer Student Training and Extern Program (42 U.S.C. 294t, 218a) were advised by the Public Health Service prior to 1981 that persons it commissioned as medical and dental officers received constructive service credit for their years of professional education under 37 U.S.C. 205(a)(7) and (8). That advice

was accurate when given, but 37 U.S.C. 205(a)(7) and (8) were repealed in 1981. The program participants should have realized that the advice they received was subject to future changes in the law, but even if they were misled in the matter payments to them under the repealed law may not be made.

Matter of: Jeffrey D. Rushlo, B. Shay Bradley, and others, June 15, 1982:

This action is in response to a question that has been brought to our attention concerning the basic pay entitlements of persons commissioned as medical and dental officers of the Public Health Service after September 15, 1981, but who participated in the National Health Service Corps Scholarship Program prior to that date. The question is whether they are entitled to the constructive service credit for basic pay purposes authorized for medical and dental officers under the provisions of 37 U.S.C. 205(a)(7) and (8), which were repealed effective September 15, 1981, by the Defense Officer Personnel Management Act.

We have concluded that scholarship program participants commissioned as medical and dental officers of the Public Health Service after September 15, 1981, may not be credited with constructive service for basic pay purposes under the repealed provisions of 37 U.S.C. 205(a)(7) and (8).

The circumstances of 2 individuals affected in this matter have specifically been brought to our attention:

1. Mr. Jeffrey D. Rushlo is in his last year of dental school at the University of Iowa. When he entered dental school in 1978, he also entered into an agreement with the Department of Health, Education, and Welfare (now Health and Human Services) under the National Health Service Corps Scholarship Program. He has agreed that in return for 4 years of financial assistance under the scholarship program he will serve for 4 years following his graduation from dental school as a commissioned officer or civilian member of the Public Health Service. In 1978 the Public Health Service informed him through brochures that dental officers in its Commissioned Corps received, among other things, 4 years' longevity of service credit for basic pay purposes for 4 years of dental school. Following enactment of the Defense Officer Personnel Management Act in 1980, however, he learned that he might not receive the 4 years' service credit if he were commissioned as a dental officer after the Act went into effect on September 15, 1981. He applied for a Reserve commission with the Public Health Service, was accepted, and was appointed as a Junior Assistant Health Services Officer (O-1) on August 2, 1981. It is contemplated that following his graduation from dental school, his commissioned status will be changed to Senior Assistant Dental Surgeon (O-3), and he will then enter active service as a dental officer.

2. Ms. B. Shay Bradley is attending the Medical College of Virginia. She is also a participant in the National Health Service Corps Scholarship Program, and when she entered the program she

was furnished with information indicating that medical officers of the Public Health Service received 4 years' longevity of service credit for basic pay purposes based on 4 years' attendance at medical school, plus an additional year of credit based on internship training or the equivalent. Unlike Mr. Rushlo, she does not now hold a Reserve commission in the Public Health Service, and she learned only recently that due to a change in the law she might not be eligible for the constructive service credit if she is now commissioned as a medical officer.

The Department of Health and Human Services had determined that Mr. Rushlo and Ms. Bradley and others similarly situated will not be entitled to the additional constructive service credit in the computation of their basic pay if they now enter on active duty as commissioned medical and dental officers. Mr. Rushlo and Ms. Bradley have expressed disagreement with that determination. It is reported that other scholarship program participants aside from Mr. Rushlo and Ms. Bradley have been affected by the determination, and that some of them are also dissatisfied with it. However, the particular facts and circumstances of their cases have not been presented to us.

The scholarship program participants suggest that the terms of the Defense Officer Personnel Management Act may actually give them a right to the constructive service credit authorized by the repealed provisions of 37 U.S.C. 205(a)(7) and (8). They note that the Act has a saving clause preserving the constructive service credit for medical and dental students who were enrolled in either the Uniformed Services University of the Health Sciences or the Armed Forces Health Professions Scholarship Program prior to September 15, 1981. They also note that the saving clause was apparently enacted because persons enrolled in those programs had previously been counseled that they would receive the additional service credit. They suggest that since National health Service Corps Scholarship Program participants received similar counseling, the benefits of the saving clause should also be applied to their program.

Mr. Rushlo suggests that the benefits of the saving clause should be extended to him for the additional reason that he received a Reserve commission as a Junior Assistant Health Services Officer prior to September 15, 1981. He notes that while the Department of Health and Human Services has determined that he is not covered by the saving clause, the Department has also determined that the saving clause does cover participants in the Public Health Service's Senior Commissioned Officer Student Training and Extern Program (Senior COSTEP) who were commissioned as Junior Assistant Health Services Officers prior to September 15, 1981, on the basis that this program was analogous to the programs specifically designated in the saving clause. Mr. Rushlo therefore suggests that the benefits of the saving clause should be extended to him and other

commissioned participants in the National Health Service Corps Scholarship Program, since their situation is analogous to that of Senior COSTEP participants.

Furthermore, the scholarship program participants contend that even if it cannot be concluded that they are covered by that saving clause of the Defense Officer Personnel Management Act, it would nevertheless be improper to withhold the constructive service credit from them since this would constitute a material breach of their scholarship agreements. They say that they relied upon inducements made to them concerning the additional constructive service credit they would receive as commissioned medical and dental officers of the Public Health Service when they entered into those agreements. They consequently suggest that this was an offer of enhanced basic pay that was incorporated into the scholarship agreements, and that payment of basic pay in any amount less than the promised rate would therefore constitute a breach of contract by the Government.

I. *Laws Governing the Pertinent Scholarship and Education Programs*

Provisions of law governing the National Health Service Corps Scholarship Program are contained in section 294t of title 42, United States Code. Section 294t authorizes the Secretary of Health and Human Services to provide scholarships to students enrolled in courses of study leading to a degree in one of the health professions. The Secretary and the individual scholarship program participant must enter into a "written contract," the contents of which are prescribed by subsection 294t(f). The Secretary must agree to provide the individual with a scholarship for a school year or period of years (not to exceed 4 school years), and in return the individual must agree to perform a period of obligated service with the Department of Health and Human Services "in a health manpower shortage area" equal to 1 year for each school year for which the individual was provided a scholarship, or for 2 years, whichever is greater. Individuals participating in the scholarship program need not be commissioned officers of either the Public Health Service or one of the Armed Forces, and a scholarship recipient may fulfill the service obligation through civilian employment with the Department of Health and Human Services.

The Senior COSTEP is governed by 42 U.S.C. 218a. Participants in that program must be commissioned officers of the Public Health Service while attending professional school. After graduation participants are obligated to serve on active duty as officers of the Public Health Service for 2 times the period of education supported by the Public Health Service, or for 2 years, whichever is greater.

The administration of the Uniformed Services University of the Health Sciences is governed by chapter 104 of title 10, United States Code. Participants in that program must be commissioned

officers of one of the uniformed services serving on active duty, and they incur an additional 7-year service obligation through participation in the program.

The Armed Forces Health Professions Scholarship Program is governed by chapter 105 of title 10, United States Code. Participants in the program must be commissioned officers in Reserve components of the Armed Forces. Service obligations incurred for participation in that program are determined under regulations prescribed by the Secretary of Defense, subject to a statutory requirement that the minimum obligation is 1 year of active duty for each year of participation in the program.

II. *Statutory Authorization of Constructive Longevity of Service Credit for Medical and Dental Officers*

Prior to September 15, 1981, 37 U.S.C. 205(a)(7) and (8) provided that:

(a) Subject to subsections (b)-(d) of this section, for the purpose of computing the basic pay of a member of a uniformed service, his years of service are computed by adding—

* * * * * * *

(7) For an officer of the Medical Corps or Dental Corps of the Army or Navy, an officer of the Air Force designated as a medical or dental officer, or an officer of the Public Health Service commissioned as a medical or dental officer-four years;

(8) For medical officer named in clause (7) who has completed on year of medical internship or the equivalent there of-one year in addition to the four years prescribed by clause (7); * * *

III. *The Defense Officer Personnel Management Act*

Section 402 of the Defense Officer Personnel Management Act, Public Law 96-513, approved December 12, 1980, 94 Stat. 2904, 10 U.S.C. 101 note, repealed the above-quoted provisions of 37 U.S.C. 205(a)(7) and (8) effective September 15, 1981. The legislative history of the Act indicates the Congress had concluded that the constructive service credit authorized by 37 U.S.C. 205(a)(7) and (8) resulted in an anomalous receipt of elevated basic and retired pay by medical and dental officers which was inconsistent with the military pay and allowance system as a whole, and that the service credit inaptly encouraged those officers' early retirement. In addition, since the time the constructive service credit had originally been authorized, the Congress had developed a system of special additional pay for all uniformed health professionals to increase their current income to a level believed adequate to encourage their retention in service and it was concluded that the constructive service credit for medical and dental officers was therefore no longer appropriate. See H.R. Rep. No. 96-1462, 96th Cong., 2d Sess. 39-40 (1980) reprinted in (1980) U.S. Code Cong, & Ad. News 6333, 6370-6371; and S. Rep. No 96-375, 96th Cong., 1st Sess. 82 (1979).

Subsection 625(b) of the Defense Officer Personnel Management Act, 94 Stat. 2952, 10 U.S.C. 611 note, contains a saving clause for certain individuals who would otherwise have lost the constructive

service credit allowed by the repealed provisions of 37 U.S.C. 205(a)(7) and (8). That saving clause states:

(b)(1) Any officer who on the effective date of this Act is an officer of the Army or Navy in the Medical or Dental Corps of his armed force, an officer of the Air Force designated as a medical or dental officer, or an officer of the Public Health Service commissioned as a medical or dental officer is entitled to include in the years of service creditable to him for the computation of basic pay and retired pay the years of service creditable to him for such purposes under clauses (7) and (8) of section 205(a) of title 37, United States Code, as in effect on the day before the effective date of this Act.

(2) Any person who on the day before the effective date of this Act was enrolled in the Uniformed Services University of the Health Sciences under chapter 104 of this title or the Armed Forces Health Professions Scholarship Program under chapter 105 of this title and who on or after the effective date of this Act graduates from such university or completes such program, as the case may be, and is appointed in one of the categories specified in paragraph (1) is entitled to include in the years of service creditable to him for the computation of basic pay and retired pay the years of service that would have been credited to him under clauses (7) and (8) of section 205(a) of title 37, United States Code, as in effect on the day before the effective date of this Act, had such clauses not been repealed by this Act.

Paragraph (1) of the saving clause was enacted "to allow physicians and dentists on active duty to continue using their constructive service credit on the basis it was credited to them on the effective date of the bill." Paragraph (2) was enacted for the benefit of persons enrolled in the Uniformed Services University of the Health Sciences and the Armed Forces Health Professions Scholarship program for the stated reason that "such individuals have been counseled regarding these entitlements and have entered these programs, at least in part, because of their existence." See H.R. Rep. No. 96-1462, 96th Cong., 2d Sess. 39-40 (cited above) and 148-149 (1980).

The Defense Officer Personnel Management Act was enacted in December 1980, but it did not go into effect until September 15, 1981. The purpose of deferring the effective date for 9 months was to allow sufficient time for problems in the implementation of the Act to be identified and corrected by remedial legislation. See H.R. Rep. No. 97-141, 97th Cong., 1st Sess. 1 (1981) reprinted in (1981) U.S. Code Cong. & Ad. News 24. Those problems were subsequently identified and addressed in the Defense Officer Personnel Management Act, Technical Corrections Act, Public law 97-22, approved July 10, 1981, 95 Stat. 124. The saving clause was not amended by the corrective legislation.

IV. *Analysis*

Concerning the application of the above-quoted provisions of the saving clause contained in subsection 625(b) of the Defense Officer Personnel Management Act, a statutory saving clause generally preserves rights under repealed legislation only to the extent that those rights are enumerated in the language of the saving clause. See 30 Comp Gen. 65, 66 (1950); and 82 C.J.S. *Statutes,* 383 and 440 (1953). In applying provisions of statute, including saving clauses, we are ordinarily bound to follow the settled rule of statutory con-

struction that provisions with unambiguous language and specific directions may not be construed in any manner that will alter or extend their plain meaning. See *Matter of Veterinary and Optometry Officers,* 56 Comp. Gen. 943, 949 (1977); 50 *id.* 822, 824 (1971); and other Comptroller General decisions and court rulings there cited. See also 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 46.01-46.07 (4th ed. C.D. Sands 1973). And if persons and things to which a statute refers are specifically and unambiuously designated, it is generally to be inferred that all omissions were intended. See 46 Comp. Gen. 695, 699 (1967); and 2A SUTHERLAND, cited above, 57.10. However, if giving effect to the plain meaning of words in a statute leads to an absurd result which is clearly unintended and at variance with the policy of the legislation as a whole, the purpose of the statute rather than its literal words will be followed. See 50 Comp. Gen. 604, 606 (1971); and 2A SUTHERLAND, cited above, 45.12, 47.38.

The plain language of the saving clause here in question specifically and unambiguously preserves the constructive service credit of the repealed provisions of 37 U.S.C. 205(a)(7) and (8) only for physicians and dentists commissioned as medical and dental officers prior to September 15, 1981, and for service members enrolled in the Uniformed Services University of the Health Sciences or the Armed Forces Health Professions Scholarship Program prior to that date. The language of the saving clause makes no provision whatever for student participants in the Senior COSTEP or National Health Service Corps Scholarship Program. Hence, we have no basis to construe the saving clause as having any application to them in the absence of circumstances clearly demonstrating that their omission was inadvertent and would lead to an absurd result.

The Senior COSTEP and the National Health Service Corps Scholarship Program are similar in some respects to the other education programs specifically designated in the saving clause. It also appears that participants in all the programs were advised by the program sponsors prior to 1981 that medical and dental officers of the uniformed services received constructive longevity of service credit based on their years of professional education. Yet, the four programs are governed by different laws and, as described above, the programs are significantly different in certain respects. Furthermore, participants in the Senior COSTEP and National Health Service Corps Scholarship Program may refuse to undertake their obligated service upon graduation from professional school, and officers of the Public Health Service may unilaterally resign their commission at any time prior to fulfilling all of their service commitments. In that event, they may be liable to pay a prescribed monetary penalty, and they may forfeit certain travel and transportation allowances or lump-sum accrued leave settlements. See 42 U.S.C. 218a(b) and 294w(c); and *Matter of Manges,* 58 Comp. Gen. 77 (1978). However, that is the extent of their accountability, since

civilians and commissioned officers of the Public Health Service are generally not subject to court-martial jurisdiction under the Uniform Code of Military Justice. See 10 U.S.C. 802 and 41 Comp. Gen. 767, 769-770 (1962). On the other hand, officers of the Armed Forces enrolled in the other two programs could not unilaterally resign their commissions, and they could be subjected to court-martial prosecution under the military code if they attempted to dishonor their active duty commitments. See 10 U.S.C. 802 and 41 Comp. Gen. 767, cited above. Hence, we are unable to conclude that any and all benefits conferred by statute upon service members enrolled in those two programs should automatically be construed as extending to participants in the Senior COSTEP or the National Health Service Corps Scholarship Program, or that legislative distinctions made among the programs are clearly inadvertent, absurd, or unreasonable. In addition, the fact that the saving clause was not amended during the 9 months allowed for the enactment of corrective legislation prior to the time the Defense Officer Personnel Management Act went into effect on September 15, 1981, tends to preclude any conclusion that the Senior COSTEP and the National Health Service Corps Scholarship Program, were omitted from the saving clause through sheer error and inadvertence.

It is therefore our view that the provisions of the saving clause contained in subsection 625(b) of the Defense Officer Personnel Management Act do not apply to participants in either the Senior COSTEP or the National Health Service Corps Scholarship Program. It is also our view that the Department of Health and Human Services was in error in determining that Senior COSTEP partricipants were covered by the saving clause simply on the basis that their program was similar or analogous in certain respects to the other programs specifically designated in the saving clause.

Concerning the suggestion made by participants in the National Health Service Corps Scholarship Program that the withholding of the constructive service credit from them would constitute a material breach of their scholarship contracts, we have examined the contract form executed by the particpants and have found nothing in it that promises or guarantees them the constructive service credit. Indeed, the contract form does not even guarantee that the program participant will be commissioned as a medical or dental officer of the Public Health Service upon graduation from professional school. Instead, in conformity with the governing provisions of 42 U.S.C. 294t(f), the participant simply agrees to perform a period of obligated service with the Department of Health and Human Services "in a health manpower shortage area." The contract merely indicates that this servcie may be performed as an officer of the Public Health Service, if the participant elects to apply for a commission and is accepted. Hence, we conclude that the scholarship program participants are not entitled to the construc-

tive service credit under the terms of the statutory contract prescribed by 42 U.S.C. 294t(f).

Moreover, while the Public Health Service is not an "Armed Force," it is defined by statute as being a "uniformed service." See 10 U.S.C. 101(4); 37 U.S.C. 101 (3) and (4). It is fundamental that the pay and allowance entitlements of members of the uniformed services are completely dependent upon rights prescribed by statute and that common law contract principles have no place in the determination of their pay entitlements. See 42 U.S.C. 210(a); *Matter of Blaylock,* 60 Comp. Gen. 257, 259-260 (1981); *Matter of Veterinary and Optometry Officers,* 56 Comp. Gen. 943, 950, cited above, and Comptroller General decisions and court rulings there cited. Hence, the United States is not bound by the advice or promises of service recruiters concerning pay entitlements, if their advice does not conform to the governing provisions of statute. See *Blaylock* and *Veterinary and Optometry Officers,* cited above.

In the present matter, it appears that participants in the Senior COSTEP and the National Health Service Corps Scholarship Program received advice or information from Public Health Service recruitment brochures published prior to December 1980 indicating that individuals commissioned as medical and dental officers received, among other things, the additional constructive service credit authorized by 37 U.S.C. 205(a)(7) and (8). The information was accurate when it was published, but the individuals who were given that information should have also realized that the pay entitlements of medical and dental officers were subject to future changes through statutory amendment. To any extent that the Senior COSTEP and National Health Service Corps Scholarship Program participants nevertheless believe that they were misled in the matter, that alone could not in any event afford a legal basis for crediting them with constructive service under the repealed provisions of 37 U.S.C. 205(a)(7) and (8).

Accordingly, we hold that participants in the Senior COSTEP and the National Health Service Corps Scholarship Program, 42 U.S.C. 218a and 294t, who are commissioned as medical and dental officers of the Public Health Service after September 15, 1981, are not entitled to constructive service credit under the repealed provisions of 37 U.S.C. 205(a)(7) and (8).

[B-205368]

Transportation—Rates—Mixed Shipments—Classification Mixing Rule

Where tender offers Government lower rates for a Freight-all-kinds (FAK) mixed shipment, but states that the truckload FAK rates will not apply to contraband such as radioactive materials, General Services Administration may apply truckload FAK rates to noncontraband portion of shipment and use other applicable less than truckload rates for the contraband. The National Motor Freight Classification Rule

645, which governs tender applicable here, does not prohibit GSA's application of the tender FAK rates under these circumstances.

Matter of: American Farm Lines, Inc., June 15, 1982:

American Farm Lines, Inc. (AFL), requests review of the General Services Administration's (GSA) determination that AFL overcharged the United States $846.90 under Government bill of lading (GBL) S-1,042,121. The shipment was a truckload (TL) quantity consisting of a consolidation of less than truckload (LTL) quantities of different articles, including two cartons of radioactive material weighing 114 pounds. In its audit, GSA considered the shipment as two separate shipments. It applied an LTL class rate to the radioactive material, and a TL Freight all kinds (FAK) rate under AFL Tender 266 to the other articles. The FAK rate could not be applied to the entire shipment because item 140 of the tender expressly stated that the FAK rates therein would not apply to radioactive material, among others.

AFL objects to this audit basis. AFL contends that the lower TL FAK rate is not applicable because the tender is governed by the National Motor Freight Classification (NMFC), which includes the TL mixing rule, Rule 645. Section 3 of this rule provides for dividing shipments into TL and LTL shipments for rate purposes where it results in lower charges; however, by the section 3 language, it is subject to section 1, which prohibits the use of FAK rates on mixed shipments.

The parties agree that for calculating the proper rate, because of the contraband, the shipment must be divided into two shipments. They disagree as to whether the FAK TL rate or a higher TL class rate is applicable to the noncontraband articles.

AFL's Tender 266 clearly provides that the tender is governed by the NMFC. This language has been interpreted to mean that NMFC rules such as Rule 645 govern shipments under the tender. *See* B-166192, December 9, 1969; *Union Pacific R.R. Co.* v. *United States,* 434 F.2d 1341 (Ct. Cl. 1970); *Ford Motor Co.* v. *McNamara Motor Express Inc.,* 305 ICC 49, 50 (1958); *Globe-Weinicke Co.* v. *Alton R. Co.,* 264 ICC 577 (1946). Thus, Rule 645 is applicable to the shipment. However, in our view, although the Rule 645 mixing rule governs, GSA's audit action is correct.

As pointed out by GSA, Tender 266 does not expressly prohibit application of FAK rates to noncontraband articles in a mixed shipment and application of a different tariff to the contraband. It simply provides that the rates will not apply to the contraband articles.

Rule 645 provides as follows:

ITEM 645

MIXED SHIPMENTS—TL OR VOL

Sec. 1. *Unless otherwise provided and* except as to livestock, a number of *articles* for which the same or different volume or truckload rates, classes or minimum weights are provided, *constituting a mixed volume or mixed truckload shipment, will be charged at the highest straight volume or truckload rate or class (not specific mixture "all freight" "freight all kinds" or "all commodity" rates or classes)* and the highest straight volume or truckload minimum weight that would be applicable to any article in the shipment if that quantity of each article in the mixed shipment were tendered as a straight volume of straight truckload shipment.

Sec. 2. Subject to the provisions of Sec. 1, when the aggregate charge on the shipment is made lower by considering the articles as if they were divided into two or more separate volume or truckload shipments, the shipment will be charged for accordingly.

Sec. 3. *Subject to the provisions* of Sec. 1, when the aggregate charge on the shipment is less on the basis of the volume or truckload rate and volume or truckload minimum weight (or actual or authorized estimated weight if the excess of the volume or truckload minimum weight) for one or more of the articles and on the basis of the less than truckload rate or rates on the actual or authorized estimated weight of the other article or articles, the shipment will be charged for accordingly. [Italic supplied.]

Rule 645 provides alternative methods of computing the lowest charges on a mixed shipment. Section 1 provides in substance that charges on articles constituting a mixed TL shipment shall be collected at the highest volume or TL rate or class and highest volume or TL minimum weight applicable to any of the articles contained in the shipment. Section 2 provides that where lower charges result by treating the mixture as two separate TL shipments, such charges are applicable. Section 3 allows calculation of charges by treating some articles as constituting an LTL shipment and applying LTL rates, and using a TL rate for the rest of the shipment. See *Rate Structure Inv. Part 5 Furniture,* 177 ICC 5, 13 (1931), and *Western Traffic Conf., Inc.* v. *A.T. & S.F. Ry. Co.,* 291 ICC 427 (1954).

AFL points to the phrase in section 1 that prohibits use of FAK rates as the highest TL rate on the entire shipment and argues that since sections 2 and 3 are subject to section 1, FAK rates may not be used under those sections either. AFL's interpretation of the interplay of the three sections of Rule 645 is not supported by the ICC's interpretation of the general mixing rule indicating that the three sections are alternative means of determining the lowest charge for the shipment. See *Rate Structure Inv. Part 5 Furniture, supra; Western Traffic Conf., Inc.* v. *A.T. & S.F. Ry. Co., supra.*

Here, GSA did not use section 1 and did not apply the FAK rate to the contraband, but used section 3 of Rule 645, an alternative to section 1, because it resulted in lower charges by applying the TL FAK rate, according to its terms, only to those articles covered by the TL FAK tender and applying the higher LTL rate to the LTL quantity of contraband. In using section 3 of Rule 645, the integrity of the classification and the tender was preserved, and GSA acted consistent with applicable case law. See *Union Pacific R.R. Co., supra; Great Northern Ry.* v. *United States,* 312 F. 2d 901 (Ct. Cl. 1962).

In the absence of an express provision making Tender 266 inapplicable to the noncontraband articles, these above-cited decisions permit the use of the TL FAK rates on all but the contraband articles, and we do not find that this determination conflicts with Rule 645.

As a final matter, AFL refers to a settlement reached in 1978 between the Government and the carrier in *American Farm Lines* v. *United States,* Court of claims No. 183-78. AFL points out that GSA agreed to AFL's view as to the application of Rule 645. However, paragraph 2 of the Memorandum of Negotiations states:

> Each party hereto has asserted and continues to assert the validity of its various claims and defenses. In settlement of all such claims and defenses, and without admitting the validity or invalidity of any particular issue, the parties agreed, subject to the approval of the Attorney General, as follows: * * *

This settlement applied to claims under that case and on shipments moving through December 31, 1977. The parties reserved their rights concerning future claims. Therefore, this case is a new matter not controlled by the 1978 agreement.

GSA's audit action is sustained.

[B-206571]

Congress—Resolutions—Continuing—Funding Level

Funding level for the National Commission for Student Financial Assistance, under the continuing resolution for fiscal year 1982, is $960,000. In fiscal year 1981 funds for the Commission were first appropriated in supplemental appropriation act enacted June 5, 1981, and were apportioned for use only in the fourth quarter of the fiscal year. Therefore, to determine the current rate of operations for the Commission it is necessary to annualize the partial-year amount over the full fiscal year. Annualizing the $250,000 appropriation over the full year results in a figure of $1 million. Reducing this amount by the 4 percent reduction required by the continuing resolution gives a funding level of $960,000.

Matter of: National Commission for Student Financial Assistance—Fiscal Year 1982 Funding Level, June 15, 1982:

The Chairman of the Senate Labor-HHS-Education Appropriations Subcommittee of the Committee on Appropriations requested a decision concerning the fiscal year 1982 funding level for the National Commission on Student Financial Assistance. The Chairman's submission suggests that the Commission's funding level for fiscal year 1982, as provided for in the continuing resolution, Pub. L. No. 97-92, 95 Stat. 1183 (1981), as extended by Pub. L. No. 97-161, 96 Stat. 22 (1982), should be $240,000, an amount which equals the fiscal year 1981 funding level for the Commission less the 4 percent reduction required by section 142(a) of the continuing resolution. The submission indicates, however, that the Commission takes the position that its appropriation for fiscal year 1982 is $960,000.

We requested the views of both the Commission and the Office of Management and Budget (OMB) about the Commission's 1982 fund-

ing level. Both agencies indicated that the "current rate" of operations of the Commission in 1982 should be $250,000 per quarter, or $1,000,000 for the entire fiscal year, less 4 percent. Their conclusion was based on the fact that the Commission was only provided for in the Supplemental Appropriations and Rescission Act, 1981, which they assert was enacted for the last quarter of fiscal year 1981 and therefore reflected only a partial year's appropriation. Additionally, OMB asserts that the effect of funding the Commission at only $240,000 in fiscal year 1982 would be to force the Commission out of existence; a result which OMB contends is not in accord with congressional intent.

For the reasons indicated below, we conclude that the funding level for the Commission for fiscal year 1982 is $960,000.

The fiscal year 1982 continuing resolution provides that where, as in this case, an item is included in only one version of an appropriation act as passed by both Houses of the Congress as of December 15, 1981, then the item is to be continued at a "rate for operations of the current rate or the rate permittted by the action of the one House, whichever is lower * * *."

Determining the rate provided by the one House is not difficult. The House of Representatives' version of the Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 1982, H.R. 4560, provides the amount of $1,000,000 for the Commission. The dispute in this case centers around the "current rate."

This Office has generally interpreted the term "current rate," as used in continuing resolutions as referring to a sum of money rather than a program level. *See, e.g.,* 58 Comp. Gen. 530 (1979); B-194063, May 4, 1979. (We have made an exception only when there was an overwhelming congressional intent to maintain a prescribed program level. *See* B-197636, February 25, 1980.) Thus we have held that the term "current rate" is equivalent to the "total appropriation or the total funds which were available for obligation for a program during the previous fiscal year." *E.g.* B-194362, May 1, 1979.

Because the Commission's $250,000 appropriation for fiscal year 1981 was contained in the Supplemental Appropriations and Rescission Act, 1981, Pub. L. No. 97-12, 95 Stat. 60, which was not enacted until June 5, 1981, it is uncertain whether this $250,000 represents the total available funds or whether this figure should be "annualized" to determine the current rate.

Neither OMB nor the Commission argues that we should look to the program level at which the Commission was operating in September 1981 in determining the fiscal year 1982 appropriation for the Commission. Apparently, they agree that the term "current rate," refers to a sum of money. Nevertheless, both OMB and the Commission argue that our general definition of "current rate" should not be applied to the fiscal year 1982 funding level for the

Commission. It is their position that since the fiscal year 1981 appropriation was intended to cover only one-fourth of the year, it is necessary to multiply the appropriation by four to get the annual amount or current rate. To justify its assertion that the fiscal year 1981 appropriation was intended to cover only one quarter of the year, OMB specifically refers to language in the Senate report accompanying the supplemental appropriation act of 1981, which states that the supplemental appropriation was "for the balance of th fiscal year." S. Rep. No. 97-67, 87th Cong., 1st Sess. 298 (1981). OMB construes this language as meaning that the appropriation represented only a "part-year, start-up amount."

We agree with OMB and the Commission that our general definition of the term "current rate" should not be applied in this case. As our precedents in this area illustrate, this general definition has only been used in situations where in the previous fiscal year an agency was funded for the entire year. Where, as here, an agency's initial funding was only intended for part of a year, applying the general definition would require the agency to drastically reduce its rates of spending during the period of the continuing resolution, a result we believe to be contrary to the intent of the Congress.

The Congress made clear its intent concerning the meaning of "current rate" during its consideration of a fiscal year 1981 continuing resolution, Pub. L. No. 96-369, 94 Stat. 1351 (1980). For the House, this intent was contained in the Appropriations Committee report accompanying the continuing resolution. The committee stated:

> Various sections of the continuing resolution refer to a "rate for operations not in excess of the current rate." * * * In most cases, the total appropriation for the current year should serve as the upper limit in determining the current rate for operations. Nevertheless, the "current rate" should not be interpreted as requiring cutbacks in ongoing program levels which Congress has approved.
>
> The Committee notes that where programs were authorized to expand during the current year, it is likely that the cost of operating the program for a full year at the rate achieved at the end of the current year would exceed the total cost for the program in the current year. The current rate for operations should be construed to maintain individual program and activity levels except where Congress has expressed a contrary intent with respect to specific programs. H. Rept. 96-1327, 96th Cong., 2d Sess. 3 (1980).

In the Senate a similar statement was included in an informal report by the Appropriations Committee. *See* 126 Cong. Rec. S 13559 (1980). Moreover, the Senate amended the resolution to define the term "current rate." Although this amendment was dropped by the Conference Committee, it does indicate the intent of the Senate with respect to current rate. The amendment reads as follows:

> For the purpose of this joint resolution, the term "current rate" shall mean the total appropriation available for a project or activity during FY 1980, except that the appropriation level shall be increased or decreased by the amounts that are nec-

essary to respond to any expansion or contraction of a particular program in FY 1980 as directed by Congress. 126 Cong. Rec. S 13564 (1980).[1]

This legislative history demonstrates that the Congress intends our general definition of current rate—the total funds available in the previous fiscal year—to apply in the normal situation. On the other hand, it is equally clear that when the Congress provides additional funding during the previous fiscal year to expand or start up a program, the Congress does not intend "current rate" to be interpreted so as to force a reduction of that increased funding under the continuing resolution. Rather, the Congress intends that the program continue to operate with the same funding that was available towards the end of the previous fiscal year.

In the present instance, the Congress increased the funding for the Commission from zero to $250,000 on June 5, 1981, after two-thirds of fiscal year 1981 had already passed. These funds were apportioned by OMB for use in the fourth quarter of the fiscal year. Were we to apply our normal definition of "current rate" and conclude that the Commission's full annual amount under the continuing resolution is $250,000, it is obvious that the Commission would be faced with drastically reduced funding under the resolution. As we have indicated, this is not what the Congress intended. To carry out the true intent of the Congress—that the Commission continue to operate under the resolution at the same rate at which it operated near the end of fiscal year 1981—we must annualize the $250,000 figure.

The appropriation for the Commission was apportioned by OMB for use in the fourth quarter of the fiscal year. Therefore, the $250,000 appropriated for the Commission was available for obligation from July 1, 1981, through September 30, 1981, or one quarter of the fiscal year. Annualizing this amount over the full fiscal year results in a figure of $1 million. We conclude that this amount is the current rate.

Since the current rate is the same as the "one-house" rate of $1 million, this is the rate for operations of the Commission. Applying the 4 percent reduction required by section 142(a) of the continuing resolution, we conclude that the funding level for the Commission for fiscal year 1982 is $960,000.

[1] This amendment was not viewed as a change to existing law but only as a clarification of what was always intended by the use of the term "current rate" in all previous continuing resolutions. Additionally, the sponsor of this amendment also recognized that it was totally consistent with the House's interpretation of this term, as expressed in House reports. 126 Cong. Rec. S 13564 (1980).

[B-203844]

Bonneville Power Administration—Certifying Officers—Responsibilities—Pacific Northwest Electric Power Planning and Conservation Act

Safeguards proposed by Bonneville Power Administration (BPA) certifying officer to govern certification of payments by BPA to Pacific Northwest Electric Power and Conservation Planning Council, pursuant to Pub. L. 96-501, are adequate to fulfill certifying officer's responsibility under 31 U.S.C. 82c for assuring compliance with requirements of Pub. L. 96-501. BPA certifying officer is also responsible for assuring that such payments are consistent with any other applicable legal requirements.

General Accounting Office—Audits—Authority—Bonneville Power Administration—Payments to Non-Federal Regional Council

General Accounting Office may scrutinize funding and functions and responsibilities of Pacific Northwest Electric Power and Conservation Planning Council through its authority to audit BPA's financial payments to Council under Pub. L. 96-501 and governmental programs and activities under 31 U.S.C. 1154(a) and to obtain access to Council's records. Also, BPA might work out with the Council some procedures short of direct audit to provide additional oversight of Council's use of funds.

Matter of: Pacific Northwest Electric Power and Conservation Planning Council, June 16, 1982:

This decision to the Secretary of Energy is in response to requests of June 26, 1981, and October 13, 1981, from Mr. Gordon Haynes, Authorized Certifying Officer, Bonneville Power Administration (BPA), for our concurrence with BPA's views on two matters involving the relationship between BPA and the Pacific Northwest Electric Power and Conservation Planning Council (Council). First, the Certifying Officer requests our agreement that certain safeguards which he proposes to apply in certifying payments from BPA funds to the Council are adequate to satisfy his responsibility as a certifying officer under 31 U.S.C. § 82c.[1]

Second, we are asked to concur with the view of the BPA General Counsel that GAO's audit authority over the Council represents the exclusive Federal audit authority with respect to the Council, so as to preclude any audit by BPA.

For the reasons stated hereafter, we agree that the safeguards proposed by the certifying officer are generally adequate to carry out his responsibilities. We also conclude that BPA lacks authority to audit the Council. In our view, GAO may scrutinize the funding and functions and responsibilities of the Council through its au-

[1] Under 31 U.S.C. § 82d, we are required to render decisions to certifing officers "* * * on any question of law involved in a payment on any vouchers presented to them for certification." In this case, no voucher accompanied the request for decision and the question presented is general in nature. Normally we would not render a decision under such circumstances. However, in view of the fact that the question presented raises problems of a recurring nature throughout the life of the Council, we are rendering our decision to the Secretary of Energy under the broad authority contained in 31 U.S.C. § 74.

thority to audit BPA's financial payments to the Council and governmental programs and activities and to obtain access to the Council's records. We suggest certain steps that BPA might take, short of a direct audit, to enhance oversight of the Council's use of funds.

I

The Council, a non-Federal regional body, was established by the Pacific Northwest Electric Power Planning and Conservation Act, Public Law 96-501 (December 5, 1981), 94 Stat. 2697, to be codified at 16 U.S.C. § 839 *et seq.* Section 4(c)(10)(A) of Public Law 96-501, to be codified at 16 U.S.C. § 839b(c)(10)(A), provides for payments by BPA to fund the Council's activities; imposes certain requirements for such payments; and provides for GAO audits of BPA payments to the Council.[2] Among other things, section 4(c)(10)(A) requires that BPA pay the compensation and other expenses of the Council authorized by the Act "as the Council determines are necessary or appropriate for the performance for its functions and responsibilities."

Section 4(c)(10)(A) also establishes that BPA's annual budget submissions to Congress, required by the Federal Columbia River Transmission Act, 16 U.S.C. § 838 *et seq.,* must include payments to the Council. Under the Transmission Act, BPA can only spend money out of the BPA fund for necessary or appropriate activities which are included in its annual budget submission to Congress. See 16 U.S.C. § 838i(b). However, Congress may include specific instructions or limitations affecting the BPA fund in appropriation acts.

BPA and the Council entered into an agreement on May 8, 1981, establishing procedures for BPA to pay the Council's necessary and appropriate expenses, including compensation. Section 8 of the agreement provides that BPA will advance to the Council enough funds to meet Council expenses for 30 days.[3] Subsequently, the

[2] Section 4(c)(10)(A) provides in relevant part:

At the request of the Council, the Administrator [of BPA] shall pay from funds available to the Administrator the compensation and other expenses of the Council as are authorized by this Act * * * as the Council determines are necessary or appropriate for the performance of its functions and responsibilities. Such payments shall be included by the Administrator in his annual budgets submitted to Congress pursuant to the Federal Columbia River Transmission System Act and shall be subject to the requirements of that Act, including the audit requirements of section 11(d) of such Act. The records, reports, and other documents of the Council shall be available to the Comptroller General for review in connection with such audit or other review and examination by the Comptroller General pursuant to other provisions of law applicable to the Comptroller General. Funds provided by the Administrator for such payments shall not exceed annually any amount equal to 0.02 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded. In order to assist the Council's initial organization, the Administrator after the enactment of this Act shall promptly prepare and propose an amended annual budget to expedite payment for Council activities.

[3] Under the agreement, this initial disbursement of funds was conditioned upon the Council's certifying in writing that the Council had provided for "an adequate accounting system to facilitate audit of its finances." We understand that the Council has so certified in a letter to BPA.

Council's revolving working capital account will be replenished through reimbursement for expenses actually incurred. Such payments will be made no more frequently than every 2 weeks, but at least once a month. To obtain payment, the Council is required to submit "a Financial Summary Statement (Statement) certified by the Council's certifying officer that its expenditures have been documented and made in accordance with applicable Federal laws."

To obtain reimbursement from BPA, the Council has been using on an interim basis Office of Management and Budget (OMB) Standard Form 270 (7-76), "Request for Advance or Reimbursement." BPA proposes to add the following certification language to OMB Form 270 or any subsequent statement:

> I [the Council's Certifying Officer] certify that (1) funds are for expenditures authorized by the Regional Act, (2) funds are necessary or appropriate to perform the functions and responsibilities of the Regional Planning council pursuant to the Regional Act, and (3) funds are for expenditures that have been included in the Administrator's budget submittal to Congress.

The Council would also attach to OMB Form 270 or any subsequent statement an itemization of expenditures for which funds have been requested. The itemization would be in sufficient detail to allow BPA's Certifying Officer to compare each item with the Council's prior budget submission to BPA and to determine whether each such expenditure is authorized by the Act.

According to Mr. Haynes' October 13 letter, BPA's Certifying Officer would certify the statement for payment if he is satisfied that (1) the statement represents the Council's determination that the expenditures are necessary or appropriate for it to perform its functions pursuant to the Act; (2) each expenditure is authorized by the Act; [4] and (3) each expenditure has been included by the Administrator in his budget submission to Congress under the Transmission Act.

BPA also will request the Council to submit its advance budget showing proposed expenditures according to specific categories. The Council is required under the agreement to certify that such expenditures are necessary and appropriate for performance of its functions and responsibilities under the Act. The advance budget is submitted by July 1 of each year for the fiscal year beginning 15 months later.

A certifying officer is responsible for both the accuracy of the facts contained in the papers submitted to him and the legality of

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[4] We assume that in determining whether an expenditure is authorized, the Certifying Officer will make sure that BPA has not exceeded the funding limitation in the Act, which is based on a mill-rate formula. Section 4(c)(10)(A), quoted previously, provided that BPA funding for the Council is restricted to an amount equal to 0.02 mill, multiplied by a stated formula. (However, this limitation may be raised to 0.10 mill upon an annual showing that the Council cannot carry out its functions and responsibilities at the lower level. See Section 4(c)(10)(B).)

the proposed payments. Specifically, section 82c of title 31, United States Code, provides:

> The officer of employee certifying a voucher shall (1) be held responsible for the existence and correctness of the facts recited in the certificate or otherwise stated on the voucher or its supporting papers and for the legality of the proposed payment under the appropriation of fund involved; and (2) be held accountable for and required to make good to the United States the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certificate made by him, as well as for any payment prohibited by law or which did not represent a legal obligation under the appropriation of fund involved * * *.

We agree that the safeguards proposed by the BPA Certifying Officer and set out in BPA's agreement with the Council, as described previously, are adequate to fulfill his responsibilities in applying the requirements of Public Law 96-501. In addition, the BPA Certifying Officer is responsible for applying any requirements from sources other than Public Law 96-501 that might affect the legality of BPA payments to the Council. For example, the Congress could enact subsequent legislation having some bearing on BPA funding of certain Council activities.

In sum, so long as the BPA Certifying Officer follows his proposed procedures for assuring compliance with the requirements with Public Law 96-501, and takes reasonable steps to ascertain any other applicable legal requirements, he will have satisfied his responsibilities under 31 U.S.C. § 82c.

II

The BPA Certifying Officer also requested our concurrence with the opinion of BPA's General Counsel that Public Law 96-501 vests Federal audit responsibility for the Council in GAO exclusively, thereby precluding any audit of the Council by BPA.

Section 4(c)(10)(A) of Public Law 96-501 extends GAO's audit authority to the payments BPA makes to the Council:

> * * * Such payments shall be included by the Administrator in his annual budgets submitted to Congress pursuant to the Federal Columbia River Transmission System Act and shall be subject to the requirements of that Act, including the audit requirements of section 11(d) of the Act. The records, reports, and other documents of the Council shall be available to the Comptroller General for review in connection with such audit or other review and examination by the Comptroller General pursuant to other provisions of law applicable to the Comptroller General.

Section 11(d) of the Transmission Act, 16 U.S.C. § 838i(d), specifically provides:

> Notwithstanding the provisions of sections 850 and 851 of Title 31, the financial transactions of the Administrator shall be audited by the Comptroller General at such times and to such extent as the Comptroller General deems necessary, and reports of the results of each such audit shall be made to the Congress within 6½ months following the end of the fiscal year covered by the audit.[5]

[5] Sections 850 and 851 of title 31 set out the requirements for audits of wholly owned Government corporations, to which BPA is subject. The reference to these sections was designed to remove the requirement that GAO perform an audit of BPA at set intervals.

Section 4(c)(10)(A) specifically authorizes GAO to audit BPA's payments to the Council, which are considered BPA financial transactions under the Transmission Act. Also, Public Law 96-501 grants GAO access to the Council's records in connection with our audit of BPA's payments to the Council and our audit authorities under other statutes.[6] Under 31 U.S.C. 1154(a), GAO "shall review and evaluate governmental programs and activities under existing law."

We believe that these audit and access to records provisions, taken together, enable GAO to scrutinize the funding and functions and responsibilities of the Council in a manner similar to our review of the funding and operations of Federal agencies.[7] GAO's audit of BPA's payments to Council may review whether, in fact, BPA's funds were used to pay for Council expenses which are authorized under Public Law 96-501 and are necessary and appropriate for the Council to perform its statutory functions and responsibilities. Under 31 U.S.C. 1154(a), GAO may examine how the Council is carrying out these functions and responsibilities.[8] GAO has access to the Council's records for the purpose of these audits.

On the other hand, Public Law 96-501 makes no mention of BPA having audit responsibility for the Council, nor does it provide BPA with authority to obtain the Council's records and documents. It establishes the Council as an agency independent of BPA which monitors BPA in some respects and can affect certain BPA activities. The language in section 4(c)(10)(A) of Public Law 96-501, discussed previously, which vests in the Council—rather than BPA— determination of the appropriateness of its expenditures, further supports the view that the Council is to be largely independent of BPA.

Since Public Law 96-501 does not specifically grant BPA authority to audit the Council or to obtain its records, and since the statute reflects a general intent to make the Council independent of BPA, we agree that BPA lacks authority to audit the Council. At the same time, we believe it would not be inappropriate for BPA to work out with the Council procedures for exercising some oversight over the Council's use of its funds short of performing direct audits. For example:

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[6] This statutory language would permit GAO to examine these records whether they are in the possession of the Council or BPA.

[7] Our view of GAO's scrutiny of the Council's actions is consistent with the statement of Congressman Dingell, November 17, 1980, on the floor of the House as the legislation was being considered. Congressman Dingell stated:

The Council's funding and expenses, as well as all functions of the Council, will be subject to scrutiny by the General Accounting Office. GAO review is not intended to be limited to just funding matters but to all of the operations of the Council in the same manner and to the same extent as the GAO reviews operations of Federal agencies. Cong. Rec. for November 17, 1980 (daily ed.) at H10682.

[8] Although the Council is not a Federal agency, it was established, assured of funding and assigned specific functions and responsibilities under Public Law 96-501. It undertakes and helps carry out governmental programs and activities established by Public Law 96-501.

1. BPA could be consulted in the selection of the outside auditor for each year's audit required under the Council's by-laws.

2. BPA could make recommendations to the Council that the annual independent outside audit include a detailed review and examination of certain activities.

3. BPA could request the Council, after reviewing an annual audit, to have the independent auditor provide additional information to both the Council and BPA with respect to certain activities.

We believe that implementation of procedures along the above lines by BPA and the Council could balance the need for a limited oversight and the need to maintain the Council's independence from BPA.

[B-206940.2]

Appropriations—Availability—Objects Other Than as Specified—Termination Costs—Discretionary Projects—Nonnuclear Energy Research

Funds appropriated for fossil energy research and development activities of the Department of Energy (DOE) may be used for expenses pertaining to the termination of various fossil energy research and development programs and projects, where those programs and projects are not specifically mandated in either the appropriation act or authorizing legislation, where the Secretary of Energy is given considerable discretion in formulating and executing a comprehensive nonnuclear energy research and development program, and where the proposed terminations and reductions would not leave the remaining overall program inconsistent with the statutory scheme.

Appropriations—Impounding—Impoundment Control Act—Reporting to Congress—Rescission *v.* Deferral—Program Termination Costs

A proposal by DOE to defer use of no-year funds to fiscal year 1983 was not a proposed rescission under section 1012(a) of the Impoundment Control Act of 1974, 31 U.S.C. 1402(a), merely because it would have been used to cover expenses incurred in connection with the termination of authorized projects and activities. Where all available budget authority will in fact be expended for termination costs, a rescission proposal is not required.

Appropriations—Impounding—Program Termination—Prior to Congressional Action on Proposed Deferral—Propriety

There is no legal requirement that would have prevented DOE from initiating termination activities within the Fossil Energy Research and Development Program in advance of congressional action on a proposed deferral of funds from that program.

Matter of: Department of Energy—Termination of Fossil Energy Programs, June 16, 1982:

The Chairman and several members of the House Committee on Science and Technology have requested our opinion as to whether the Department of Energy may use funds appropriated for fossil energy research and development to pay for the termination of a number of fossil energy research and development programs, projects, and activities. We have received similar congressional re-

quests concerning the Magnetohydrodynamics program and the Hydropyolysis Coal Gasification project. In connection with these various requests, we have also been asked several questions concerning a proposal by DOE to defer certain fossil energy funds to pay for subsequent program termination costs: whether the proposed deferral should not have instead been designated a proposed rescission, and whether Energy could initiate program terminations in advance of congressional action on the impoundment proposal.

After the committee members submitted their questions, the Congress rejected the proposed deferral. *See* H.R. Res. 411, 97th Cong., 2d Sess., 128 Cong. Rec. H1660 (daily ed. April 29, 1982). Nonetheless, we shall address the impoundment questions because they raise significant issues that may again arise in the future.

We have examined the Department's proposals in light of the authorization and appropriation statutes governing the Fossil Energy Research and Development Program, and conclude that the funds in question may be used to pay for fossil fuel program termination expenses. We also conclude that the proposed impoundment by Energy was in fact a deferral, and that the Department need not have waited until the Congress had acted on the impoundment proposal before commencing termination activities. A detailed discussion of the reasons for our conclusions follows.

BACKGROUND

Program Authorization

The Fossil Energy Research and Development Program consists of a number of research and development efforts carried out under authority of the Federal Nonnuclear Energy Research and Development Act of 1974 (the Nonnuclear Energy Act), 42 U.S.C. § 5901 *et seq.* (1976), and the Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq.* (Supp. III 1979). The Nonnuclear Energy Act required the Administrator of the Energy Research and Development Administration (ERDA) to formulate and carry out a comprehensive Federal nonnuclear energy research and development program to advance certain policies and comply with certain requirements of that statute. 42 U.S.C. § 5903(b) (1976). It further required the Administrator to develop and transmit to the Congress a comprehensive nonnuclear energy research, development, and demonstration program, designed "to achieve solutions to the energy supply and associated environmental problems in the immediate and short-term (to the early 1980's), middle-term (the early 1980's to 2000), and long-term (beyond 2000) time intervals." 42 U.S.C. § 5905(b)(2) (1976).

The Nonnuclear Energy Act required that the program transmitted to the Congress include elements and activities designed to advance the development and demonstration of specific categories of

energy technology, including conservation, low sulfur boiler fuels, electrical generation, coal gasification and liquefaction, oil shale, petroleum, geothermal and solar energy, tidal power and synthetic fuels. 42 U.S.C. § 5905(b)(3) (1976). Program elements and activities were to be assigned to the three time intervals. The program was required to include justifications for these assignments and for the degree of emphasis given to each. *Id.* In addition, the Administrator was required to revise the program annually. 42 U.S.C. § 5914(a) (1976).

The responsibility and authority provided to the Administrator by the Nonnuclear Energy Act were transferred to the Secretary of Energy by section 301(a) of the Department of Energy Organization Act. 42 U.S.C. § 7151(a) (Supp. III 1979).

Funding Authorization and Appropriations

Appropriations to carry out the requirements of the Nonnuclear Energy Act are made subject to annual authorization. 42 U.S.C. §§ 5821, 5915, 7270 (1976 and Supp. III 1979). The fiscal year 1982 authorization for fossil energy research and development was included in section 1001 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 606. That provision authorized the appropriation of $460.8 million for fiscal year 1982 for "[f]ossil energy research and development, including capital equipment not related to construction."

The fiscal year 1982 appropriation statute provided a lump-sum of $431.1 million, to remain available until expended, for "necessary expenses in carrying out fossil energy research and development activities under the authority of the Department of Energy Organization Act * * *." Act of December 23, 1981, Pub. L. No. 97-100, 95 Stat. 1391, 1407. The report of the committee of conference on this act contained detailed recommendations as to specific amounts that were intended to be used for various programs, projects, and activities within the overall fossil energy research and development program. This specific language, however, was not carried over into the appropriation act itself.

Administration's Proposals

The Reagan Administration is proposing a major modification of the Fossil Energy Research and Development Program, based upon a perception that "it is the role of the private sector, responding to free market forces, to support and accelerate advanced technology development." *Federal Energy Programs, FY 1983 Budget Highlights,* at 15 (February 1982). According to Energy, the Fossil Energy program was realigned in fiscal year 1982 to concentrate on long-term, high-risk research and development while relying on the private sector to demonstrate and commercialize promising individual technologies. *Id.* Continuing this realignment, Energy now intends to halt long-term research and development designed to ac-

celerate the development of "advanced" technologies, and intends to leave "proof of concept" work to industry for completion. *Id.*

During the remainder of fiscal year 1982 and continuing into fiscal year 1983, Energy plans to phase out those specific activities no longer considered to be consistent with the Reagan Administration's fossil energy research and development objectives. Some of the specific programs and projects slated for termination include the Magnetohydrodynamics program, the Heat Engines development program, the In Situ Coal Gasification program, the Eastern Oil Shale project, the Tar Sand Oil Recovery projects, the Pressurize Fluidized Bed Combined Cycle project, the Bi-Gas Combined Cycle pilot plant projects, and a number of Surface Coal Gasification projects, including the Hydropyrolysis Coal Gasification project.

As a consequence of Energy's proposed "realignment" of the fossil energy program, a portion of the funds that were appropriated to carry out activities within the Fossil Energy Research and Development Program are now proposed to be used to cover contract termination costs, personnel reduction-in-force expenses, "mothballing" costs, and other expenses related to program reductions and terminations. In addition, the Reagan Administration had proposed to defer some $45 million in fossil energy funds to cover these same types of expenses in 1983. *See* Deferral Message D82-236, H.R. Doc. No. 155, 97th Cong., 2d Sess. 3 (1982).

DISCUSSION

I. Program Terminations

The committee members first ask whether it is lawful for the Department of Energy to use fossil energy funds to terminate various fossil energy research and development programs, projects, and activities. The committee members have expressed concern that proposed terminations are contrary to the intention of the Congress as evidenced by appropriation and authorizing legislation, that such programs and projects be continued. According to the committee members, Energy's proposal appears to violate the requirements of section 3678 of the Revised Statutes, which provides that sums appropriated be applied solely to the objects for which they are appropriated. *See* 31 U.S.C. § 628 (1976).

As a preliminary matter, we note that, although the committee reports on Energy's lump-sum appropriation for fossil energy research and development contain specific recommendations as to the use of that appropriation, those recommendations are not legally binding on Energy. See *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 315-26 (1975). Agencies are not required to follow restrictions expressed in committee reports when those expressions, as here, are not explicity carried over into the statutory language. Nonetheless, Energy's use of the funds in question must be consistent with the

purposes specified by the appropriation act itself, as well as the applicable authorizing statutes. *See* 31 U.S.C. § 628 (1976); 53 Comp. Gen. 328 (1973).

In a 1977 opinion, this Office concluded that funds appropriated for a particular project, specifically the Clinch River Breeder Reactor Project, could not be used to further actions intended to implement a proposed curtailment of that project. *See* B-115398.33, June 23, 1977. In that case our decision was based upon the restrictive language of the authorizing legislation. We stated that the proposed curtailment actions would result in the implementation of a project that would no longer be consistent with the major elements of the undertaking explicitly dictated by the controlling statute. Although Clinch River funds were included in a broad lump-sum appropriation for ERDA operating expenses, we found that the authorizing legislation placed specific constraints on the purposes for which those appropriated funds could be used. The applicable statute authorized ERDA to enter into agreements for the research and development, design, construction, and operation of a demonstration reactor that would comply with criteria approved by the Joint Committee on Atomic Energy. *See* section 106, Pub. L. No. 91-273, *as amended by* Act of December 31, 1975, Pub. L. No. 94-187, § 103(d), 89 Stat. 1069. As the proposed curtailment actions would have been inconsistent with the approved criteria and thus with the statutory scheme, we considered use of funds to further such actions to be unauthorized.

In contrast to the Clinch River opinion, we have on occasion been asked for our views on the legality of project termination or curtailment expenditures where the project on program that was to be terminated had not been specifically provided for in either the applicable appropriation or authorization statute, but instead had been part of an agency effort to implement a broader statutory directive. In a recent case, we stated that expenses pertaining to the termination of activities carried out in furtherance of a statutory program could be paid from funds appropriated for that program, so long as the proposed termination action would not result in such a curtailment of the overall program that it would no longer be consistent with the statutory requirements. *See* B-203074, August 6, 1981, in which we approved the use of funds appropriated for implementation of the Railroad Reorganization and Regulatory Reform Act of 1976 to terminate contracts intended to meet certain goals of that statute. *Accord* B-115398, August 1, 1977, concerning termination of B-1 bomber production.

The present situation is comparable to these latter cases. First, none of the fossil energy research and development projects and activities that are the subject of DOE's proposed terminations and reductions is specifically provided for in either the fiscal year 1982 appropriation statute or the fiscal year 1982 funding authorization, both of which refer broadly to fossil energy research and develop-

ment activities of Energy. *See* Pub. L. No. 97-100, 95 Stat. 1391, 1407 (1981); Pub. L. No. 97-37 § 1001, 95 Stat. 357, 606 (1981). Instead, each project and activity was initiated as part of Energy's effort to implement the research and development requirements of the nonnuclear Energy Act. Second, while the original program authorization, contained in the Nonnuclear Energy Act, requires that Energy's program be designed to advance certain specific categories of energy technology, it does not explicitly require the program to include any of the individual projects and activities now considered for termination.

In connection with this latter point, we recognize that section 6(b)(3) of the nonnuclear Energy Act requires Energy to design its Nonnuclear Energy Research and Development Program to advance the development and demonstration of specific categories of energy technology, 42 U.S.C. § 5905(b)(3). Among the technologies specifically mentioned are Magnetohydrodynamics (although only "if practicable") and In Situ Coal Gasification, both of which have been targeted for termination by Energy. We do not, however, consider section 6(b)(3) to be a mandatory list of technologies that must be pursued at all times with the overall program. Certainly, if any of the listed technologies proved to be technologically infeasible, commercially impractical, or simply too expensive to pursue at a particular time, the Congress did not intend that the Secretary continue implementation of such projects. This view is confirmed by section 15 of the act, in which the Congress anticipates annual revisions to the program. *See* 42 U.S.C. § 5914. It is also confirmed by section 5 of the statute, which sets out broad criteria that are to govern the Secretary's actual selection of projects to constitute the program at any given time. *See* 42 U.S.C. § 5904. Consequently, so long as the program that is transmitted to the Congress contains a full justification for the degree of emphasis for each of the technologies listed in the statute, the Secretary may decide to discontinue present research and development activities in any particular technology, so long as that decision is made in conformance with the criteria of section 5.

Consistent with our previous opinions regarding terminations of nonmandatory program activities, we consider that expenses pertaining to the termination of activities carried out in furtherance of the Fossil Energy Research and Development Program may be paid from funds appropriated for that program, so long as the proposed termination activities do not result in such a curtailment of the overall program that it would no longer be consistent with the Nonnuclear Energy Act. Consequently, the underlying question in this matter is whether Energy's proposed "realignment" of the program, of which these termination activities would be a part, is in violation of the requirements of the Nonnuclear Energy Act. We conclude that it is not.

As described above, the Nonnuclear Energy Act affords the Secretary of Energy considerable discretion in the selection of individual programs, projects and activities, so long as those selections are made in accordance with certain principles and criteria set out in section 5, 42 U.S.C. § 5904. Of particular relevance to an examination of the Secretary of Energy's proposal to restructure the fossil energy program are the criteria contained in 42 U.S.C. § 5904(b)(2). That provision requires that, in the execution of an energy research and development program, the selection of individual research efforts should be determined by reference to the following:

(A) The urgency of public need for the potential results of the research, development, or demonstration effort is high, and it is unlikely that similar results would be achieved in a timely manner in the absence of Federal assistance.

(B) The potential opportunities for non-Federal interests to recapture the investment in the undertaking through the normal commercial utilization of proprietary knowledge appear inadequate to encourage timely results.

(C) The extent of the problems treated and the objectives sought by the undertaking are national or widespread in their significance.

(D) There are limited opportunities to induce non-Federal support of the undertaking through regulatory actions, end use controls, tax and price incentives, public education, or other alternatives to direct Federal financial assistance.

(E) The degree of risk of loss of investment inherent in the research is high, and the availability [of] risk capital to the non-Federal entities which might otherwise engage in the field of the research is inadequate for the timely development of the technology.

(F) The magnitude of the investment appears to exceed the financial capabilities of potential non-Federal participants in the research to support effective efforts. 42 U.S.C. § 5904(b)(2).

The Congress expected these criteria to be in conflict with one another upon occasion, and the Administrator of ERDA (now the Secretary of Energy) was encouraged to balance these factors in determining which efforts should be federally supported. *See* H.R. Rep. No. 93-1563, 93d Cong., 2d Sess. 23 (1974).

In restructuring the Fossil Energy Research and Development Program, Energy appears to be reexamining existing programs with strong emphasis given to the criteria of 42 U.S.C. §§ 5904(b)(2)(E) and (F), which indicate the appropriateness of Federal efforts when the private sector is unable or unwilling to pursue such efforts. Consequently, many of Energy's termination decisions reflect the Reagan Administration's conclusion that industry should be expected to support the development, from the pilot plant stage onwards, of advanced technologies the engineering feasibility of which has been established. Consistent with this conclusion is the decision to concentrate Federal involvement in more generic research efforts and long-term technology base development.

In some cases, Energy has proposed the termination of programs and activities that in fact satisfy the criteria of 42 U.S.C. §§ 5904(b)(2)(E) and (F) in that high development risks and costs have discouraged private sector involvement. Nonetheless, these criteria must be balanced by that of 42 U.S.C. § 5904(b)(2)(A): a high urgency of public need for the potential results of the research.

One example of Energy's reevaluation of programs in light of these multiple factors is the Magnetohydrodynamics (MHD) research and development program. Energy has concluded that MHD technology has higher risks and costs than other Energy-funded electricity generating technologies, a factor that would satisfy the Federal-support criteria of 42 U.S.C. §§ 5904(b)(2)(E) and (F). *See* Department of Commerce, Energy Research and Technology Administration, *Congressional Budget Request FY 1983*, Vol. 5 at 66 (1982). Energy, however, considers this factor outweighed by the fact that other alternative electricity technologies should be ready for commercial introduction far sooner than MHD. *Id.* The "urgency of public need" of 42 U.S.C § 5904(b)(2)(A), it appears, has been determined to lie elsewhere.

While favoring Energy's general view that it is preferable to have the private sector carry out activities to promote new energy technology, this Office has stated in the past our opinion that private industry's willingness and ability to advance energy supply technologies may have been overestimated. *See Analysis of Federal Energy Roles and Structures*, EMD-82-21, B-205424, January 20, 1982, at 18. We have also been critical of Energy's categorization of certain technologies as "near-term" simply because Federal efforts have been carried out for some time, and its resulting decision to discontinue efforts in these areas because commercial feasibility has not yet been shown. *Id.* Despite our criticisms of Energy's Fossil Energy Research and Development Program, however, and despite our questioning many of the assumptions upon which the proposal to realign that program is based, we cannot conclude, as a legal matter, that Energy's proposals violate the requirements of the Nonnuclear Energy Act. As we have stated above, the statute gives the Secretary of Energy considerable discretion in formulating and executing a research and development program, so long as certain broad principles and criteria are followed. As Energy's proposals appear to be consistent with those factors, we cannot conclude that the proposed program revisions are an abuse of discretion.

We conclude, therefore, that it is lawful for the Department of Energy to use fossil energy research and development funds for expenses incurred in the termination of fossil energy programs and activities no longer considered to be consistent with the Reagan Administration's fossil energy research and development objectives.

II. Proposed Deferral of Funds

As described above, Energy proposed to defer to fiscal year 1983 some $45 million in fossil energy research and development funds to cover various expenses related to reductions and terminations

within the Fossil Energy Research and Development Program.[1] The committee members have first asked whether the proposed deferral should have instead been classified as a rescission. We conclude that it was correctly classified as a deferral.

The Impoundment Control Act of 1974, 31 U.S.C. § 1400 *et seq.*, covers two types of impoundment actions: "rescissions" and "deferrals." A deferral of budget authority is defined as a withholding or delaying (whether by establishing reserves or otherwise) of the obligation or expenditure of budget authority provided for projects or activities. 31 U.S.C. § 1401(1). While the term "rescission" is not specifically defined in the statute, section 1012(a) provides guidance as to when a rescission exists. That provision requires the President to report a proposed rescission:

> Whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of authorized projects or activities for which budget authority has been provided) * * *. 31 U.S.C. § 1402(a).

In those cases where we have been asked to examine an impoundment of funds in connection with the termination of a particular program or activity, the typical situation has involved a proposed rescission. In those instances, once the activity has been successfully shut down, funds remaining for obligation are no longer needed and are proposed to be rescinded. *See, e.g.,* our Clinch River opinion, B-115398.33, *supra.* This type of situation was clearly contemplated by the Congress in drafting section 1012(a) of the Impoundment Control Act, as project termination is expressly given as an example of the reasons that might occasion a rescission proposal. 31 U.S.C. § 1402(a). We do not consider, however, the language "other reasons (including the termination of authorized projects or activities) * * *" to mean that every impoundment in connection with a program termination must be classified as a rescission.

In the present case, Energy has stated its intention to expend the entire amount of budget authority provided in the fiscal year 1982 appropriation for costs pertaining to the reorganization of the Fossil Energy Research and Development Program, including termination expenses. In actuality, Energy merely proposed to delay the obligation or expenditure of budget authority. This is defined by section 1011(1) as a deferral. 31 U.S.C. § 1401(1)(A).

The committee members' second question is whether Energy could initiate program termination actions in the Fossil Energy Research and Development Program in advance of congressional action on the proposed deferral of funds from that program. The question, however, presupposes the existence of a legal connection

[1] As we indicated above, the Congress has already disapproved the proposed deferral. *See* H.R. Res. 411, 97th Cong., 2d Sess., 128 Cong. Rec. H1660 (daily ed. April 29, 1982).

between the proposed deferral and the initiation of present fossil energy project termination activities. We find no basis for such a connection. We recognize that the intended use of the deferred funds was to finance future termination expenses incurred to the proposed realignment of the program. Nonetheless, the termination activities that are the subject of the committee members' attention are those that are proposed to be financed from present sources. Because, as discussed previously, present termination expenses would be properly chargeable to the fiscal year 1982 fossil energy appropriation, termination activities could be continued without regard to congressional action on the proposed deferral.

Finally, we note that continuation of fossil energy termination activities would not interfere with the power of the Congress, contained in the Impoundment Control Act, to prevent the withholding or delaying of obligation or expenditure of budget authority by the Executive branch. Section 1013(b) of the statute provides that budget authority proposed to be deferred must be made available for obligation if either House of the Congress passes an impoundment resolution disapproving the deferral. 31 U.S.C. §1403(b). In the present case, funds released by congressional action would be available, either directly or through reprogramming actions, for any valid activity of the Fossil Energy Research and Development Program, including the very termination activities the continuation of which has been questioned by the committee members. We conclude, therefore, that there was no legal requirement that would have prevented the Department of Energy from initiating termination activities within the Fossil Energy Research and Development Program in advance of congressional action on the deferral proposal.

CONCLUSION

For the reasons discussed above, we conclude that Energy may use fossil energy research and development funds for expenses pertaining to the termination of various research and development programs and projects no longer considered to be consistent with the Reagan Administration's fossil energy research and development objectives. In addition, we consider that the impoundment proposed by Energy of certain fossil energy funds to be used for later termination expenses was correctly classified as a deferral, and that there is no legal requirement that would have prevented Energy from commencing termination activities before the Congress had acted on the impoundment proposal.

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[B-200005]

Officers and Employees—Promotions—Temporary—Detailed Employees—Higher Grade Duties Assignment—Agency Regulations

In *Wilson* v. *United States,* the Court of Claims ruled that no statute or provision of the Federal Personnel Manual requires a temporary promotion for an overlong detail. We followed *Wilson* in *Turner-Caldwell III,* 61 Comp. Gen 408 (B-203564, May 25, 1982), and overruled our prior *Turner-Caldwell* decisions. Nevertheless, we hold that an agency, by regulation or collective bargaining agreement, may establish a policy under which it becomes mandatory to promote employees detailed to higher grade positions. The violation of such a mandatory provision in a regulation or agreement may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. 5596.

Compensation—Backpay—Retroactive Promotions—Detailed Employees—Agency Regulations—Mandatory Provisions

Where agency asserts that its regulation was intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, that regulation may provide the basis for backpay under the Back Pay Act, 5 U.S.C. 5596. While other interpretations of the regulation could be made, under the circumstances of this case the agency's interpretation is a reasonable one.

Compensation—Backpay—Retroactive Promotions—Detailed Employees—Union Agreements—As Basis for Backpay

Where the parties to a collective bargaining agreement agree that the provisions in the negotiated agreement were intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, those provisions may provide the basis for backpay under the Back Pay Act, 5 U.S.C. 5596. While other interpretations of the negotiated agreement could be made, the interpretation of the parties is a reasonable one under the circumstances of this case.

Unions—Federal Service—Collective Bargaining Agreements—Interpretation—Not for GAO Consideration—Exceptions

Although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for General Accounting Office (GAO) to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, the parties are in agreement as to the intent of the negotiated provisions, there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office.

Matter of: Albert W. Lurz—Extended detail to higher grade position—Agency regulation and provision of negotiated agreement, June 18, 1982:

The issues in this case are whether we will accept the agency's interpretation of its own regulation concerning temporary promotions for overlong details and whether we will accept the interpretation of the parties of a similar provision in the collective bargaining agreement concerning temporary promotions for overlong details. These issues arise in connection with our reconsideration of the claim of Mr. Albert W. Lurz for retroactive temporary promo-

tion and backpay in connection with an alleged overlong detail to a higher grade position as an employee of the Social Security Administration, Department of Health, Education, and Welfare (now Department of Health and Human Services).

We decide that since the above interpretations are reasonable, the claim may be paid as recommended by the agency.

BACKGROUND

The record in Mr. Lurz's case shows that he was detailed from his official position as a GS-12 Computer Specialist to a higher grade position as a GS-13 Computer Systems Analyst from November 26, 1972, through April 28, 1973. Mr. Lurz filed a claim for backpay based on an overlong detail, and the agency determined that since his detail exceeded 60 days it was in fact violative of paragraph D3, Chapter III of the Social Security Administration Headquarters Promotion Plan Guide 1-1, which states that if an individual's assignment to higher level work is expected to exceed 60 days in a 12-month period, the assignment should normally be made by temporary promotion rather than by detail. As this authority was consistent with and deemed to be required by Articles 15 and 17 of the collective bargaining agreement between the Social Security Administration and Local 1923 of the American Federation of Government Employees, the agency considered Mr. Lurz as being on a detail for the first 60 days; but, due to the presidential freeze on promotions during the period from December 11, 1972, to January 30, 1973, his temporary promotion could not be effective until January 30, 1973. As a result the agency granted Mr. Lurz a temporary promotion and backpay for the period from January 30, 1973, through April 28, 1973. Mr. Lurz felt he was entitled to retroactive temporary promotion with accompanying backpay for the entire period of his detail and therefore presented his case to our Claims Group.

ACTION OF OUR CLAIMS GROUP

Our Claims Group not only denied the claim of Mr. Lurz for the first 60 days of his detail, but also held that the agency's action in granting backpay from the 61st day of the detail was improper. The claims settlement stated, in pertinent part, as follows:

> Since your agency's promotion plan and your union's collective bargaining agreement merely state that temporary promotions should normally be given instead of details to higher grade positions which would exceed 60 days, they cannot be considered nondiscretionary, so as to require that you be promoted prior to the 121st day of your detail. Therefore, your agency's settlement of your claim was incorrect in that it temporarily promoted you 60 days too soon. * * *

THE AGENCY'S POSITION

The Social Security Administration argues that its interpretation of its own regulation and the interpretation of the collective bar-

gaining agreement by both management and union should be given effect. It submitted copies of guidelines for processing backpay cases signed by five of its division directors in which it is implicit that management and union have consistently viewed the contract provisions as establishing a nondiscretionary agency policy. The agency also points out that the issue is of great importance since it not only involves decisions it has already made on over 220 claims, but also bears on the larger issue of the interpretation of the negotiated agreement. See *Beachley and Davis,* B-200000, B-200001, May 25, 1982, 61 Comp. Gen. 403.

ANALYSIS

Before discussing the issues involved in this particular claim, we believe it will be helpful to discuss our recent decision in *Turner-Caldwell III,* 61 Comp. Gen. 408 (B-203564, May 25, 1982), which, in effect, overruled our prior *Turner-Caldwell* decisions. Our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975), sustained in 56 Comp. Gen. 427 (1977), represented a departure from prior decisions of our Office regarding the entitlement of employees to temporary promotions where they have been detailed to higher level positions for more than 120 days without the prior approval of the Civil Service Commission (now Office of Personnel Management). See 52 Comp. Gen. 920 (1973). Our *Turner-Caldwell* decisions allowed temporary promotions under such circumstances, following a decision of the Board of Appeals and Review, Civil Service Commission, dated April 19, 1974, which held that the remedy expressed in the Federal Personnel Manual for an agency's failure to obtain prior Civil Service Commission approval to extend a detail was a temporary promotion for the employee.

Recently, the Court of Claims decided *A. Leon Wilson* v. *United States,* Ct. Cl. No. 324-81c, Order, October 23, 1981. The plaintiff had sought a retroactive temporary promotion and backpay for an alleged higher level detail based upon our *Turner-Caldwell* decisions. The court denied the plaintiff's claim by relying upon prior decisions where it had denied relief for overlong details. *Salla* v. *United States,* Ct. Cl. No. 623-80C (Order, July 2, 1981); *Goutos* v. *United States,* 212 Ct. Cl. 96, 98, 552 F.2d 922, 924 (1976) *Peters* v. *United States,* 208 Ct. Cl. 373, 376-380, 534 F.2d 232, 234-236 (1975). In addition, the court in *Wilson* addressed our *Turner-Caldwell* decisions but declined to follow them, stating that neither the applicable statute (5 U.S.C. § 3341) nor the Federal Personnel Manual authorizes a retroactive temporary promotion and backpay in cases involving overlong details.

After the *Wilson* decision was issued, we reconsidered the *Turner-Caldwell* decisions in *Turner-Caldwell III,* above. For reasons stated at length in that decision, we have decided to adopt the

Wilson decision and no longer follow our *Turner-Caldwell III* decisions as they apply to all pending and future claims.

However, we have held that an agency, by its own regulation or by the terms of a collective bargaining agreement, has the discretion to establish a specified period under which it becomes mandatory to promote an employee who is detailed to a higher grade position. Thus, an agency may establish a specified period by regulation, or it may bargain away its discretion and agree to a specified period through a provision of a collective bargaining agreement. If the regulation or the agreement establishes a nondiscretionary agency policy and if the provision in question is consistent with applicable Federal laws and regulations, then the violation of such a mandatory provision in a regulation or negotiated agreement which causes an employee to lose pay, allowances or differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596. For a comprehensive analysis of our case law in this regard, see *John Cahill*, 58 Comp. Gen. 59 (1978). And see also, as a specific case example, *Burnell Morris*, 56 Comp. Gen. 786 (1977).

Since *Wilson* and *Turner-Caldwell III* are predicated upon the absence of a mandatory provision in a statute or in the Federal Personnel Manual requiring temporary promotions for overlong details, we do not believe those decisions are applicable to cases involving mandatory detail provisions contained in agency regulations or in collective bargaining agreements. Therefore, we will continue to follow the *Cahill* and *Morris* decisions, cited above, and allow backpay claims for violations of such mandatory provisions in agency regulations and collective bargaining agreements.

CONCLUSION

Turning back to the particular claim before us, the primary issue raised by the Social Security Administration in this appeal is whether the agency regulation and the comparable provision of the collective bargaining agreement, both of which use the word "normally," establish a nondiscretionary agency policy.

In our decision *Beachley and Davis*, cited above, we reasoned as follows:

> In considering the interpretation given an agency regulation by officials of that agency, we give great weight to their interpretation. This is especially the case where, as here, the agency has promulgated supplemental personnel regulations and policies for its employees within the general framework and consistent with Office of Personnel Management regulations. See 5 U.S.C. § 301 and Chapter 171 of the Federal Personnel Manual. Here, the Social Security Administration asserts that the wording of the detail provision was intended to make temporary promotion for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, the violation of which is compensable under the Back Pay Act, 5 U.S.C. § 5596. See *Kenneth Fenner*, B-183937, June 23, 1977. While other interpretations of the regulation could be made, the agency's interpretation is a reasonable one.
>
> Similarly, in considering the interpretation given a provision of a collective bargaining agreement by the parties to the agreement, we give great weight to the par-

ties' own interpretation. We have stated that if such an interpretation is reasonable, we will accept it even if other interpretations could be made. *Fish and Guy*, B-197660, June 6, 1980. In Mr. Davis' case the joint position of the agency and the union that the 60-day detail provision is mandatory in the sense of being a nondiscretionary agency policy is a reasonable interpretation.

We are no less persuaded in Mr. Lurz's case that the agency's determination that the 60-day detail provision is mandatory in the sense of being a nondiscretionary agency policy is a reasonable interpretation. The agency's internal guidelines for processing backpay claims requires such an interpretation and the provision has been consistently applied in that manner to hundreds of claims. As a result, the agency had a mandatory duty to temporarily promote Mr. Lurz on the 61st day of his detail.

However, on the issue of the controlling significance of a presidential freeze to the circumstances of Mr. Lurz's claim, we find that the subject presidential freeze, as distinguished from an agency-imposed freeze, would serve to bar any promotions for the duration of such freeze. See Annettee Smith, *et al.*, 56 Comp. Gen. 732, 737 (1977), and *John J. Curry*, B-191796, July 13, 1978. Therefore, since the presidential freeze covered a period from December 11, 1972, until January 29, 1973, a temporary promotion could not have been made in any event until January 30, 1973.

Accordingly, we sustain the agency's action in temporarily promoting Mr. Lurz retroactively to the first permissible day following the 61st day of his detail and continuing through the date the detail terminated on April 28, 1973. We note, however, that, under the provision of the 1972 agreement applicable to Mr. Lurz's claim, there is no entitlement in any event for promotion or backpay during that portion of a detail that is not prohibitied as overlong by the agreement, or in this case 60 days. Thus, Mr. Lurz's claim for backpay for the the initial 60 days of his detail is denied.

Finally, as more fully discussed in *Beachley and Davis*, although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for GAO to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, the parties are in agreement as to the intent of the negotiated provision, there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office.

[B-205116]

Bids—Invitation for Bids—Specifications—Tests—First Article—Administrative Determination

Decision to waive first article testing is essentially a discretionary one which will not be disturbed unless it is clearly arbitrary or capricious. Where previous procurement indicated specifications were defective, agency was not arbitrary in requiring

first article testing for first items produced under revised specifications and in rejecting low bid which was based solely on waiver of first article testing.

Bids—Invitation for Bids—Defective—First Article Testing—Alternative Basis Provision—Military Procurement

Invitation for bids (IFB) which solicited alternative bids: (1) with first article testing and (2) without such testing—although it appeared first article testing would be required of all bidders—violated intent of DAR 1-1903(b), which states that in such cases the agency should not solicit alternative bids. Although this deficiency is not considered compelling reason for cancellation of procurement, General Accounting Office recommends that revised specifications be reviewed by quality control personnel as to need for first article testing prior to, rather than after, issuance of IFB.

Bids—Invitation for Bids—Cancellation—After Bid Opening—Partial—Lesser Quantities, etc.

Where increased quantities added by amendment are no longer needed, agency may accept bid for initial quantities even though bidder did not acknowledge amendment since solicitation did not prohibit bids for less than the specified quantity nor the agency from accepting less than the specified quantity.

Matter of: LM&E Co., Inc., June 18, 1982:

LM&E Company, Inc. protests the rejection of its low bid and the proposed award to another bidder of a contract for helicopter blade tie-downs under invitation for bids (IFB) No. DAAJ09-81-B-0626 issued by the U.S. Army Troop Support and Aviation Materiel Readiness Command, St. Louis, Missouri. The IFB provided for alternative bids, one including first article testing and the other without first article testing. LM&E submitted a bid only for performance without first article testing; the Army refused to waive such testing and rejected the bid. LM&E protests rejection of its bid; for other reasons, it also protests acceptance of the lowest bid that included first article testing. For the reasons discussed below, we deny this protest.

The solicitation cautioned that bids based on waiver of first article testing might be determined to be nonresponsive unless accompanied by the evidence required by Section L-11. This section reads, in part, as follows:

> Where supplies identical or similar to those called for in the solicitation have been previously furnished by the bidder or offeror and have been accepted by the Government, the requirement for first article approval may be waived by the Contracting Officer. However, the Contracting Officer may determine the waiver of the first article approval requirement is not in the best interest of the Government; therefore *all bidders/offerors should submit a bid/offer based on compliance with the first article approval provisions of this solicitation.*
>
> All bidders/offerors who have previously furnished supplies identical or similar to those called for in this solicitation, which have been accepted by the Government, are urged to also submit a bid/offer based on exclusion of the requirement for first article approval. Bidders/offerors who submit a bid/offer based on exclusion of the requirement for first article approval must furnish test reports or other evidence (e.g., number of contract covering a prior procurement or test) with the bid/offer to show that he has manufactured and delivered under any prior Government contract the first article and/or production equipment which in the case of first article equipment has been approved or conditionally approved prior to the date of opening of this Invitation for Bid/closing date of this Request for Proposal (whichever is applicable) or, in the case of production equipment, has been accepted by the Government prior to said date of opening/closing. Such test reports or other evidence shall

be considered in determining whether Government approval without a first article approval requirement may be appropriate for the pending procurement. [Italic supplied].

The protester asserts that it complied with the invitation requirements to submit the evidence required by Section L-11 and that the Army therefore could not properly reject its bid since it met all applicable invitation requirements relating to bids based on first article waiver. The protester further suggests that it was misled here because on a previous procurement it allegedly had been advised by the agency that if it desired first article waiver it should have submitted a bid only on that basis. LM&E also contends that the specifications for the previous contract and this procurement are nearly identical and differ only with respect to the length of a pin. LM&E therefore asserts that the Army arbitrarily refused to waive first article testing.

The Army advises that the previous specifications to which LM&E had produced were defective and, through no fault of LM&E, resulted in unusable products which had to be scrapped. Revised specifications were used for this procurement, and the Army advises that its refusal to waive first article testing reflects the fact that no company, including LM&E, has produced an item in accordance with the new specifications. According to the Army, the old specifications had a deficiency with respect to the design of the tie-down locking mechanism; the revised specifications corrected that deficiency.

The decision to waive first article testing for a particular bidder is essentially a discretionary one which our Office will not disturb unless it is clearly arbitrary or capricious. *Kan-Du Tool & Instrument Corporation,* B-183730, February 23, 1976, 76-1 CPD 121. The language used in the IFB here makes clear that when identical or similar items previously have been successfully furnished, the agency may, but is not required to, waive first article testing. *Libby Welding Company, Inc.,* B-186395, February 25, 1977, 77-1 CPD 139. We cannot agree with LM&E that providing the numbers of its previous contracts for similar items removed the discretion of the contracting officer as to whether first article testing should be waived. The invitation provision upon which the protester relies merely warned that those seeking waiver must submit appropriate data in support of the request for waiver, so that the contracting officer could make a determination regarding the waiver; it did not obligate the contracting officer to grant the waiver solely because the requested data was provided. In view of the previous defective specifications, we cannot conclude the contracting officer was arbitrary or capricious in insisting on first article testing in this case.

The oral advice allegedly given to LM&E with respect to a previous procurement—that it should not submit a bid for first article testing if it desired to have such testing waived—cannot compromise the discretion of the contracting officer here. The invitation

language clearly indicates the possibility that first article testing would not be waived, and that language cannot lose its validity because of some previous informal oral advice. In this regard, the solicitation cautions bidders that oral explanations and instructions given before contract award would not be binding, and it is well settled that a bidder who relies upon such oral advice does so at its own risk. *Klean-Vu Maintenance, Inc.,* B-194054, February 22, 1979, 79-1 CPD 126; *Delora Haidle,* B-194154, April 6, 1979, 79-1 CPD 243. This principle would seem to be even more appropriate when the oral advice was given in connection with another procurement. If the protester had any question about the invitation provision in light of the previous advice it claims to have received, it should have sought clarification from the procuring activity prior to bid opening.

Although we find the agency's decision to require first article testing to be reasonable, we are concerned that the solicitation invited bids on the basis of both waiver of first article testing and non-waiver when it appears there was no likelihood that non-waiver would occur. Defense Acquisition Regulation (DAR) § 1-1903(b) states that when it is known that first article approval will be required of all bidders, an agency is not to solicit bids in the alternative (with and without first article tests). *BEI Electronics, Inc.,* 58 Comp. Gen. 340 (1979), 79-1 CPD 202.

Here, after the bids were opened, the contracting officer forwarded them to the agency's quality assurance personnel for evaluation as to whether the first article test requirement could be waived. The reply was that the requirement should not be waived for *any* bidder because this was the first purchase of the item under specifications which had been recently amended to correct the earlier deficiency. Since the reason for not waiving the first article test requirement related to circumstances which existed at the time the IFB was issued, and had nothing to do with the bids received, bids should have been invited solely on the basis of first article testing. It appears that the situation would have been avoided had there been closer coordination between the procurement and quality assurance offices before the solicitation was issued.

Nevertheless, we do not think this lack of early coordination constitutes a compelling reason on which we could recommend that the solicitation be canceled and reissued. Because of the potential adverse impact on the competitive bidding system of canceling an IFB after all bid prices have been exposed, contracting officers, in exercising their discretion, must find such a compelling reason before they can cancel an IFB. *Engineering Research, Inc.,* 56 Comp. Gen. 364 (1977), 77-1 CPD 106. The fact that the terms of the IFB are deficient in some way does not by itself constitute such a compelling reason. *North American Laboratories of Ohio, Inc.,* 58 Comp. Gen. 724 (1979), 79-2 CPD 106. Two factors must be considered: (1) whether the best interest of the Government would be

served by making award under the IFB, and (2) whether bidders would be treated in an unfair manner if an award were made. *North American Laboratories of Ohio, supra.* Here, it appears the interest of the Government requries an award and receipt of the needed supplies as soon as practicable and all bids, including that of the protester, were evaluated properly under the terms of the IFB as issued. However, we are recommending to the Secretary of the Army that procedures be developed which would require that revised specifications be reviewed by quality control personnel for a determination of whether first article approval should be required of all bidders, prior to when a purchase request is sent to the procuring office.

As further ground for its protest, LM&E contends the lowest bid which included first article, testing is nonresponsive since that bidder, GP Company, bid only for the initial quantity of 2,064 units and did not acknowledge an amendment which increased the quantity to 2,436 units. The Army states that after bid opening, it determined that the additional units were no longer needed and the contracting officer "canceled" the amendment. LM&E argues that it should have been notified if the amendment was canceled and it should have been given an opportunity to amend its bid.

The Army points out that Standard Form 33 A (Solicitation Instructions and Conditions, Rev. 1-78), which was incorporated by reference into the solicitation, provides that unless otherwise provided in the schedule, offers may be submitted for any quantities less than those specified and the Government reserves the right to make an award on any line item for a quantity less than the quantity offered at the unit prices offered unless the offeror specifies otherwise in its bid.

As a general rule, the cancellation of a solicitation after bid opening is improper unless that action is warranted by a compelling reason. One such reason is where, as here, supplies are no longer required. DAR § 2-404.1(b)(iii). In most instances, this would result in the cancellation of an entire solicitation rather than a portion of it. We have recognized, however, that under appropriate circumstances it is permissible, under DAR § 2-404.1(b), to cancel a portion of the solicitation. See, e.g., *Hampton Metropolitan Oil Co., Utility Petroleum, Inc.,* B-186030, B-186509, December 9, 1976, 76-2 CPD 471, affirmed on reconsideration February 10, 1977, 77-1 CPD 102.

We see no reason to compel the agency to purchase more items than it needs and, in view of the agency's reservation of the right in the IFB to make award for less than the total quantity specified, we have no legal objection to the proposed award to GP Company.

The protest is denied.

[B-203214]

Appropriations—Availability—Traffic Lights—State Highways—At/Near Federal Installations

General Accounting Office will no longer object to use of appropriations to finance installation of traffic signals at or near Federal installations where such installation is not a service which the State or local jurisdiction is required to provide for all residents of the area free of charge, and the charge does not discriminate against the United States. Previous Comptroller General decisions to the contrary (36 Comp. Gen. 286, 51 *id.* 135, and similar cases) are hereby modified.

Matter of: Financing Traffic Signal at Entrance to Detroit Arsenal Tank Plant, June 23, 1982:

This decision is in response to a letter dated April 30, 1981, from Senator Carl Levin, who asked whether it was permissible for the Department of the Army to contribute to the financing of a new traffic signal at the intersection of Michigan State Highway M-3 (Van Dyke Avenue) and entrance gate number 8 of the Detroit Arsenal Tank Plant in Warren, Michigan.

The plant is a Government-owned-contractor-operated facility currently producing M-60 Army tanks. The affected intersection is "T" shaped, where the entrance drive meets the heavily traveled State road. The lack of a traffic signal has been determined to interfere with access to the plant and to cause a safety hazard for all travelers in the intersection. In accordance with Michigan State law (Mich. Stat. Ann. § 9.1097(1b)), the State of Michigan will pay two-thirds of the installation cost and of the annual maintenance expenses of the traffic signal. The question before us is whether Department of Defense appropriations may be charged for the remaining third. On the basis of the analysis below, we would not object to the Department of Defense appropriations being used for this purpose.

In our early cases involving traffic signals, we held that traffic regulation is a function of State and local authorities, to be financed by State and local taxes. Analogizing a required Federal subsidy of signal installation to an unconstitutional tax or an unauthorized payment in lieu of taxes, we found such expenditures generally to be unauthorized. 36 Comp. Gen. 286 (1956); 51 *id.* 135 (1970).

We made a limited exception in 55 Comp. Gen. 1437 (1976), where we held that the Army could procure and install a traffic light (to be maintained by local authorities) at a point where a public road bisected a military base, based on evidence that base traffic comprised the majority of traffic in the intersection, and two serious accidents in the intersection demonstrated a severe safety hazard for Government personnel. We concluded that the installation of the traffic signal was for the "primary benefit of the Government," and the expenditure was allowed.

On the other hand, in B-187733, October 27, 1977, we permitted the Immigration and Naturalization Service (INS) to pay for police protective services for a special ceremony at a city-controlled building. A clause in the rental contract between the city and INS provided that a city police detail must be used to protect the city's property at any event open to members of the public on a reimbursable bases. We distinguished these special services from "normal police services which are financed by tax revenues and which are required to be provided to all residents of the city." We pointed to a similar line of reasoning in a series of fire fighting service cases. (*See* e.g., 24 Comp. Gen 599 (1945); 26 *id.* 382 (1946); 53 *id.* 410 (1973).) In all these cases, the propriety of payment depended on whether the State or local Government was required to provide the services in question without cost to all residents of the jurisdiction. If, on the other hand, the services are not among those which the jurisdiction is required to provide and the charge does not single out the United States but would be imposed on any resident for like services, the invoices may be paid. B-187733, cited above. We think this rationale should be applied to all future traffic light cases.

As noted earlier, even when the State agrees on the need for a traffic light on a State highway, Michigan statutes provide for its financing only of the trunk line portion of the costs. The remaining portion of the costs is supposed to be borne by the person who desires the light because its road intersects with or abuts the State highway. It does not appear that the city of Warren has any streets intersecting with the State highway at the point in question. It therefore has no obligation to provide any part of the financing of this light. In the present case, it is the Government whose interests are affected by the absence of a light. We see no reason why the Government should not assume the required portion of the costs, as prescribed by State statute, which is applicable to all parties desiring similar services.

Moreover, this decision would not prevent a Federal agency from adhering to a more restrictive internal policy with respect to signal installations at or near its facilities. The Department of Defense has an unwritten informal policy prohibiting funding of single projects on defense access roads. We understand that this policy reflects our previous decisions prohibiting signal installation, but it also reflects the Department's desire not to participate in a plethora of small projects. Nothing in this decision would contravene that policy's continued implementation at the discretion of the appropriate Defense Department officials.

Consistent with the foregoing, this Office will in the future permit appropriations to be used for financing needed traffic signals at or near Federal installations where the Federal Government alone will benefit (except for the incidental benefit of making the intersection safer for other travelers) and all residents of the

area would be subjected to a similar charge for the same type of benefits. All previous cases to the contrary are hereby modified.

[B-205970]

Contracts—Protests—Interested Party Requirement—Multiple-Award FSS Contracts—Parties Not Bidding on All Items

Offeror which chose to respond to solicitation for only certain items is an "interested party" to protest award of contracts only as to those items.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Solicitation Improprieties—Apparent Prior to Bid Opening/Closing Date for Proposals

Protest alleging that solicitation was ambiguous is untimely since that alleged defect was apparent on the face of the solicitation, yet the protest was not filed until the closing date for receipt of proposals. 4 C.F.R. 21.2(b)(1).

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Significant Issue Exception—For Application

Protest alleging that agency improperly awarded contracts on f.o.b. origin basis is untimely where protester did not file protest within 10 working days of receiving notice of criteria used by agency in making awards, but will be considered because it raises question central to how Federal Supply Schedule contracts are awarded.

Contracts—Federal Supply Schedule—Purchases for System—Multiple-Award Schedule Contracts—Evaluation—Delivery Costs

General Services Administration is not required to evaluate delivery costs when offers for multiple-award Federal Supply Schedule contracts are made on f.o.b. origin basis since such costs can only be evaluated by ordering agencies at time of placing order against Schedule contract.

Matter of: Continental Water Systems Corporation, June 28, 1982:

Continental Water Systems Corporation protests the award of multiple-award Federal Supply Schedule (FSS) contracts for water purification equipment under solicitation No. 7CF-52074/S4/7FC issued by the General Services Administration (GSA). GSA has awarded 26 contracts under this solicitation, thirteen of which were made on an f.o.b. origin basis. Continental alleges that the awards made on an f.o.b. origin basis were improper and that the solicitation was ambiguous. We dismiss the protest in part and deny it in part.

Continental alleges that the awards made on an f.o.b. origin basis are "illegal" because in evaluating these offers the contracting officer did not take into account quantity, shipping weight, shipping rates, source of shipment, and destination. Continental argues that since the contracting officer did not know this informa-

tion concerning the cost of shipping the items, he could not determine whether an f.o.b. origin offer was more advantageous to the Government than an f.o.b. destination offer. Continental also claims that the solicititation was ambiguous, because one clause in the solicitation provides that prices must cover delivery to the destination while another clause requests f.o.b. origin prices.

GSA notes that Continental did not submit an offer on the items involved in eight of the thirteen contracts which it is protesting and argues that as to those contracts Continental is not an "interested party" qualified to protest under our Bid Protest Procedures. 4 C.F.R. § 21.1(a) (1982).

The submission of a proposal is not necessarily required in order for a protester to qualify as an interested party. Whether a party is sufficiently interested depends on its status in relation to the procurement, the nature of the issues raised, and whether these circumstances indicate the existence of a direct and/or substantial economic interest on the part of the protester. *Cardion Electronics,* 58 Comp. Gen. 591 (1979), 79-1 CPD 406.

The direct and substantial economic interests at stake here are those of the offerors who responded to the solicitation for these items and did not receive award. Continental did not submit offers for these eight items and there is no indication that Continental was precluded by the solicitation specifications from submitting an offer on these items. Thus, assuming Continental's allegations are true, the unsuccessful offerors were the ones who were harmed and they would have been the appropriate parties to file a protest on these eight contracts with this Office. See *Cullinane Corporation,* B-201132, January 27, 1981, 81-1 CPD 48; *cf. Fred Anderson,* B-196025, February 11, 1980, 80-1 CPD 120 (protester was interested party where alleged that specifications precluded it from preparing bid). However, as an unsuccessful offeror on the other five contracts, Continental is an interested party capable of pursuing this protest as to those contracts.

To the extent that Continental alleges that the solicitation is ambiguous, the protest is untimely. Our Procedures require that protests based upon alleged improprieties apparent on the face of a solicitation be filed prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.2(b)(1). The alleged ambiguity, which involves two clauses in the solicitation, is readily apparent from the face of the solicitation. Although the closing date for the receipt of proposals was August 26, the protest was not filed until December 30, more than 4 months after the closing date. Accordingly, the allegation that the solicitation is ambiguous is untimely and will not be considered on the merits. See *R. E. White and Associates, Inc.,* B-202677, B-202877, August 12, 1981, 81-2 CPD 130.

Continental's allegation that the award of the contracts on an f.o.b. origin basis was improper is also untimely. Our Procedures require that a protest be filed within 10 working days of when the

basis for protest is known. 4 C.F.R. § 21.2(b)(2). By letter of November 25, GSA advised Continental of the criteria used in making awards and informed the firm that f.o.b. point was not a determinative factor. Continental did not file its protest here, however, until December 30. Nonetheless, because this issue involves a fundamental aspect of how FSS contracts are awarded, we will consider the matter.

FSS multiple-award contracts, unlike other Government procurement contracts, do not give rise to an immediate obligation on the part of the contractor to perform and are not awarded on the basis of overall lowest evaluated cost. They are used to simplify purchasing of commonly used items by individual Government agencies, *see* Federal Property Management Regulations (FPMR) § 101-26.402-1, 41 C.F.R. § 101-26.402-1 (1981), and give rise to actual contractor performance obligations only upon acceptance of delivery orders issued by Government agencies against specific FSS contracts. The agencies are responsible for identifying and ordering the lowest cost item meeting their needs that is available from FSS contracts, unless they can justify ordering a more costly item. In determining cost, the agencies are also responsible for evaluating delivery costs, if any. FPMR §§ 101-26.408-2, 101-26.408-4. GSA, in awarding the FSS contracts, does not and is not required to consider delivery costs, since such costs will vary depending upon the desired delivery point for each order. Obviously, since deliveries might be required anywhere in the country, it would not be possible for GSA to evaluate f.o.b. origin offers with respect to delivery costs when considering whether those offers are advantageous to the Government. Instead, and as the solicitation itself indicated, FSS contracts are awarded on the basis of discounts from vendors' established prices.

What GSA did here was consistent with its standard practice. It received and evaluated offers on both an f.o.b. origin and f.o.b. destination basis, and awarded several contracts on the basis of offered discounts. In so doing, it violated no law or regulation. The ultimate determination of which vendor's item can be furnished to an agency at the lowest overall cost, including delivery, must be made by the agency at the time of ordering. Thus, the evaluation that the protester seeks in effect will be made, but at the time when it is practicable to do so.

The protest is denied in part and dismissed in part.

[B-206129]

Pay—Retired—Certificates of Existence—Procedural Changes

The furnishing of reports of existence by military retirees and survivor annuitants whose checks are mailed to a foreign address and delivered through foreign postal channels may be changed to a semiannual basis from the current "one month behind" basis. This change is approved in view of the potential for administrative

cost savings while still providing a reasonable protection to the Government against erroneous payments.

Matter of: Reports of Existence for Military Retirees and Survivor Annuitants Residing Overseas, June 28, 1982:

The Assistant Secretary of Defense (Comptroller), requests an advance decision whether the report of existence requirement for military retirees and survivor annuitants whose checks are mailed to a foreign address and delivered through foreign postal channels may be changed from a monthly to a semiannual basis. A discussion of the matter is provided in Department of Defense Military Pay and Allowance Committee Action Number 554 included with the request for decision. We have no objection to the reports being furnished on a semiannual basis.

The primary purpose of requiring retired members and annuitants to complete reports of existence is to protect against continuing payments when the persons entitled to receive them have died.

We previously approved a change to the report of existence requirement for checks mailed to certain military retirees or annuitants to allow the report to be made after the issuance of the check (i.e., on a "one month behind" basis) rather than before issuance of the check. We approved the change bacause the Department of Defense set out the advantages such a system would have, including less delay in mailing checks, reduced administrative costs, and simplified administrative procedures. Additionally, we considered that the maximum potential overpayment would be limited to 1 month. 44 Comp. Gen. 208 (1964).

In the current submission, the Military Pay and Allowance Committee points out that several military retirees living overseas have undergone undue hardship because of delays in receiving their retired pay even under the "month behind" system. The Committee indicates that "[t]here has been no problem in checks being returned for the month of death under the 'month behind' reporting procedure." Furthermore, they indicate that the importance of immediately reporting the death of a military retiree or annuitant has been widely publicized. Also, the Committee indicates that the proposed change would reduce the administrative costs involved in making the payments while providing protection to the Government.

Since the proposed change should reduce administrative costs while still providing reasonable protection to the Government, we have no objection to the change in procedures suggested.

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Bond. (*See* **BONDS, Bid**)
Buy American Act. (*See* **BUY AMERICAN ACT**)
Discarding all bids
After bid opening. (*See* **BIDS, Invitation for bids, Cancellation, After bid opening**)
Invitation for bids
Cancellation
After bid opening
Partial
Lesser quantities, etc.
Where increased quantities added by amendment are no longer needed, agency may accept bid for initial quantities even though bidder did not acknowledge amendment since solicitation did not prohibit bids for less than the specified quantity nor the agency from accepting less than the specified quantity 496
Reinstatement
Price comparison with invalid resolicitation
Auction prohibition
It would be fundamentally unfair and tantamount to sanctioning a prohibited auction for an agency to declare unreasonably high the low bid under a reinstated solicitation based on a comparison with the low bid under a resolicitation where a bidding misrepresentation by the resolicitation's low bidder in connection with the first procurement created the auction situation. 60 Comp. Gen. 666 and B-206012, Feb. 24, 1982, distinguished 423
Award propriety
A procuring agency properly may make award to a bidder at the price it bid under a reinstated IFB despite the fact that that bidder submitted a lower bid under an invalid resolicitation. 60 Comp. Gen. 666 and B-206012, Feb. 24, 1982, distinguished 423

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Invitation for bids—Continued
Defective
First article testing
Alternative basis provision
Military procurement
Invitation for bids (IFB) which solicited alternative bids: (1) with first article testing and (2) without such testing—although it appeared first article testing would be required of all bidders—violated intent of DAR 1-1903(b), which states that in such cases the agency should not solicit alternative bids. Although this deficiency is not considered compelling reason for cancellation of procurement, General Accounting Office recommends that revised specifications be reviewed by quality control personnel as to need for first article testing prior to, rather than after, issuance of IFB 496
Specifications
Deviations
Form *v.* substance
Price establishment
Insertion in low bid of unit prices per appliance, instead of monthly unit prices as required by invitation for bids, was not material deviation requiring rejection of bid as nonresponsive but was matter of form having no effect on services being procured, since the correct total prices were entered for each period and monthly unit price was easily ascertainable by simple arithmetical calculation 444
Tests
First article
Administrative determination
Decision to waive first article testing is essentially a discretionary one which will not be disturbed unless it is clearly arbitrary or capricious. Where previous procurement indicated specifications were defective, agency was not arbitrary in requiring first article testing for first items produced under revised specifications and in rejecting low bid which was based solely on waiver of first article testing 496
Prices
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After bid opening
Effect
Bidder ineligible for award
General Accounting Office (GAO) finds that the bidder is not entitled to a post-bid opening adjustment to its bid price and that the bidder's request constitutes the bidder's refusal to extend its bid acceptance period and renders the bidder ineligible for award. Therefore, GAO will not consider the merits of the protest because the protest has become academic and no useful purpose would be served 384
Unbalanced
Propriety of unbalance
"Mathematically unbalanced bids"
Materiality of unbalance
Although low bid was higher on contract for 10-month base period than it was for two 1-year options, thus appearing to be mathematically unbalanced, bid may be accepted because material unbalancing

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Propriety of unbalance—Continued
"Mathematically unbalanced bids"—Continued
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is not present since there is no reasonable doubt that award will not result in lowest ultimate cost to Government 444

BOARDS, COMMITTEES, AND COMMISSIONS
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BONDS
Bid
Deficiencies
Affidavit of Individual Surety (SF-28). (*See* **BONDS, Bid, Surety, Affidavit (Standard Form 28), Deficiencies**)
Surety
Affidavit (Standard Form 28)
Deficiencies
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Questions concerning an individual surety's financial acceptability are matters of responsibility rather than responsiveness 456
More than one
Net worth requirements
Propriety
Agency's requirement that both individual sureties on a bid bond have net worths in excess of their total outstanding surety obligations in order to be deemed acceptable sureties is unobjectionable since it is reasonably related to the purpose for which a bid guarantee is intended, namely, to protect the Government's financial interest in the event of default on the bid 456
Unacceptable
Substitution after bid opening precluded
Although questions concerning an individual surety's acceptability are matters of responsibility, a bidder may not after bid opening substitute an acceptable individual surety for one deemed unacceptable because such a substitution would alter the sureties' joint and several liability under the bid bond, the principal factor in determining the bid's responsiveness to the bid guarantee requirement 456

BONNEVILLE POWER ADMINISTRATION
Certifying officers
Responsibilities
Pacific Northwest Electric Power Planning and Conservation Act
Safeguards proposed by Bonneville Power Administration (BPA) certifying officer to govern certification of payments by BPA to Pacific Northwest Electric Power and Conservation Planning Council, pursuant to Pub. L. 96-501, are adequate to fulfill certifying officer's responsibility under 31 U.S.C. 82c for assuring compliance with requirements of Pub. L. 96-501. BPA certifying officer is also responsi-

BONNEVILLE POWER ADMINISTRATION—Continued Page
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ble for assuring that such payments are consistent with any other applicable legal requirements ... 477

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Public interest
Administrative discretion
Decision to waive the Buy American Act is vested in the discretion of department heads ... 431
Agreements with foreign countries
Place of production *v.* bidder's nationality
Buy American Act is concerned with the place of manufacture, mining, or production, and not with the nationality of bidders. When determination and findings to waive the Act refers to items that are "produced" in a particular country, the waiver also will depend upon the place of production, not ownership or control of the firms bidding 431
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Responsiveness of bid
Buy American Act, as implemented by the Defense Acquisition Regulation, provides a preference for suppliers of domestic end products, but does not require that bidders offering foreign end products be rejected as nonresponsive ... 431
Foreign bidders
Competitive advantage
Equalization
Not required
While foreign bidders may enjoy competitive advantages because they are exempt from U.S. requirements concerning equal opportunity, environmental protection, and the like, there is no Federal law which seeks to equalize such competition ... 431

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False. (*See* FRAUD, False claims)
Fraud. (*See* FRAUD, False claims)
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COMPENSATION
Backpay
Retroactive promotions
Detailed employees
Agency regulations
Mandatory provisions
Where agency asserts that its regulation was intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency

COMPENSATION—Continued Page
Backpay—Continued
Retroactive promotions—Continued
Detailed employees—Continued
Agency regulations—Continued
Mandatory provisions—Continued
policy, that regulation may provide the basis for backpay under the Back Pay Act, 5 U.S.C. 5596. While other interpretations of the regulation could be made, under the circumstances of this case the agency's interpretation is a reasonable one 492
Union agreements
As basis for backpay
Where the parties to a collective bargaining agreement agree that the provisions in the negotiated agreement were intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, those provisions may provide the basis for backpay under the Back Pay Act, 5 U.S.C. 5596. While other interpretations of the negotiated agreement could be made, the interpretation of the parties is a reasonable one under the circumstances of this case 492
Boards, committees, and commissions
Boards of contract appeals
Supergrade positions
Contract Disputes Act of 1978
Appointments prior to enactment
Individuals designated to serve on Department of Agriculture's board of contract appeals prior to Mar. 1, 1979, the effective date of the Contract Disputes Act of 1978, claim backpay from Mar. 1 through Aug. 12, 1979, when they were promoted to supergrade positions. While subsection 8(b)(1) of Disputes Act provides that members of agency boards are to be compensated at supergrade rates, that subsection contemplates appointment to the respective supergrade positions. Claim is denied since individuals were not promoted until Aug. 12, 1979, following allocation of four supergrade positions to the Department pursuant to 5 U.S.C. 5108(c) 336

CONGRESS
Resolutions
Continuing
Funding level
Funding level for the National Commission for Student Financial Assistance, under the continuing resolution for fiscal year 1982, is $960,000. In fiscal year 1981 funds for the Commission were first appropriated in supplemental appropriation act enacted June 5, 1981, and were apportioned for use only in the fourth quarter of the fiscal year. Therefore, to determine the current rate of operations for the Commission it is necessary to annualize the partial-year amount over the full fiscal year. Annualizing the $250,000 appropriation over the full year results in a figure of $1 million. Reducing this amount by the 4 percent reduction required by the continuing resolution gives a funding level of $960,000 473

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CONTRACT DISPUTES ACT OF 1978
Boards of contract appeals
Compensation. (*See* COMPENSATION, Boards, committees, and commissions, Boards of contract appeals)

CONTRACTS
Architect, engineering, etc. services
Contractor selection base
"Brooks Bill" application. (*See* CONTRACTS, Architect, engineering, etc. services, Procurement practices)
Procurement practices
Brooks Bill applicability
Procurement not restricted to A.E. firms
Research contracts
Brooks Act provides a procedure which must be used when an agency is selecting an architectural or engineering (A-E) firm to perform A-E services. This procedure is not applicable in procuring a research contract, even though the contractor is expected to use engineers, where it is unnecessary for the contractor itself to be a professional engineering firm to successfully perform the contract 377
Protest timeliness
Postaward protest that procurement should have been conducted under Brooks Bill procedures for procuring architect-engineering services is untimely since solicitation indicated that procurement was not to be conducted as one for these services and alleged improprieties apparent from solicitation must be filed before closing date for receipt of initial proposals. B-199548, Sept. 15, 1980, and B-192578, Feb. 5, 1979, are distinguished 370
Awards
Labor surplus areas. (*See* CONTRACTS, Labor surplus areas)
Multiple
Contrary to solicitation's terms
Protest sustained
Protest against multiple contract awards under a solicitation containing the "Additive and Deductive Items" clause, which clearly advises that award will be made to the low aggregate bidder, is sustained. Award must be made on the same terms offered to all bidders and multiple awards were improper even though the aggregate award would be more costly to the Government 317
Bonds. (*See* BONDS)
Buy American Act. (*See* BUY AMERICAN ACT)
Discounts
Transportation charges
Discount period
Commencement date
Under carrier's tender which allows Government a discount from charges billed by carrier when bill is paid within 15 days of date of voucher, the Government is not entitled to a discount when payment is made more than 15 days after the date of the voucher. For billing purposes, the date placed on the voucher by the carrier is the voucher date 323

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Federal Supply Schedule

Purchases elsewhere

Award combining FSS and non-FSS items

Full FSS coverage determination

Missing items' significance

Where Federal Supply Schedule (FSS) contractor had all but one of the items required by the contracting agency on its FSS contract and the missing item was not of major importance or its price a significant portion of the contractor's overall price, the contractor had, in effect, 100-percent FSS coverage and should have received the award. However, in view of the contracting officer's good-faith determination to award the order to another FSS contractor and the fact that the delivery order has already been filled, no corrective action is recommended. B-204565, March 9, 1982, distinguished 414

Non-mandatory accessory items

Protester's claim of greater FSS coverage than awardee under second solicitation is incorrect. Although protester had required accessory item on its FSS contract, item is not considered part of mandatory Federal Supply Schedule. Therefore, protester and awardee had identical FSS coverage, and award was properly made to awardee as contractor with lowest aggregate price for FSS items and one open market item. B-204565, March 9, 1982, distinguished 414

Purchases for system

Multiple-award schedule contracts

Evaluation

Delivery costs

General Services Administration is not required to evaluate delivery costs when offers for multiple-award Federal Supply Schedule contracts are made on f.o.b. origin basis since such costs can only be evaluated by ordering agencies at time of placing order against Schedule contract 503

Injunctive relief

Not available through General Accounting Office

General Accounting Office does not have authority to restrain award of Federal contracts 417

Labor surplus areas

Evaluation preference

Eligibility of bidder

First-tier subcontractors

"Converter" status effect

Where the first-tier subcontractor is a "converter" of fabric (one who arranges for the production of gray goods into finished cloth), the costs of the converter's manufacturers rather than the administrative costs of the converter are required to be used by the clause in the invitation for bids to determine whether the bidder is eligible as a labor surplus area concern 333

Place of substantial performance

Responsibility matter

Protest that agency improperly awarded contracts to firm as a labor surplus area (LSA) concern and failed to consider evidence that it lacked ability to meet LSA concern performance requirements is sustained to the extent that the agency had not placed the burden on

CONTRACTS—Continued Page
Labor surplus areas—Continued
Evaluation preference—Continued
Eligibility of bidder—Continued
Place of substantial performance—Continued
Responsibility matter—Continued
the firm to demonstrate affirmatively its ability to meet those requirements as a matter of responsibility, but instead assumed the agency had the burden of showing the firm intended to evade the requirements 385
Negotiation
Best advantage to Government
Exclusion from competitive range unjustified
Corrective action recommended
Where a solicitation clearly places primary emphasis on technical factors, the elimination from the competitive range of an offeror who is rated 10 percent higher technically but has proposed costs 40 percent higher than the offeror ranked second technically, on the basis that the cost proposal is so out of line that meaningful negotiations are precluded, resulting in a competitive range of one, is inconsistent with the use of negotiation procedures to obtain the most advantageous contract for the Government 347
Competition
Competitive range formula
Technical *v.* cost consideration
Technically superior offer excluded
The principle that price or cost may become determinative where two proposals are essentially equal technically, notwithstanding the fact that in the overall evaluation scheme cost was of less importance than other evaluation criteria, does not justify elimination of the highest technically rated proposal from the competitive range resulting in a competitive range of one. Moreover, the record does not support a finding that the proposals were regarded as essentially equal technically 347
Maximum possible extent
In negotiated procurements, both statute and regulations require that proposals be solicited from the maximum number of qualified sources consistent with the nature and requirements of supplies or services being procured. For this reason, General Accounting Office (GAO) closely scrutinizes sole-source procurements, although it will uphold them if they are reasonably or rationally based 388
Debriefing conference
Timeliness
Of protest to raised issues. (*See* CONTRACTS, Protests, General Accounting Office procedures, Timeliness of protest, Debriefing conferences)
Offers or proposals
Revisions
Late *v.* revised proposal
Line item addition
Where request for reconsideration of decision denying bid protest provides no basis to alter that decision, decision is affirmed 437

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Requests for proposals
Evaluation criteria
Failure to apply
Competitive range establishment
Where the evaluation criteria set forth in a solicitation place greatest emphasis on technical factors, eliminating all but the lowest cost, technically acceptable proposal from the competitive range is inconsistent with criteria which stress technical excellence rather than mere technical acceptability 347
Sole-source basis
Justification
Inadequate data package
When, due to long development period and piecemeal funding, an agency has not obtained a technical data package suitable for competitive procurement, GAO recommends that, concurrent with first production run, the agency take all necessary steps to obtain such a data package 388
Research and development
Initial production awards
To most recent developer
When item being procured is technologically complex, stems from a research and development contract, and is urgently needed for national defense or safety, the most recent developer's familiarity with work to be performed may justify a sole-source award of an initial production contract, since developer may be uniquely able to implement design changes required for mass production 388
Persons, etc. qualified to protest. (*See* CONTRACTS, Protests, Interested party requirement)
Protests
Buy American Act applicability
Awards to foreign firms
Policy considerations
General Accounting Office will not review arguments in bid protest that award to a foreign bidder will adversely affect U.S. industrial preparedness base in the absence of any statute or regulation requiring award to domestic bidders 431
General Accounting Office procedures
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Date basis of protest made known to protester
Single *v.* multiple awards
Protest asserting that multiple contract awards were improper under the "Additive and Deductive Items" clause of the solicitation is timely filed after bid opening, because it challenges the propriety of the awards rather than the terms of the solicitation 317
Debriefing conferences
Issues providing protest basis
Protest based on grounds that were revealed in debriefing must be filed within 10 days of that debriefing. Protest filed 10 days after post-debriefing meeting at which same grounds were discussed is untimely even as to ground which protester states was not discussed until post-debriefing meeting. Under circumstances, agency's position

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Protests—Continued
General Accounting Office procedures—Continued
Timeliness of protest—Continued
Debriefing conferences—Continued
Issues providing protest basis—Continued
that ground was discussed at debriefing is accepted. B-199548, Sept. 15, 1980, and B-192578, Feb. 5, 1979, are distinguished 370
Significant issue exception
For application
Protest alleging that agency improperly awarded contracts on f.o.b. origin basis is untimely where protester did not file protest within 10 working days of receiving notice of criteria used by agency in making awards, but will be considered because it raises question central to how Federal Supply Schedule contracts are awarded 503
Prior GAO consideration of same issue effect
Untimely protest alleging that certain services should be procured under Brooks Bill procedures is not significant issue and will not be considered on that basis. B-199548, Sept. 15, 1980, and B-192578, Feb. 5, 1979, are distinguished 370
Solicitation improprieties
Apparent prior to bid opening/closing date for proposals
Protest alleging that solicitation was ambiguous is untimely since that alleged defect was apparent on the face of the solicitation, yet the protest was not filed until the closing date for receipt of proposals. 4 C.F.R. 21.2(b)(1) 503
Not apparent prior to bid opening/closing date for proposals
Fact that only one person would evaluate cost proposals was not clear from solicitation, and, therefore, protest filed after closing date for receipt of initial proposals is timely. However, composition of evaluation panel and procedures used to evaluate proposals are within discretion of contracting agency, and we see nothing inherently improper in having only one person evaluate cost. B-199548, Sept. 15, 1980, and B-192578, Feb. 5, 1979, are distinguished 370
Interested party requirement
Air controllers' strike
Participant's status
Solicitation provision prohibiting employment
Former air controller who participated in strike against the Federal Government is not an interested party to protest a solicitation provision prohibiting contractor from employing such former Federal employees 417
Multiple-award FSS contracts
Parties not bidding on all items
Offeror which chose to respond to solicitation for only certain items is an "interested party" to protest award of contracts only as to those items 503

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Consideration of untimely protest
Significant issues. (*See* CONTRACTS, Protests, General Accounting Office procedures, Timeliness of protest, Significant issue exception)
Persons, etc. qualified to protest. (*See* CONTRACTS, Protests, Interested party requirement)
Procedures
Bid Protest Procedures
Standing to protest
"Interested" party. (*See* CONTRACTS, Protests, Interested party requirement)
Significant issues requirement. (*See* CONTRACTS, Protests, General Accounting Office procedures, Timeliness of protest, Significant issue exception)
Small purchases
Consideration by GAO. (*See* PURCHASES, Small, Protests, Consideration by GAO)
Research and development
Initial production awards
To developer
Limited production run
Absolute minimum recommended
When proposed contract for initial production calls for testing only six of 25 vehicles to be procured, GAO recommends that the agency reevaluate to determine the minimum number needed to validate production design 388
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Self. (*See* CONTRACTS, Small business concerns, Awards, Self-certification)
Responsibility determination
Nonresponsibility finding
Sureties on bid bonds. (*See* CONTRACTS, Small business concerns, Awards, Small Business Administration's authority, Certificate of Competency, Sureties on bid bonds status)
Self-certification
Erroneous
Resonsibility or responsiveness matter
Question regarding bidder's status as small business under total small business set-aside for rental and maintenance of laundry equipment is not matter of bid responsiveness since question does not relate to bidder's commitment or obligation to provide required services in conformance with material terms of solicitation, but rather to bidder's status and eligibility for award. Thus, contracting agency was correct in permitting bidder to correct erroneous certification indicating bidder was large business in order to reflect bidder's actual status as small business 444

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Small business concerns—Continued
Awards—Continued
Small Business Administration's authority
Certificate of Competency
Prime or subcontractor status determination
General Accounting Office (GAO) disagrees with the Small Business Administration's (SBA) and the protester's conclusion that, under the circumstances of this procurement, a contract award to the low priced offeror would have made that offeror the Government's agent so that the offeror's proposed supplier would have essentially been the prime contractor and, thus, entitled to consideration under SBA's certificate of competency (COC) procedure. Rather, GAO agrees with contracting agency that the COC procedure was not applicable because no contract relationship would have existed between the supplier and the agency in the event of award. 47 Comp. Gen. 223 is distinguished 379
Sureties on bid bonds status
Bidder nonresponsibility determinations based on the unacceptability of an individual surety on a required bid bond need not be referred to the Small Business Administration (SBA) for review under the Certificate of Competency procedures; such determinations are based solely on the qualifications of the individual surety and there is no indication that Congress intended the Small Business Act to bring surety qualifications under the scrutiny of SBA 456
Small purchases. (*See* PURCHASES, Small)
Sole-source procurements. (*See* CONTRACTS, Negotiation, Sole-source basis)
Subcontracts
Competition
Applicability of Federal norm
Procurements "for" Government
Agency's instruction to its prime contractor that it select another source besides the protester is inconsistent with the Federal norm requirement for competition to the maximum practicable extent, which was incorporated into the prime contract, where the record does not show that the protester was unavailable as a source of supply or unable to provide the services within the required timeframe 328

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COOPERATIVE AGREEMENTS
Propriety of use
Review by GAO. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Cooperative agreements)

COURTS
Decisions
Wilson, A. Leon *v.* United States, Ct. Cl. 324–81C, 10/23/81. (*See* OFFICERS AND EMPLOYEES, Promotions, Temporary, Detailed employees, Higher grade duties assignment)

DEBT COLLECTIONS
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Debts to Government. (*See* OFFICERS AND EMPLOYEES, Debts to U.S., Liquidation)

DEFENSE OFFICER PERSONNEL MANAGEMENT ACT
Repeal of constructive service credit
Medical/dental officers. (*See* PAY, Service credits, Constructive, Medical/dental officer education)

DEPARTMENTS AND ESTABLISHMENTS
Services between
Reimbursement
Merit Systems Protection Board services
Travel expenses of hearing officers
In view of the Merit Systems Protection Board's [MSPB] statutory responsibility to provide appeals hearings, and absent any specific authority to the contrary, there is no authority for the MSPB to accept reimbursement for the travel expenses of its hearing officers, nor is there any authority for the employing agencies to use their appropriations for this purpose. 59 Comp. Gen. 415 (1980), which held that MSPB may not accept payments from other agencies or augment its appropriations by accepting donations from employees or unions, is affirmed 419

DETAILS
Higher grade duties assignment
Excessive period
Temporary, retroactive promotions. (*See* OFFICERS AND EMPLOYEES, Promotions, Temporary, Detailed employees)

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Attorneys. (*See* ATTORNEYS, Fees)

FRAUD
False claims
Burden of proof
The burden of establishing fraud rests upon the party alleging the same and must be proven by evidence sufficient to overcome the existing presumption of honesty and fair dealing. Circumstantial evidence is competent for this purpose, provided it affords a clear inference of fraud and amounts to more than a suspicion or conjecture. If, in any case, the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is required to

FRAUD—Continued Page
False claims—Continued
Burden of proof—Continued
be drawn. Accordingly, a mere discrepancy or inaccuracy, in itself, cannot be equated with an intent to defraud the Government..... 399
Debt collection
On April 7, 1981, after deciding certain legal issues, General Accounting Office remanded this case to the Department of the Air Force for a recalculation of the amount of suspected fraud and a determination of number of days for which fraudulent information was submitted on a temporary duty voucher by a civilian employee. The parties have raised several issues concerning the recalculation. Accordingly, we will set forth the governing legal principles and procedures and return the case to the Air Force for appropriate action consistent with this and our previous decision..... 399
Per diem
"Lodgings-plus" basis
Average cost computation
In calculating the average cost of lodging under lodgings-plus method of the Federal Travel Regulations, the term "total amount paid for lodgings" does not include amounts paid by claimants for days when fraud in any amount was committed, and the term "number of nights for which lodgings were or would have been required" does not include those nights tainted by fraud in any amount. 60 Comp. Gen. 181 (1981) and 60 *id.* 53 (1981) are distinguished 399
Evidence establishing fraud
Sufficiency
The framework for the recalculation necessary in the present case is the lodging-plus method of determining per diem expenses. Under this method, fraud cannot be established merely because claimant's claimed daily cost for lodging on any one day is more than the average cost of lodging. Thus, fraud cannot be established merely by showing a deviation from an average or estimated figure..... 399
GENERAL ACCOUNTING OFFICE
Audits
Authority
Bonneville Power Administration
Payments to non-Federal regional council
General Accounting Office may scrutinize funding and functions and responsibilities of Pacific Northwest Electric Power and Conservation Planning Council through its authority to audit BPA's financial payments to Council under Pub. L. 96-501 and governmental programs and activities under 31 U.S.C. 1154(a) and to obtain access to Council's records. Also, BPA might work out with the Council some procedures short of direct audit to provide additional oversight of Council's use of funds 477

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Decisions
Overruled or modified
Prospective application
Turner-Caldwell decision
Decision to overrule *Turner-Caldwell* decisions is prospectively effective and affects only pending and future claims. Prior decisions or claim settlements issued before date of this decision pursuant to *Turner-Caldwell* line of decisions will not be disturbed. 56 Comp. Gen. 427, 55 *id.* 785 and 55 *id.* 539 are overruled in whole or in part... 408
Jurisdiction
Attorney fee claims
Discrimination complaint cases
Employee filed discrimination complaint and was awarded retroactive promotion in 1979. Claim for attorney fees is denied since General Accounting Office (GAO) is without authority under Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. 2000-5(k) and 2000e-16, to consider discrimination complaints or claims for attorney fees incident to such complaints. Regulations authorizing payment of attorney fees in discrimination cases were issued subsequent to this employee's case and are not retroactively effective 326
Contracts
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Cooperative agreements. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Cooperative agreements)
Small purchases
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Cooperative agreements
Complaints against agency use
Criteria for review
A complaint that the Department of Energy's use of a cooperative agreement, rather than a procurement, was improper is dismissed because the complainant has failed to establish that the project in question should have been the subject of a procurement..... 428
Labor-management relations
Interpretation. (*See* UNIONS, Federal service, Collective bargaining agreements, Interpretation)
Subcontracts
General Accounting Office will consider a protest of a subcontract award where the agency instructs its prime contractor not to select the protester and where the agency participates in selecting the subcontract awardee 328
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Payment
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Carrier's claim to recover monies deducted by agencies on the basis of a tender's prompt-payment discount provision constitutes a claim for transportation charges under 31 U.S.C. 244(a) (Supp. III, 1979),

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Transportation charges—Continued
Payment—Continued
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Recovery claim—Continued
since the claim involves a discount taken by the agencies based on application of a tender, and the 3-year statute of limitation for the filing of claims is applicable.....

LEGISLATION
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MERIT SYSTEMS PROTECTION BOARD
Appropriations
Reimbursement
Travel expenses of hearing officers. (*See* DEPARTMENTS AND ESTABLISHMENTS, Services between, Reimbursement, Merit Systems Protection Board services)

MILEAGE
Travel by privately owned automobile
Administrative approval
Official business
Driving, etc. services
Employee injured on temporary duty
An employee was informed that another employee on temporary duty was in the hospital due to an automobile accident. The employee called her supervisor who told her to drive the injured employee back to her residence 90 miles away. Employee is entitled to a mileage allowance since we hold that travel which is authorized or approved in order to return an injured employee on temporary duty to his or her home should be treated as necessary to carry out the agency's duty and therefore such travel is on official business. B-176128, Aug. 30, 1972, is overruled; 59 Comp. Gen. 57 is amplified; B-198299, Oct. 28, 1980, is distinguished..... 373
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OFFICERS AND EMPLOYEES
Backpay
Retroactive promotions
Detailed employees. (*See* COMPENSATION, Backpay, Retroactive promotions, Detailed employees)
Debts to U.S.
Liquidation
Employees' Compensation Fund
Erroneous payments
Interagency reimbursement effect
Payments to an Air Force employee from the Department of Labor's Employees' Compensation Fund are repaid to the Fund by

OFFICERS AND EMPLOYEES—Continued Page
Debts to U.S.—Continued
Liquidation—Continued
Employees' Compensation Fund—Continued
Erroneous payments—Continued
Interagency reimbursement effect—Continued
the Air Force pursuant to 5 U.S.C. 8147. An overpayment by the Fund becomes an overpayment within the meaning of 5 U.S.C. 5514 when the agency is billed for the payment by the Department of Labor. Therefore, an overpayment by the Fund to the employee may be collected by the Air Force under 5 U.S.C. 5514 as if it had been made directly by the Air Force 450
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Higher grade duties assignment
Agency regulations
Where agency asserts that its regulation was intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, that regulation may provide the basis for backpay. While other interpretations of the regulation could be made, the agency's interpretation is a reasonable one 403
In *Wilson* v. *United States,* the Court of Claims ruled that no statute or provision of the Federal Personnel Manual requires a temporary promotion for an overlong detail. We followed *Wilson* in *Turner-Caldwell III,* 61 Comp. Gen. 408, and overruled our prior *Turner-Caldwell* decisions. Nevertheless, we hold that an agency, by regulation or collective bargaining agreement, may establish a policy under which it becomes mandatory to promote employees detailed to higher grade positions. The violation of such a mandatory provision in a regulation or agreement may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. 5596..... 492
Union agreement interpretation
Where the parties to a collective bargaining agreement agree that the provisions in the negotiated agreement were intended to make temporary promotions for details to higher grade positions mandatory after 60 days, thereby establishing a nondiscretionary agency policy, those contract provisions may provide the basis for backpay. While other interpretations of the negotiated agreement could be made, the interpretation of the parties is a reasonable one..... 403
Wilson case
Our *Turner-Caldwell* decisions granting retroactive temporary promotions for overlong details are reconsidered in light of Court of

OFFICERS AND EMPLOYEES—Continued Page

Service agreements—Continued

Promotions—Continued

Temporary—Continued

Detailed employees—Continued

Wilson case—Continued

Claims decision in *Wilson* v. *United States* which reaches opposite result. Although General Accounting Office is not bound by decisions of Court of Claims, the *Wilson* decision is a reasonable interpretation of law and regulation, it follows a clear line of precedent by the court, and it is consistent with the views of Management. Therefore, we will follow the *Wilson* decision and deny all pending and future claims under our *Turner-Caldwell* line of decisions. 56 Comp. Gen. 427, 55 *id.* 785 and 55 *id.* 539 are overruled in whole or in part 408

Service agreements—Continued

Failure to fulfill contract

Overseas employees. (*See* **OFFICERS AND EMPLOYEES, Service agreements, Overseas employees, Failure to fulfill contract**)

Overseas employees

Failure to fulfill contract

Voluntary retirement

The Federal Bureau of Investigation (FBI) may require that an employee posted overseas sign a service agreement which obligates the employee to repay the Government the cost of his transfer to the overseas post, if he elects to retire prior to the completion of the 12-month term of the service agreement. Likewise, the FBI may require that if an employee transferred overseas voluntarily retires within a period of not less than 1 nor more than 3 years, prescribed in advance by the Director of the FBI, then the employee's return expenses shall not be allowed. It is within the FBI's discretion to make a determination that a voluntary retirement within the period of service agreement is not a separation beyond the employee's control .. 361

Supergrades

Establishment

Boards of contract appeals. (*See* **COMPENSATION, Boards, committees, and commissions, Boards of contract appeals, Supergrade positions**)

Transfers

Real estate expenses

Condominium dwelling

Purchase of ownership interest

Employee transferred from Cincinnati, Ohio, to Detroit, Michigan, in May 1981, claims certain real estate transaction expenses in connection with the purchase of a cooperative apartment at the new duty station. Following the rule established in *Zera B. Taylor,* 61 Comp. Gen. 136 (1981), in the absence of evidence clearly establishing a different arrangement, we will consider an interest in a cooperatively owned apartment building to be a form of ownership in a residence for which real estate expenses may be reimbursed as provided under the Federal Travel Regulations (FTR). This decision extends 61 Comp. Gen. 136 and distinguishes, in part, 60 Comp. Gen. 451 352

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Real estate expenses—Continued
Condominium dwelling—Continued
Purchase of ownership interest—Continued
"Application fee"
In *Herbert W. Everett,* 60 Comp. Gen. 451 (1981), we held that membership fees in cooperatively owned apartments are part of the purchase price, having no relationship to any expense required for the purchase of the property. In the present case "application fee" and "lottery (unit selection) fee" may be distinguishable as incidental charges made for required services in connection with the purchase of a cooperative for which reimbursement may be further considered under para. 2-6.2f of the FTR. However, $200 claimed as an application fee must be further explained to adequately differentiate it from a membership fee. This decision extends 61 Comp. Gen. 136 and distinguishes, in part, 60 Comp. Gen. 451 352
Costs includable in purchase price
Transferred employee claims his "10% downpayment" and "security deposit" as reimbursable expenses incurred in the purchase of his cooperative apartment. Both of these monetary outlays are credited against the purchase price of the residence. Neither 5 U.S.C. 5724a nor the FTRs contemplate the Government's taking a real property interest in an employee's new residence. As the downpayment and security deposit are part of the purchase price and not a part of the cost or expenses of purchasing, they are not reimbursable as relocation expenses. This decision extends 61 Comp. Gen. 136 and distinguishes, in part, 60 Comp. Gen. 451 352
Mortgage services
Claims for expenses of "mortgage service," "insurance," and "legal service" in connection with employee's purchase of a cooperative apartment at the new official station must be further explained and itemized to enable the agency to ascertain qualifying mortgage expenses and insurance entitlements under para. 2-6.2d of the FTR, and qualifying legal expenses under para. 2-6.2c of the FTR. Expenses for "marketing and advertising" extend only to the sale of a residence at the old duty station under para. 2-6.2b of the FTR and may not be reimbursed in connection with the purchase of a residence at the new duty station. Expenses for "real estate tax" and "operating reserve" are specifically precluded from reimbursement under para. 2-6.2d of the FTR. This decision extends 61 Comp. Gen. 136 and distinguishes, in part, 60 Comp. Gen. 451 352

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses
Real estate expenses
Condominum dwelling. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses, Condominium dwelling**)
Service agreements
Failure to fulfill
Overseas employees. (*See* **OFFICERS AND EMPLOYEES, Service agreements, Overseas employees, Failure to fulfill contract**)

PAY
Drill
Training assemblies
Reserves and National Guard
Nonprior service personnel
Period awaiting initial active duty training
Army Reserve member awaiting assignment to initial active duty for training attended 22 training assemblies after termination of 180-day period following his enlistment. The member's claim for training pay may not be allowed since Army Regulation 140–1 provides that a nonprior service member is not eligible for inactive duty training pay (drill pay) for assemblies attended after the expiration of 180 days while awaiting initial active duty for training 332
Longevity. (*See* **PAY, Service credits**)
Retired
Certificates of existence
Procedural changes
The furnishing of reports of existence by military retirees and survivor annuitants whose checks are mailed to a foreign address and delivered through foreign postal channels may be changed to a semi-annual basis from the current "one month behind" basis. This change is approved in view of the potential for administrative cost savings while still providing a reasonable protection to the Government against erroneous payments 505
Reports of existence. (*See* **PAY, Retired, Certificates of existence**)
Survivor Benefit Plan
Non-Regular service
Retired pay eligibility loss
Effect on SBP coverage prior to retirement
An Air Force Reserve officer elected Survivor Benefit Plan coverage for his children under new provisions added by Pub. L. 95–397 when he was notified of his eligibility (except that he had not reached age 60) for non-Regular retired pay under 10 U.S.C. chapter 67. Subsequently he became eligible for retirement under 10 U.S.C. 8911 but was not retired. Later he was killed while on active duty for training. Although he lost eligibility for retired pay under chapter 67 upon becoming eligible for retirement under section 8911, his original election of coverage for his children continued in effect since he had not retired under section 8911 when he died. Therefore, the children are entitled to a Survivor Benefit Plan annuity under that election 441

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Non-Regular service—Continued
Retired pay eligibility loss—Continued
Reelection of SBP coverage after retirement
Under provisions added to the Survivor Benefit Plan by Pub. L. 95-397, members notified of their eligibility (except for not having reached age 60) for non-Regular retired pay under 10 U.S.C. chapter 67 may elect immediate coverage for dependents. If such a member becomes entitled to retired pay under another law the member loses eligibility for chapter 67 retired pay, but the Survivor Benefit Plan election remains effective until the member actually retires. He is then covered by other provisions of the Plan and may make a new election 441
Service credits
Constructive
Medical/dental officer education
Statutory repeal
Effect on statutory contract entitlements
Participants in the National Health Service Corps Scholarship Program enter into a "written contract" prescribed by 42 U.S.C. 294t(f) in which they become eligible for a scholarship in return for their agreement to serve after their graduation from professional school with the Dept. of Health and Human Services "in a health manpower shortage area," either as civilians, or as officers of the Public Health Service if they elect to apply for a commission and are accepted. The terms of this statutory contract do not give rise to an entitlement for program participants commissioned as medical and dental officers of the Public Health Service after Sept. 15, 1981, to constructive service credit under the provisions of 37 U.S.C. 205(a)(7) and (8) which were repealed on that date 461
Saving clause interpretation
The Defense Officer Personnel Management Act repealed constructive longevity of service credit for medical and dental officers of the uniformed services effective Sept. 15, 1981, and it contained a saving clause with plain and unambiguous language specifically preserving the credit only for service members who on that date were already medical and dental officers, or were enrolled in the Uniformed Services University of the Health Sciences or the Armed Forces Health Professions Scholarship Program (10 U.S.C. ch. 1904 and 105). The saving clause may not be extended to participants in the National Health Service Corps Scholarship Program or the Senior Commissioned Officer Student Training and Extern Program (42 U.S.C. 294t, 218a), since there is no justification for a conclusion that their omission was clearly inadvertent and would lead to an absurd result 461
Scope of applicability
The Defense Officer Personnel Management Act, Pub. L. 96-513, repealed 37 U.S.C. 205(a)(7) and (8), which had authorized constructive longevity of service credit for medical and dental officers of the uniformed services based on their years of professional education. The constructive service credit was terminated because the Congress had concluded that it resulted in an anomalous receipt of elevated

PAY—Continued Page
Service credits—Continued
Constructive—Continued
Medical/dental officer education—Continued
Statutory repeal—Continued
Scope of applicability—Continued
basic and retired pay by medical and dental officers, and inaptly encouraged their early retirement. Also, the Congress had developed a special pay system for all uniformed health professionals to increase their current income, and it was concluded that the constructive service credit for medical and dental officers was therefore no longer appropriate 461
Public Health Service
Constructive longevity of service
Statutory repeal effect
Participants in the National Health Service Corps Scholarship Program and the Senior Commissioned Officer Student Training and Extern Program (42 U.S.C. 294t, 218a) were advised by the Public Health Service prior to 1981 that persons it commissioned as medical and dental officers received constructive service credit for their years of professional education under 37 U.S.C. 205(a)(7) and (8). That advice was accurate when given, but 37 U.S.C. 205(a)(7) and (8) were repealed in 1981. The program participants should have realized that the advice they received was subject to future changes in the law, but even if they were misled in the matter payments to them under the repealed law may not be made 461
Training
Assemblies. (*See* **PAY, Drill, Training assemblies**)

PURCHASES
Purchase orders
Federal Supply Schedule
Combining FSS and non-FSS items in one order. (*See* **CONTRACTS, Federal Supply Schedule, Purchases elsewhere, Award combining FSS and non-FSS items**)
Small
Competition
Adequacy
Since small purchses do not require maximum competition, General Accounting Office (GAO) will review a contracting agency's approach to defining the field of competition only in a case of fraud or intentional misconduct, or where it appears that there has not been a reasonable effort to secure price quotations from a representative number of responsible firms. Once the field of competition is defined, however, GAO will review the procurement to insure that is conducted and concluded consistent with the small purchase selection procedures and the concern for a fair and equitable competition that is inherent in any procurement 320
Requests for quotations
Misplaced lower offer
Effect on award
In view of the need for the orderly and expenditious fulfillment of an agency's requirements, GAO will not disturb a small purchase

PURCHASES—Continued Page
Small—Continued
Requests for quotations—Continued
Misplaced lower offer—Continued
Effect on award—Continued
contract where after award the contracting agency discovers a lower priced offer that had been timely received but misplaced before it could be recorded, absent evidence of a conscious or deliberate effort to prevent award to that offeror 320

RETIREMENT
Civilian
Disability
Sick leave status on approval date
Separation date
Right to select
An employee on sick leave at the time his disability retirement was approved should be afforded the opportunity to select a separation date which is most advantageous to him in accordance with Office of Personnel Management Regulations. He is also entitled to be credited with sick and annual leave accrued while on sick leave prior to his separation date. Section 402 of Public Law 96-499 does not affect an employee's right to holiday pay before his separation date 363

STATES
Federal payments in lieu of taxes
Distribution to units of local government
"Received" revenue status
Distribution to school districts
County supported
Where county is responsible for supporting schools and funds them with its own tax revenues, entire amount of Forest Service (16 U.S.C. 500) revenues expended for schools, regardless of whether such expenditure exceeds minimum required by State law, must be treated as received for purposes of computing county's payment under the Payment in Lieu of Taxes Act, 31 U.S.C. 1602. 58 Comp. Gen. 19 is amplified 365
Payments to independent school districts
Delegation of State's distribution authority
If no minimum payment is specified in State law, but instead the State delegates the right to determine the amount of the Forest Service receipts to pass on to the politically and financially independent school districts to the County Board of Supervisors, the entire payment to the schools may be regarded as the equivalent of a State-mandated minimum, and need not be deducted from the Payment in Lieu of Taxes Act payment. In case of Arizona, however, State statutes indicate that school districts are not independent of county. Definitive interpretation of status of school districts is for Arizona authorities. 58 Comp. Gen. 19 is amplified 365
Exceeding State's minimum requirements
Where county, which is required by State law to pass a certain portion of its Forest Service receipts on to politically and financially independent school districts, chooses to pass on sum which exceeds

STATES—Continued Page
Federal payments in lieu of taxes—Continued
Distribution to units of local government—Continued
"Received" revenue status—Continued
Payments to independent school districts—Continued
Exceeding State's minimum requirements—Continued
State-mandated minimum, amount by which county's expenditure exceeds minimum must be viewed as "received" for purposes of computing the Payment in Lieu of Taxes Act payment. 58 Comp. Gen. 19 is amplified 365

STATUTES OF LIMITATION
Claims
Transportation
Discount deductions
Carrier's recovery claim
Where statute permits filing of transportation claims within a 3-year statute of limitation period, carrier cannot be estopped from filing such claims within this period by its acceptance of initial payment of bill submitted 323

STATUTORY CONSTRUCTION
Persons and things enumerated
Omissions
A statutory saving clause generally preserves rights under repealed legislation only to the extent that those rights are enumerated in its provisions. Statutory provisions with unambiguous language and specific directions may not be construed in any manner that will alter or extend their plain meaning, and if persons and things to which a statute refers are specifically and unambiguously designated, it is to be inferred that all omissions were intended. However, if giving effect to the plain meaning of words in a statute leads to an absurd result that is clearly unintended and at variance with the policy of the legislation as a whole, the purpose of the statute rather than its literal words will be followed 461

SUBSISTENCE
Per diem
"Lodgings-plus" basis
Computation
Fraudulent claims. (*See* FRAUD, False claims, Per diem, "Lodgings-plus" basis)
Temporary duty
At former permanent duty station
Prior to reporting to new duty station
What constitutes reporting
Employee who traveled to his new duty station on a house-hunting trip prior to the date scheduled for his transfer, and on the day before his scheduled transfer date received temporary duty orders for duty at his old station, may not be paid per diem and mileage at the old duty station unless it is determined that he did, in fact, report for duty at the new duty station before returning to the old duty station. 54 Comp. Gen. 679 is distinguished 339

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TAXES

Federal payments in lieu of taxes

To States. (*See* **STATES,** Federal payments in lieu of taxes)

TRANSPORTATION

BILLS

Payment

Discount provisions. (*See* **CONTRACTS, Discounts, Transportation charges)**

Household effects

Weight

Net

Computation formula

Containerized shipments

Civilian employee of Dept. of the Army had household goods shipped from McLean, Va., to the Canal Zone (now Republic of Panama) incident to an official change of duty station in 1975. Employee was authorized shipment of maximum household goods at a net weight of 3,750 pounds, but he exceeded that weight and now owes the Government the difference between the authorized net weight and the actual net weight. The issue considered is how to determine actual net weight under para. 2-8.2b(3) of the Federal Travel Regulations. We conclude that net weight under para. 2-8.2b(3) is determined by subtracting the container weight from the gross weight of the goods shipped and multiplying the resulting figure by 0.85. Stated as an equation: n=.85(g-c). The computational method applied in our decision *Wayne I. Tucker,* 60 Comp. Gen. 300 will no longer be followed 452

Weight limitation

Excess cost liability

Actual expense shipment

Computation formula

An employee whose household goods shipment exceeds his authorized weight must reimburse the Government in accordance with paragraph 2-8.3b(5) of the Federal Travel Regulations for the cost of transportation and other charges applicable to the excess weight. Since there is no way to discern which charges are applicable to the authorized weight and which charges are on account of the excess weight, the regulation provides a formula based on a ratio of excess weight to total weight as a proportion of the total charges. Accordingly, the net amount actually paid by the Government is for use in determining the pro rata portion of shipping charges for collection as excess weight charges 341

Weight certificate invalid

Employee authorized to move 11,000 pounds under actual expense method claims that error was made in weighing his household goods because gross weight of shipment (44,050 pounds) exceeded the rated capacity of the scale (30,000 pounds) used to weigh shipment, thus invalidating weight certificate and placing accuracy of weight in reasonable doubt. Although employee has established that error was made in obtaining weight certificate for actual weight (14,800 pounds) of shipment, he is not relieved of liability for charges on

TRANSPORTATION—Continued Page
Household effects—Continued
Weight limitation—Continued
Excess cost liability—Continued
Actual expense shipment—Continued
Weight certificate invalid—Continued
3,800 pounds of excess weight. To correct error, constructive weight of 15,169 pounds computed in accordance with paragraph 2-8.2b(4) of FTR is substituted for incorrect actual weight of 14,800 pounds. However, there is no additional liability for resulting increase in excess weight since Government incurred expenses on only 14,800 pounds..... 341
Rates
Carload shipments
Mixed shipments. (*See* TRANSPORTATION, Rates, Mixed shipments)
Mixed shipments
Classification mixing rule
Where tender offers Government lower rates for a Freight-all-kinds (FAK) mixed shipment, but states that the truckload FAK rates will not apply to contraband such as radioactive materials, General Services Administration may apply truckload FAK rates to noncontraband portion of shipment and use other applicable less than truckload rates for the contraband. The National Motor Freight Classification Rule 645, which governs tender applicable here, does not prohibit GSA's application of the tender FAK rates under these circumstances 470

TRAVEL EXPENSES
Overseas employees
Failure to fulfill contract. (*See* OFFICERS AND EMPLOYEES, Service agreements, Overseas employees, Failure to fulfill contract)
Renewal agreement travel
Delays
Rest stopover
Employee who performed renewal agreement travel from Kwajalein, Marshall Islands, to Huntsville, Ala., arrived at Hickam Air Force Base, Hawaii, at 6:30 p.m. after 5½ hour flight and continued on to Los Angeles by flight departing from Honolulu at 11:30 p.m., 2 days later. Employee's entitlement to per diem should not be based on constructive schedule which requires him to continue on from Hawaii by flight departing at 11:30 p.m. on same night as his arrival at Hickam AFB. The fact that the employee traveled at a late hour following 2 days of rest does not warrant departure from constructive travel schedule otherwise applicable which would permit him to continue on at a reasonable hour the following morning 448

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UNIONS
Federal service
Collective bargaining agreements
Interpretation
Not for GAO consideration
Exception
Although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for General Accounting Office (GAO) to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this Office 403

Although this claim pertains to the interpretation of a collective bargaining agreement, it is appropriate for General Accounting Office (GAO) to assert jurisdiction since to refuse to do so would be disruptive to labor-management procedures due to the impact such a refusal would have on other claims and grievances. Moreover, the parties are in agreement as to the intent of the negotiated provisions, there is no arbitration award involved, no one has objected to submission of the matter to GAO, and the matter is in an area of our expertise and has traditionally been adjudicated by this office 492

WORDS AND PHRASES
"Converter" status
First-tier subcontractors
Where the first-tier subcontractor is a "converter" of fabric (one who arranges for the production of gray goods into finished cloth), the costs of the converter's manufacturers rather than the administrative costs of the converter are required to be used by the clause in the invitation for bids to determine whether the bidder is eligible as a labor surplus area concern 333

"Current rate" as used in
continuing resolution
Funding level for the National Commission for Student Financial Assistance, under the continuing resolution for fiscal year 1982, is $960,000. In fiscal year 1981 funds for the Commission were first appropriated in supplemental appropriation act enacted June 5, 1981, and were apportioned for use only in the fourth quarter of the fiscal year. Therefore, to determine the current rate of operations for the Commission it is necessary to annualize the partial-year amount over the full fiscal year. Annualizing the $250,000 appropriation over the full year results in a figure of $1 million. Reducing this amount by the 4 percent reduction required by the continuing resolution gives a funding level of $960,000 473

"Federal norm" requirement
Agency's instruction to its prime contractor that it select another source besides the protester is inconsistent with the Federal norm requirement for competition to the maximum practicable extent, which was incorporated into the prime contract, where the record does not

WORDS AND PHRASES—Continued Page
"Federal norm" requirement—Continued
show that the protester was unavailable as a source of supply or unable to provide the services within the required timeframe 328
"Operating reserve"
Claims for expenses of "mortgage service," "insurance," and "legal service" in connection with employee's purchase of a cooperative apartment at the new official station must be further explained and itemized to enable the agency to ascertain qualifying mortgage expense and insurance entitlements under para. 2-6.2d of the FTR, and qualifying legal expenses under para. 2-6.2c of the FTR. Expenses for "marketing and advertising" extend only to the sale of a residence at the old duty station under para. 2-6.2b of the FTR and may not be reimbursed in connection with the purchase of a residence at the new duty station. Expenses for "real estate tax" and "operating reserve" are specifically precluded from reimbursement under para. 2-6.2d of the FTR. This decision extends 61 Comp. Gen. 136 and distinguishes, in part, 60 Comp. Gen. 451 352

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