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[B-217025]

Transportation—Dependents—Military Personnel—Children—Travel to Attend School, etc.

Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. The construction of a statute as expressed in implementing regulations by those charged with its execution, however, is to be sustained in the absence of plain error, particularly when the regulations have been long followed and consistently applied with Congressional assent. Hence, regulations of the Secretary of State in effect since 1960 authorizing shipments of unaccompanied baggage for the student-dependents of Federal civilian employees stationed overseas on occasions when those dependents travel to and from schools located in the United States, issued under a statute broadly authorizing reimbursement of their "travel expenses," are upheld as valid.

Transportation—Dependents—Military Personnel—Children—Travel to Attend School, etc.

A statute enacted in 1983 provides that under regulations prescribed by the Secretary of Defense, members of the uniformed services stationed overseas may be paid a "transportation allowance" for their dependent children who attend school in the United States. The legislative history reflects that Congress intended to provide service members with benefits similar to those authorized by a law enacted in 1960 to cover the "travel expenses" of the student-dependents of civilian employees stationed overseas. Regulations of the Secretary of State under the 1960 enactment properly include provision for unaccompanied personal baggage shipments, so that there is no objection to a similar provision adopted through regulation by the Secretary of Defense under the 1983 enactment, since related statutes should be construed together in a consistent manner.

Matter of: Student-Dependents of Government Personnel Stationed Overseas—Baggage Shipments, March 4, 1985:

The Secretary of Defense and the Secretary of State have issued regulations authorizing shipments of unaccompanied baggage for the student-dependents of Government personnel stationed overseas on occasions when those dependents travel to and from schools located in the United States. The question presented here is whether those regulations are without a statutory basis and invalid.[1] We conclude that the regulations are valid under the governing provisions of statute.

Background

Section 430 of title 37, United States Code, provides that under regulations to be prescribed by the Secretary of Defense, a member of a uniformed service who is assigned a permanent duty station outside the United States—

> * * * may be paid a transportation allowance for each unmarried dependent child, who is under 23 years of age and is attending a school in the United States for the purpose of obtaining a secondary or undergraduate college education, of one annual trip between the school being attended and the member's duty station in the overseas area and return. * * *

[1] This action is in response to a request for a decision received from the Chairman of the Per Diem, Travel and Transportation Allowance Committee (PDTATAC/68/0423D).

This provision was added to the United States Code by a law enacted in 1983.[2] The Congressional reports relating to that enactment contain these remarks concerning its purpose:

> Foreign Service personnel and civilian employees of the federal government who serve overseas are currently authorized reimbursement for one round trip annually for their children who attend college in the United States. No such authority exists to reimburse military personnel stationed overseas for similar travel by their dependents.
>
> In order to eliminate this disparity, the Committee recommends that military personnel serving overseas be reimbursed for the annual round trip transportation of their dependents to attend school in the United States. * * *[3]

Statutory authority for the annual round-trip transportation of the children of Foreign Service personnel and civilian employees stationed overseas had been enacted earlier in 1960, in a law providing for the payment of "[t]he travel expenses of dependents of an employee to and from a school in the United States to obtain an American secondary or undergraduate college education."[4] Implementing regulations issued by the Secretary of State since 1960 have included "expenses for transportation of unaccompanied personal baggage" as a reimbursable item.[5]

After 37 U.S.C. § 430 was enacted into law in 1983, the responsible officials of the uniformed services apparently determined that it would be appropriate to prescribe a similar authorization by regulation for the shipment of unaccompanied baggage for the children of service members stationed overseas. Consequently, when Volume 1 of the Joint Travel Regulations was amended to implement 37 U.S.C. § 430, the following new paragraph was included in the amendment:

> M7353 UNACCOMPANIED BAGGAGE
>
> Unaccompanied baggage, not to exceed 225 pounds (gross), may be transported at Government expense in connection with each trip authorized between the school and the member's duty station under this Part. (Change 372, 1 JTR, February 1, 1984)

Issues Presented

Questions have recently been raised by officials of one of the military departments concerning the validity of the regulations authorizing baggage shipments for the student-dependents of Federal personnel stationed overseas when those students travel to and

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[2] Section 910 of the Department of Defense Authorization Act, 1984, Public Law 98-94, approved September 24, 1983, 97 Stat. 614, 638-639.

[3] S. REP. NO. 174, 98th Cong., 1st Sess. 223, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS 1081, 1113. See also H.R. REP. NO. 352 (CONF.), 98th Cong., 1st Sess. 225, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS 1160, 1162; S. REP. NO. 213 (CONF.), 98th Cong., 1st Sess. 225 (1983); and H.R. REP. NO. 107, 98th Cong., 1st Sess. 211 (1983).

[4] Subsection 221(4)(B) of the Overseas Differentials and Allowances Act, Public Law 86-707, approved September 6, 1960, 74 Stat. 792, 794. This subsection, as amended, is currently codified in 5 U.S.C. § 5924(4)(B).

[5] See section 285, Standardized Regulations (Government Civilians, Foreign Areas); Transmittal Letter SR-368, dated September 4, 1983 (current); and Transmittal Letter SR-104, dated April 2, 1961 (superseded).

from schools located in the United States. In a memorandum accompanying the request for a decision in this matter, they note that 37 U.S.C. § 430, and the statute enacted earlier in 1960 to provide for the "travel expenses" of civilian employees' children, contain no specific and separate authorization for the transportation of a student's unaccompanied baggage. It is further noted that the baggage shipments at issue are not authorized under those provisions of statute contained elsewhere in the United States Code which prescribe specific rules concerning the transportation of baggage and household goods for Government personnel.[6] It is therefore suggested that the regulations in question may lack a statutory basis and may thus be invalid.

Analysis and Conclusion

It is fundamental that Federal agencies and officials must act within the authority granted to them by statute in issuing regulations.[7] It is equally fundamental, however, that regulations are deemed to be within an agency's statutory authority and consistent with Congressional intent unless shown to be arbitrary or contrary to the statutory purpose.[8] It is a settled rule of statutory construction that the interpretation of a provision of statute, as expressed in implementing regulations by those charged with the execution of the statute, is to be sustained in the absence of any showing of plain error, particularly when the regulations have been long followed and consistently applied, and the Congress has declined to alter the administrative interpretation in later amendments to the statute.[9]

Regarding the question raised in the present matter about the validity of the regulations issued by the Secretary of State which provide for unaccompanied personal baggage shipments under the statute enacted in 1960, we note that a version of the statute as initially passed by the House of Representatives would have limited reimbursement to "the cost of transporting dependents." When the proposed legislation was subsequently considered in the Senate, concern was expressed that this term might be construed to "prevent payment of more than the actual air or ship fare." The term "travel expenses" was consequently substituted in the Senate version with the intent of "authorizing the usual expenses of transpor-

[6] With specific reference to 37 U.S.C. § 406, 5 U.S.C. §§ 5722-5729, and 5 U.S.C. § 5742.

[7] See, for example, 56 Comp. Gen. 943, 949 (1977); 53 Comp. Gen. 547 (1974); and 52 Comp. Gen. 769 (1973).

[8] See, generally, 58 Comp. Gen. 635, 637-638 (1979); and 42 Comp. Gen. 27 (1962).

[9] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); 58 Comp. Gen. at 638; 49 Comp. Gen. 510, 516-517 (1970); 48 Comp. Gen. 5, 9 (1968); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 49.05 (4th ed. C.D. Sands 1973).

tation, per diem, and related costs." [10] This substitution was then adopted by the Congress as a whole and enacted into law.

Thus, while the 1960 legislation authorizing payment of the "travel expenses" of the student-dependents of civilian employees overseas does not specifically refer to shipments of unaccompanied baggage, the legislative history of the statute reflects that the Congress intended to authorize reimbursement of not only the fares of personal travel but also other usual transportation expenses and related costs associated with annual travel by students to and from schools. This statutory authorization has consistently been construed in the implementing regulations during the past 25 years to include authority for a shipment of unaccompanied personal baggage, and the Congress has not disturbed this administrative construction placed on the original legislation in later amendments to the statute.[11] In these circumstances, we are unable to conclude that the regulations in question which have been issued by the Secretary of State are contrary to the statutory purpose or lack a statutory basis.

As to the validity of paragraph M7353 of the Joint Travel Regulations, the governing provisions of statute contained in 37 U.S.C. § 430 authorize members of the uniformed services stationed overseas to be paid a "transportation allowance" for an "annual trip" of their dependent children who are attending a school in the United States. Although the statute does not specifically list the trip or transportation expenses to be covered by the allowance, as indicated, the Congress intended that the legislation be applied to provide service members with benefits similar to those previously granted to civilian employees in 1960. Consequently, our view is that the 1983 and 1960 enactments are related and are to be construed consistently together.[12] While the language of neither statute is as clear in this regard as it might be, since it is our view that the civilian statute may properly be construed to include the transportation of unaccompanied personal baggage, we do not object to regulations providing a similar benefit for service members as part of the "transportation allowance" authorized under 37 U.S.C. § 430. Hence, we find that there is a statutory basis for paragraph M7353 of the Joint Travel Regulations and that the paragraph furthers the legislative purpose of 37 U.S.C. § 430.

Accordingly, we conclude that the regulations brought into question in this matter are valid.

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[10] See S. REP. NO. 1647, 86th Cong., 2d Sess. 7-8, *reprinted in* 1960 U.S. CODE CONG. & AD. NEWS 3338, 3344-3345.

[11] See, e.g., the amendment of 5 U.S.C. § 5924(4)(B) by Public Law 96-465, § 2308, October 17, 1980, 94 Stat. 2165; Public Law 96-132, § 4(h), November 30, 1979; 93 Stat. 1045; and Public Law 93-475, § 13, October 26, 1974, 38 Stat. 1443.

[12] That is, we consider the statutes *in pari materia.* See 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 51.01-51.03 (4th ed. C.D. Sands 1973).

[B-216075]

Officers and Employees—Transfers—Nonreimbursable Expense—House Lease with Option to Buy

Under a lease with an option to purchase agreement a transferred employee forfeited the $3,500 amount paid as consideration for the option because he had not exercised the option to purchase the leased residence before he was transferred. Since agency transfer of employee appears to be the proximate cause of forfeiture, the deposit may be claimed as a miscellaneous relocation expense to the extent authorized under FTR para. 2-3.3. However, forfeited deposit may not be reimbursed as a real estate transaction expense. This decision distinguishes B-207420, February 1, 1983.

Matter of: Nathan F. Rodman—Forfeited Real Estate Deposit, March 6, 1985:

The issue in this decision is whether an employee may be reimbursed money paid on a lease for an exclusive option to purchase during the lease period which he forfeited when he was transferred to a new duty station prior to the exercise of the option. We hold that the forfeited deposit may be reimbursed as a miscellaneous expense under 5 U.S.C. § 5724a(b) (1982), as implemented by the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), para. 2-3.3, but not as an expense of the sale or purchase of a residence as provided for under 5 U.S.C. § 5724a(a)(4).

This decision is in response to a request from an authorized certifying officer of the Internal Revenue Service (IRS), Southeast Region, concerning the claim of Mr. Nathan F. Rodman, an IRS employee, for reimbursement of a forfeited real estate deposit under a lease with an option to purchase agreement. On March 14, 1983, Mr. Rodman signed a 6-month lease with an option to purchase on or before October 15, 1983, in consideration of an option fee in the amount of $3,500. The purchase clause provided for a purchase price of $95,000 with credit of the option fee to be given against the purchase price. However, if the option was not exercised, the clause provided for the option fee to be retained by the owner-landlord as consideration for the granting of the exclusive option to purchase.

Mr. Rodman lived in the leased premises, located in Fort Lauderdale, Florida, until he was requested to transfer to Sarasota, Florida, in May or early June 1983. Mr. Rodman reported for duty in Sarasota in August 1983 and vacated his Fort Lauderdale residence on September 12, 1983. He did not exercise the option to purchase and forfeited the $3,500 he had deposited under the agreement.

Mr. Rodman has informed our Office of the circumstances surrounding his decision to buy the option to purchase at the time he entered into his lease agreement and his intention to exercise that option before its expiration had he not been required to transfer. At the time that Mr. Rodman leased his Ft. Lauderdale residence he owned another house that he was trying to sell. The house that he was trying to sell was occupied by his wife with whom he was in

divorce proceedings. Mr. Rodman needed his share of the equity from his former residence in order to obtain the necessary financing required to exercise the option to purchase in question. Additionally, when Mr. Rodman signed his lease agreement, interest rates were historically very high and he received advice that he might obtain more advantageous financing if he could delay purchasing. Mr. Rodman explained that he is not of independent means and would not have paid $3,500 cash on his IRS salary for the option to purchase had he not had every intention of exercising that option.

The IRS has reimbursed Mr. Rodman for the forfeited deposit as a miscellaneous expense under 5 U.S.C. § 5724a(b) and FTR para. 2–3.3 which resulted in reimbursement of $873.20 of the $3,500 forfeited. The IRS relied on our decision B–177595, March 2, 1973, in which we allowed reimbursement for a forfeited purchase deposit as an item of miscellaneous expense pursuant to a lease-purchase contract. Mr. Rodman has requested our review of the IRS determination limiting his reimbursement of the forfeited deposit.

The provisions of 5 U.S.C. § 5724a authorize payment of relocation expenses to transferred employees. Subsection (a)(4) provides, in part, for the payment of expenses of the sale of a residence, or the settlement of an unexpired lease, of the employee at the old official station, and for purchase of a home at the new official station.

The execution of a lease with an option to purchase has been held not to constitute a purchase of a residence under the meaning of section 5724a(a)(4). In the case of *Marion B. Gamble,* B–185095, August 13, 1976, the employee entered into a lease-purchase agreement upon arrival at his new duty station and, upon exercising his option 10 months later, sought reimbursement for the total expenses. On the question of whether such expenses were proper for reimbursement, we held that section 5724a(a)(4) does not apply to lease-purchase transactions in which only an interest in property, rather than legal or equitable title, is passed. A purchase, for purposes of section 5724a(a)(4) and the implementing regulations, consists of the conveyance of some form of ownership. A mere interest, such as the opportunity to purchase the property, does not suffice. In fact, until Mr. Rodman exercised the option to purchase, he was under no obligation to purchase the residence at all. In the present case the lease-purchase agreement did not pass title to Mr. Rodman. Therefore, payment is not authorized under 5 U.S.C. § 5724a(a)(4).

As an alternative to reimbursement under 5 U.S.C. § 5724a(a)(4), employees may be paid in certain circumstances for miscellaneous expenses incurred due to the discontinuance of one residence and the establishment of a residence at a new location. FTR para. 2–3.1. The forfeiture of a deposit made on a residence is among the expenses that have been covered. 55 Comp. Gen. 628 (1976). Para-

graph 2-3.1c of the FTR states that the miscellaneous expense allowance will not be used to reimburse the employees for "expenses brought about by circumstances, factors, or actions in which the move to a new duty station was not the proximate cause."

The evidence before us establishes that Mr. Rodman's transfer to Sarasota, Florida, was the proximate cause of the forfeiture. The circumstances surrounding Mr. Rodman's decision to obtain the option to purchase and his ordered transfer as set forth above, the interest rates prevalent at the time, the circumstances of his divorce, and his need to capture the equity from his house for sale, strongly suggest that had Mr. Rodman not been requested to transfer he would have exercised the option for which just 3 months prior he had expended $3,500 to acquire.

We have disallowed reimbursement for a forfeited purchase deposit as an item of miscellaneous expense in *Lillie L. Beaton,* B-207420, February 1, 1983. This case is distinguishable from Mr. Rodman's because the facts of record in *Lillie L. Beaton* failed to establish that Ms. Beaton's transfer was the proximate cause of the forfeiture whereas, as indicated above, we are satisfied that Mr. Rodman's transfer was.

Accordingly, we will not object to the reimbursement of the option payment forfeited by Mr. Rodman to the extent authorized by para. 2-3.3 of the FTR. Mr. Rodman's claim for expenses in excess of the maximum amount reimbursable as miscellaneous expenses may not be paid.

[B-218033]

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

Protest concerning responsiveness of awardee's bid is timely since it was filed within 10 working days of date agency determined bid responsive and awarded firm the contract.

Contracts—Protests—Notice—To Contracting Agency

Under section 21.1(d) of GAO Bid Protest Regulations, 49 Fed. Reg. 49417, 49420 (to be codified at 4 C.F.R. 21.1(d)), a protest may be dismissed where the protester fails to furnish a copy of the protest to the contracting officer within 1 day after the protest is filed with GAO. Dismissal is not warranted in this case of first impression where agency was aware of protest basis, raised no objections prior to filing its protest report, and timely filed the protest report. However, GAO emphasizes criticality of compliance with this filing requirement.

Bids—Ambiguous—Two Possible Interpretations—Clarification Prejudicial to Other Bidders—Rejection of Bid

Bid containing notation "N/C Pan Stock" as a material cost for several line items is ambiguous, at best, and should have been rejected. Record shows that pan stock refers to ancillary items which are normally provided by the contractor and phrase could reasonably be interpreted as obligating bidder to provide only pan stock items

at no charge or providing the required materials only to the extent they could be supplied from pan stock.

Matter of: Sabreliner Corporation, March 6, 1985:

Sabreliner Corporation protests the award of a contract to Midcoast Aviation, Inc. under invitation for bids (IFB) No. N68520-85-B-9102, issued by the Department of the Navy for the repair and scheduled maintenance of a CT-39E aircraft which had been heavily damaged in a crash. Sabreliner contends that Midcoast's bid was nonresponsive and should have been rejected.

We sustain the protest. This decision is issued pursuant to the express option provision set forth in section 21.8 of our Bid Protest Regulations, 49 Fed. Reg. 49417, 49422 (1984) (to be codified at 4 C.F.R. § 21.8), and is rendered within 45 calendar days of the date the protest was filed.

Initially, we note that the Navy contends that the protest was not timely filed. The Navy argues that Sabreliner knew or should have known the basis for its protest when bids were opened on January 7, 1985. Since Sabreliner did not file a written protest within 10 working days of that date, the Navy concludes that the protest is untimely and should not be considered on the merits. In addition, the Navy urges that we dismiss Sabreliner's protest for failure to comply with section 21.1(d) of our Bid Protest Regulations, 49 Fed. Reg. 49417, 49420 (to be codified at 4 C.F.R. § 21.1(d)), which requires that a copy of the protest be furnished to the contracting officer or his designee within 1 day after the protest is filed with GAO.

In our view, Sabreliner's protest is timely since it was filed within 10 working days of the date the Navy awarded the contract to Midcoast. A protester is not obligated to protest until an agency takes some action adverse to the protester's interest. *Brandon Applied Systems, Inc.*, 57 Comp. Gen. 140 (1977), 77-2 CPD ¶ 486. Although Sabreliner may have known, as of bid opening, the basis for its allegation that Midcoast's bid was nonresponsive, it is the agency's acceptance of the alleged nonconforming bid which forms the basis for protest. It was not until the Navy determined the firm eligible for award and awarded Midcoast the contract that the Navy took some action adverse to the protester's position. Since the protest was filed within 10 working days of that date, the protest is timely. See *M&M Services, Inc.; EPD Enterprises, Inc.*, B-208148.3, B-208148.4, May 23, 1983, 83-1 CPD ¶546.

Concerning the Navy's argument that the protest should be dismissed because of the protester's failure to furnish a copy of the protest to the agency within 1 day after the protest was filed, our regulations provide that the failure to comply with this provision may result in dismissal of the protest. *See* Bid Protest Regulations, § 21.1(f), 49 Fed. Reg. 49417, 49420 (to be codified at 4 C.F.R. § 21.1(f)). Under section 3553(b)(2) of the Competition in Contracting

Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 494, July 18, 1984, and 21.3(c) of our Bid Protest Regulations, the agency is required to furnish its report on the protest with our Office within 25 working days (or 10 days under our express option procedures, Bid Protest Regulations § 21.8(d)(1)), from the date of telephone notice of the protest from our Office. Clearly, the agency will not be in a position to comply with this requirement unless it promptly receives a copy of the protest. The time limits set forth in CICA, and in our regulations, are designed to ensure that protests will be resolved expeditiously. Therefore, whenever a protester fails to furnish a copy of the protest to the agency within 1 day after the protest is filed, as required by section 21.1(d), the protest may be dismissed as a result. Otherwise, the ability of our Office and the contracting agencies to comply with the statutory time frames is jeopardized.

In this case, however, we do not find that dismissal of the protest is required. We note that Sabreliner pursued its protest initially with the Navy and, although the Navy may not have timely received a copy of the submission filed with our Office, the Navy had actual knowledge of the grounds which formed the basis for Sabreliner's protest at the time the protest was filed with our Office. Also, the Navy filed its protest report in a timely manner under our express option procedures and at no time prior to that date did the Navy object to the protester's failure to comply with this provision. Under the circumstances, and in view of the fact that the application of section 21.1(d) is an issue of first impression, we find that dismissal is not required and the merits of the protest will be considered.

The IFB indicated that award would be made to the contractor submitting the lowest responsive bid and that the low price would be determined by the total aggregate price of the contract line items, the evaluated labor rates applied to the government's best estimate of hours to perform the work and the prices provided by the contractors in Attachments 1 and 4. Attachment 1 was comprised of nine line items and required bidders to submit a firm fixed price for the material cost and installation of these items. Bidders were also notified that some of the items might not be ordered because the Navy had a limited supply in stock.

The bid submitted by Midcoast contained the notation "N/C Pan Stock" for the material cost for eight of the nine line items in Attachment 1. The remaining item required the bidder to conduct an inspection and for this item, Midcoast bid "O." Sabreliner contends that the notation "N/C Pan Stock" renders Midcoast's bid nonresponsive since the phrase could be interpreted as an offer to provide only pan stock items at no charge or, alternatively, to provide the required items only to the extent the material could be furnished from Midcoast's pan stock. Pan Stock generally refers to ancillary items, such as tubings, wires, connectors, clamps, and screws, which are not normally provided with the required materi-

als but which are necessary for their installation. Since the materials required by Attachment 1 could not be furnished from pan stock, Sabreliner argues that under one interpretation of Midcoast's bid, Midcoast did not include a price for the material cost of several required items and under another construction, Midcoast qualified its bid.

In addition, Sabreliner notes that the Navy contacted Midcoast regarding its bid after bid opening and that as a result of that contact, Midcoast submitted an additional statement indicating that all the materials required by Attachment 1 would be furnished at no cost. Sabreliner argues that the fact that the Navy found it necessary to contact Midcoast demonstrates that there was confusion regarding the meaning of the notation in Midcoast's bid. Sabreliner contends that the Navy should have found the bid nonresponsive and should not have permitted Midcoast to explain the ambiguity.

The Navy argues that Midcoast's bid bound the firm to provide all the materials required by Attachment 1 at no charge. The Navy indicates that it considered the term "pan stock" irrelevant and assumed that the term merely referred to where the materials would be obtained by Midcoast. The Navy argues that since the phrase has no impact on price, quantity, quality or delivery, Midcoast's bid was responsive to the requirements of the IFB and was properly accepted. Furthermore, the Navy states that Midcoast was contacted simply to verify its price and that it was not allowed to alter its bid in any manner.

The question of the responsiveness of a bid concerns whether a bidder has unequivocally offered to provide the requested items in total conformance with the terms and specification requirements of the invitation at a fixed price. *M. A. Barr, Inc.,* B-189142, Aug. 3, 1977, 77-2 CPD ¶ 77. If the bid is subject to more than one reasonable interpretation, it is ambiguous and must be rejected as nonresponsive under the rigid rules applicable to procurement made by formal advertising. *The Kerite Company,* B-212206, Aug. 10, 1983, 83-2 CPD ¶ 198. A bidder's intention must be determined from the bid itself at the time of bid opening and only material available at bid opening may be considered in making a responsiveness determination. *International Waste Industries,* B-210500.2, June 13, 1983, 83-1 CPD ¶ 652.

Here, we believe that the phrase "N/C Pan Stock" may reasonably be interpreted as obligating Midcoast only to supply pan stock items at no charge and therefore, Midcoast did not enter a bid for the material cost for those items. Although we recognize that Sabreliner's installation costs for Attachment 1 were somewhat higher than those submitted by Midcoast, the fact remains that Sabreliner's proposed material costs were approximately $37,000 and Midcoast's failure to provide prices for these items cannot be waived as minor. Also, the phrase could be interpreted as requiring Midcoast to furnish the required items only to the extent they

could be supplied from pan stock. We note that the record clearly indicates that "pan stock" items do not encompass the materials which were required by Attachment 1. Although the Navy argues that the phrase refers to where the required materials would be obtained, Midcoast itself states that pan stock materials are ancillary items which must be furnished by the contractor. Furthermore, the fact that Midcoast bid "O" for the remaining item in Attachment 1 where no materials were required casts further doubt on what meaning is to be given the "N/C Pan Stock" entries. Accordingly, we find that Midcoast's bid is ambiguous, at best, and should have been rejected.

The protest is sustained. We recommend that the contract awarded to Midcoast be terminated and award be made to Sabreliner. *See* Bid Protest Regulations, § 21.6, 49 Fed. Reg. 49417, 49422 (to be codified at 4 C.F.R. § 21.6).

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

[B-218154.2]

Contracts—Protests—General Accounting Office Procedures—Filing Protest With Contracting Agency

Dismissal of original protest for failure to file copy of protest with agency affirmed where the contracting agency had not been furnished a copy of the protest 6 working days after receipt of the protest by General Accounting Office.

Matter of: Brunk Tool & Die Company, March 6, 1985:

Brunk Tool & Die Company requests reconsideration of our dismissal of its protest concerning invitation for bids (IFB) No. DAA09-84-B-0844, issued by the Department of the Army. We dismissed the protest because Brunk failed to furnish a copy of its protest to the contracting agency within 1 day after the protest was filed with our Office. For the reasons that follow, we conclude that the protest was properly dismissed.

Brunk's protest was filed on Monday, February 11, 1985. Under our Bid Protest Regulations, Brunk was required to furnish a copy of its protest to the contracting agency by Tuesday, February 12. *See* § 21.1(d) of our Bid Protest Regulations, 49 Fed. Reg. 49,417, 49,420 (1984) (to be codified at 4 C.F.R. § 21.1(d)). The agency had not received a copy of Brunk's protest as of Friday, February 20.

The protester states that it was unaware of this "unrealistic" regulatory requirement; that it sent a copy of its protest to the contracting agency by regular mail (its protest to our Office was filed

via commercial courier); that it was therefore unable to verify receipt by the contracting agency; and that it notified the contracting agency by telephone of the filing of the protest so that they were "aware of the situation."

First, the protester's lack of actual knowledge of our regulations provides no basis for reopening the file since our Bid Protest Regulations are published in the Federal Register and protesters therefore are charged with constructive notice of their contents. See *Peter A. Tomaino, Inc.—Request for Reconsideration,* B-208167.2, Jan. 10, 1983, 83-1 CPD ¶ 19. Second, the Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2741(a), 98 Stat. 1175, 1199, 31 U.S. Code 3551, and our implementing regulations impose a strict time limit of 25 working days for an agency to file a written report with our Office from the date it receives telephone notice of the protest from our Office. § 21.3(c), 49 Fed. Reg. 49,420. Extensions are considered exceptional and are sparingly granted. Despite the protester's contentions, the fact remains that the agency still had not received a copy of the protest 9 calendar days and 6 working days after receipt of the protest by our Office. Any such delay in furnishing a copy of the protest to the contracting agency necessarily delays all subsequent protest proceedings and frustrates our effort to provide effective and timely consideration of all objections to agency procurement actions. We do not think that this purpose would be served by reopening our file on this protest.

The dismissal is affirmed.

[B-216736]

General Accounting Office—Jurisdiction—Contracts—Disputes—Contract Disputes Act of 1978

General Accounting Office generally does not consider mistake in bid claims alleged after award, since they are claims "relating to" contract within the meaning of the Contract Disputes Act of 1978, which requires that all such claims be filed with the contracting officer for decision.

Matter of: Alliance Properties Inc., March 8, 1985:

Alliance Properties Inc. (API) requests that our Office review the Air Force's decision to deny API's request to modify its bid under invitation for bids No. F41800-84-B-9339 after bid opening but before award due to a mistake.

On September 25, 1984, API accepted award of the contract while attempting to reserve its rights to pursue any remedies permitted by law. However, the Air Force letter denying the requested correction advised API that it could either withdraw its bid or waive its claim of error and accept award of the contract. The Air Force did not agree to a reservation of rights or that our Office should consider the claim. API's claim was received in this Office on October 9, 1984.

Our Office generally does not consider mistake in bid claims alleged after award. The reason is that such matters are claims "relating to" contracts within the meaning of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1982), which requires that all such claims be filed with the contracting officer for decision. *Rainey's Security Agency, Inc.*, B-214653, July 2, 1984, 84-2 C.P.D. ¶ 6.

Since API's claim was not brought to our attention until after the award, we find that it should be filed and processed in accordance with the Contract Disputes Act. Although API argues that a reservation of claim has been recognized by our Office as a permissible method of guaranteeing our review of the question, the cases API relies on were decided before the Contract Disputes Act was effective. We will only review such matters now when both parties agree to our review, which the Air Force has not done here.

The matter is dismissed.

[B-218088.3]

Contracts—Protests—General Accounting Office Procedures—Filing Protest With Contracting Agency

Protester that failed to furnish a copy of its protest to the contracting officer 1 day after filing with General Accounting Office (GAO) failed to comply with Bid Protest Regulations.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Significant Issue Exception—Not for Application

Concepts of "significant issue" and "good cause" in sec. 21.2(c) of Bid Protest Regulations apply only to protests which are untimely filed with GAO and not to protests timely filed, but otherwise deficient.

Matter of: Marconi Electronics, Inc.—Reconsideration, March 8, 1985:

Marconi Electronics, Inc. (Marconi), has requested reconsideration of our dismissal notice of February 5, 1985, which dismissed the company's February 1, 1985, protest against a purchase order awarded by the Naval Surface Weapons Command (Navy) on January 25, 1985, for signal generators to "Hewlett-Packard Company * * * under the Federal Supply Schedule Program."

We dismissed the February 1 protest because we concluded that the protester had not complied with section 21.1(d) of our Bid Protest Regulations, 49 Fed. Reg. 49,417, 49,420 (1984) (to be codified at 4 C.F.R. § 21.1(d)).

Section 21.1(d) provides:

> The protester shall furnish a copy of the protest (including relevant documents not issued by the contracting agency) to the individual or location designated by the contracting agency in the solicitation for receipt of protests. If there is no designation in the solicitation, the protester shall furnish a copy of the protest to the contracting officer. The designated individual or location, or if applicable, the contracting officer must receive a copy of the protest no later than 1 day after the protest is

filed with the General Accounting Office. The protest document must indicate that a copy has been furnished or will be furnished within 1 day to the appropriate individual or location.

Although Marconi filed its February 1 protest with our Office on February 4, 1985, there was no indication that the protester had transmitted a copy of its protest to the appropriate individual or location at the procuring agency.

On requesting reconsideration, Marconi states that it furnished a copy of its February 1, 1985, protest to "contracting agency personnel at the same time that [the February 1 protest] was furnished to the GAO."

The Navy advises informally that there was no individual or location designated for receipt of protests in the informal solicitation for quotations which Marconi received for the purchase order in January 1985. Consequently, under section 21.1(d) of our Bid Protest Regulations, above, Marconi was obligated to furnish a copy of its February 1 protest to the contracting officer no later than February 5.

Marconi and the Navy have advised informally that the copy of Marconi's February 1 protest was addressed to the Navy legal office—not the contracting officer. And Marconi informed us that it cannot question Navy's further statement that the copy of its February 1 protest was not received until February 7 at the Navy legal office and not by the contracting officer until a later date. Consequently, Marconi failed to comply with the above regulation.

Marconi also argues that it had transmitted to the procuring agency a copy of an earlier (January 28, 1985) protest filed with our Office. We dismissed this January 28, 1985, protest by dismissal notice dated January 30, 1985, since this earlier protest was found not to state a basis for protest. Marconi does not contest our finding that its January 28 protest did not state a basis for protest. Therefore, it is irrelevant as to which date the Navy received Marconi's January 28 protest since this earlier protest was defective on its face.

Finally, Marconi requests that its protest be considered because it "raises significant issues" and because Marconi "has spent considerable time and expense in formulating its protest." The concepts of "significant issue" and "good cause" in section 21.2(c) of our Bid Protest Regulations apply only to protests which are untimely filed with our Office under section 21.2 ("Time for Filing") of our Bid Protest Regulations, above. These concepts are not for application in determining whether a protest—timely filed with our Office but otherwise deficient—should be considered.

In view of the foregoing, the prior dismissal is affirmed and the request issued to the Navy for a formal report after the receipt of the request for reconsideration is canceled. *See* section 21.3(f) of our Bid Protest Regulations, 49 Fed. Reg. 49,417, 49,421 (1984) (to be codified at 4 C.F.R. § 21.3(f)).

[B-217040]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Dependents—Children—Adopted

A member of the uniformed services who adopted her 26-year old disabled brother who is incapable of self-support, may claim him as her dependent to receive basic allowance for quarters at the with dependent rate. In this case the "child" is legally adopted, is in fact dependent upon the member for support, and resides with the member; thus, a *bona fide* parent and child relationship exists. 42 Comp. Gen. 578 (1963), amplified.

Matter of: Captain Kathy A. Montgomery, USAF, March 11, 1985:

The question presented in this case is whether a member of the uniformed services may receive basic allowance for quarters on behalf of an adopted child when that child is a legally adopted blood relative, over the age of 21, who is in fact dependent upon the member for support and resides with the member. We hold that under circumstances such as these, the member may receive basic allowance for quarters at the "with dependent" rate.[1]

BACKGROUND

Captain Kathy A. Montgomery, USAF, has requested basic allowance for quarters at the "with dependent" rate on account of her adopted son, Steven, whom she legally adopted in 1983 at age 26. Steven is also her blood relative, a twin brother, who is quadraplegic and incapable of self-support. Captain Montgomery explains that her brother and adopted son was severely injured in an automobile accident at the age of 19 in 1976 and in addition to being quadraplegic, is brain damaged, and has vision, hearing and a variety of other medical problems. He must be closely supervised and relies on Captain Montgomery for everything. He has resided with her for 4 years, and will continue to reside with her since their father is dead and their mother is incapable of caring for him. Other than Captain Montgomery, his only means of support is a $235 per month social security disability payment.

The Air Force has not allowed payment of the increased allowance pending our decision because of 42 Comp. Gen. 578 (1963). In that case, we held that an officer of the uniformed services who adopted her unemployable older brother and sister over 21 years of age, who did not reside with the Officer, did not have an established parental relationship with the adopted children to have them considered as her children under 37 U.S.C. § 401. Thus, we

[1] This decision is in response to a request submitted by Major T. H. Cuevas, USAF, Chief, Accounting and Finance Branch, Comptroller, Headquarters San Antonio Air Logistics Center, Kelly Air Force Base, Texas. The submission was approved by the Department of Defense Military Pay and Allowance Committee as Air Force Submission DO-AF-1447.

held that the officer was not entitled to the basic allowance for quarters on their account.

ANALYSIS

Section 401 of title 37 defines "dependent" as it is used in 37 U.S.C. § 403, the statute authorizing basic allowance for quarters, stating in pertinent part:

401. Definitions

In this chapter, "dependent", with respect to a member of a uniformed service, means—

* * * * * * *

(2) his unmarried child (including any of the following categories of children if such child is in fact dependent on the member: * * * an adopted child; * * *) who either—

(A) Is under 21 years of age;

(B) Is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his support; * * *

As is indicated above, we have held that certain adoptions by members of the uniformed services did not create a *bona fide* parental relationship and members could not receive the increased allowance based on those dependents. See 42 Comp. Gen. 578, *supra*, where the member adopted her older brother and sister, who did not reside with her, and B-150929, May 21, 1973, where the member adopted his elder sister who did not reside with him. In another case we found that a *bona fide* relationship did not exist between the member and his adopted child since the child, although a minor, was the member's brother who lived with this natural parents rather than with the member. The child was dependent financially upon his natural parents rather than the member, and it appeared that the member had merely "adopted" the child for purposes of making the child his heir. 7 Comp. Gen. 6 (1927).

The law has not always recognized adopted children under the definition of a dependent for quarters allowance purposes. See 9 Comp. Gen. 299 (1930) where we discussed the effect of the Act of February 21, 1929, 45 Stat. 1254, which amended section 4 of the Act of June 10, 1922, 42 Stat. 627, to include an adopted child. In discussing the language used in the 1929 Act, we noted that it was intended to prevent payments of increased allowances in situations where a member adopts a near relative, but the "child" remains in the custody of its natural parent or parents, and *prima facie*, no purpose is served other than to give the member a basis for claiming increased allowances on the basis of having an adopted child. See also B-150929, *supra*.

This concern is not applicable to the case before us. Here, Captain Montgomery has complete responsibility for the care, maintenance and support of her adopted son. He cannot function as an adult since he is both mentally and physically disabled. He resides with the member and has resided with her for a number of years.

Also, from the dependency statement submitted, it appears he is dependent upon her for over one-half of this financial support. Thus, the adopted child in this case is dependent upon the member as completely as, or perhaps more than, any other adopted child would be upon his parents.[2]

As is indicated above, in denying payment, the Air Force has relied upon our holding in 42 Comp. Gen. 578, *supra,* where we stated at page 580:

> * * * We do not believe that by including adopted children within the meaning of the term "children" it was intended to broaden the scope of the law to cover situations where the parent and child relationship did not exist when the children reached the age of 21 and the disability existed at the time of adoption. * * *

While generally this is true, particularly when considered in connection with all the facts of that case, we think that the holding in the case has been too broadly construed. In that case, a member had adopted her older "unemployable" siblings. Although she had a technical status as a parent, the "children" lived independently elsewhere. In considering these cases, the age of the adoptee, the existence of a disability and the living arrangements should be reviewed to determine whether a *bona fide* parent and child relationship exists for the purpose of the additional quarters allowance.

That is what should be the determinative factor, as is indicated in the next sentence of that case where we went on to state:

> * * * In any event, it appears extremely doubtful that the Congress contemplated the extension of the benefits of the law to an officer who adopts a brother, sister, or other relative over the age of 21 where no *bona fide* relationship of parent and child exists. * * *

When read as a whole, the case makes the existence of a *bona fide* parent and child relationship a determinative factor in the decision to allow or deny the additional quarters allowance. In determining whether or not a *bona fide* parent and child relationship exists, the service should consider all the circumstances, including the age of the adoptee, the existence of a disability at the time of the adoption, and whether the adopted child remains with his natural parents or actually lives with and is dependent upon the member for a least half his support.

The purpose of the increased allowance is to at least partially reimburse members for the expense of providing quarters for their dependents when Government quarters are unavailable, but not to grant the higher allowance as a bonus merely for the technical status of being married or a parent. See 42 Comp. Gen. 642 (1963). Therefore, in cases such as the present where an adopted child who has reached the age of 21 is being considered, the actual dependence of the child on the member, and the existence of a *bona fide*

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[2] We note that adoption of an adult is authorized under Tennessee law. Tenn. Code Ann §§ 36-116, 36-139. In *Coker v. Celebrezze,* 241 F. Supp. 783 (E.D. Tenn. 1965), a grandfather's adoption of his disabled adult grandson, who lives with the grandfather and who was dependent upon him, was held to establish a valid parent-child relationship for Social Security purposes.

parent and child relationship should be considered. In the circumstances of this case, the age of the adopted child and the existence of his disability at the time of adoption should not bar receipt of the additional allowance when a *bona fide* parent and child relationship exists.

As mentioned above, Captain Montgomery's child was disabled at the age of 19 and is completely unable to care for himself. She has parental control over and responsibility for all matters concerning him including medical, financial and legal matters, and his daily supervision and activity. Thus, the facts provide reasonable grounds to conclude that a *bona fide* parent and child relationship exists between the member and her adopted son.

Accordingly, Captain Montgomery may be paid basic allowance for quarters at the "with dependent" rate on account of her adopted son.

[B-218148.2]

Contracts—Protests—General Accounting Office Procedures—Filing Protest With Contracting Agency

Dismissal of original protest contesting propriety of agency issuance of a purchase order for computer equipment to higher priced competitor is affirmed where the protester failed to furnish a copy of its protest to the contracting agency within 1 day after the protest was filed with General Accounting Office.

Matter of: Storage Technology Corporation, March 11, 1985:

Storage Technology Corporation (STC) requests reconsideration of our dismissal of its protest concerning request for proposals (RFP) No. FO4699-85-R-OA002, issued by the Department of the Air Force. In its protest, STC contended that the Air Force improperly placed a purchase order for computer equipment to a competitor even though STC's own equipment was technically acceptable and lower priced. We dismissed the protest because STC failed to furnish a copy of its protest to the contracting agency within 1 day after the protest was filed with our Office. For the reasons that follow, we conclude that the protest was properly dismissed.

STC's protest was filed on Friday, February 8, 1985. Under our Bid Protest Regulations, STC was required to furnish a copy of its protest to the contracting agency by Monday, February 11. *See* § 21.1(d) of our Bid Protest Regulations, 49 Fed. Reg. 49,417, 49,420 (1984) (to be codified at 4 C.F.R. § 21.2(d)). The protester states that it "believes" that the contracting agency received at least the enclosure to its protest, if not the protest itself, on Monday, February 11 and therefore that it materially complied with this provision. However, on Tuesday, February 12, the contracting agency informed our Office that it still had not received any communication whatsoever from the protester. In fact, the agency now informs us that the first communication that was received from the protester was a telefaxed copy of the protest documents on Wednesday, Feb-

ruary 13. The actual protest documents did not arrive until Thursday, February 14.

The Competition in Contracting Act of 1984, Pub. L. No. 98-369 § 2741(a), 98 Stat. 1175, 1198, 31 U.S. Code 3551, and our implementing regulations impose a strict time limit of 25 working days for an agency to file a written report with our Office from the date of the telephone notice of the protest from our Office. § 21.3(c), 49 Fed. Reg. 49,420. Extensions are considered exceptional and are sparingly granted. Any delay in furnishing a copy of the protest to the contracting agency therefore necessarily delays all subsequent protest proceedings and frustrates our efforts to provide effective and timely consideration of all objections to agency procurement actions. We do not think that this purpose would be served by reopening our file on this protest.

The dismissal is affirmed.

[B-214459]

Credit Cards—United States Government National—Liability of Government

Generally, the Govt. should not pay for unauthorized transactions involving the use of a United States Government National Credit Card (SF-149) when (1) the expiration date embossed on the SF-149 passed before the transaction occurred; (2) the purchaser was not properly identified as a Federal agent or employee; or (3) the vehicle was not properly identified as an official vehicle. However, where these three items are satisfied, the Govt. should reimburse oil companies for otherwise legitimate purchases involving SF-149's, even though the authorized purchaser later made unauthorized use of the supplies or services so acquired (unless it can be demonstrated that the oil company or its agents or employees knew, or had strong reason to know, that the transaction was not authorized or would be used for unauthorized purposes). In those cases, after paying the oil company, the Govt. should seek reimbursement from the person who improperly acquired or misused the purchased services and supplies.

Matter of: Unauthorized Use of United States Government National Credit Card, March 18, 1985:

The Controller of the General Services Administration (GSA) has requested our opinion on the liability of the Government for unauthorized use of the United States Government National Credit Card (SF-149). For the reasons given below, we find that, under the terms of the governing contracts and regulations, the Government is not bound to pay for unauthorized uses of the SF-149. However, we recommend that the Defense Fuel Supply Center (DFSC) of the Defense Logistics Agency and GSA revise their respective contracts and regulations to make this clearer.

Background

The SF-149 is a plastic credit card issued by GSA which may be used by Government officials and employees (pursuant to a series of procurement contracts issued and administered by DFSC) to make credit purchases of fuel and other supplies and services from

commercial oil company retailers for use in Government vehicles engaged on official business. 41 C.F.R. § 101-26.406-1 (1983). The card is embossed with a billing account number, agency name, card identification number, expiration date, and replacement code. *See* Federal Supply Schedule FSC 75, pt. VII, § 13 (sch3 Nov. 30, 1982) (hereafter referred to as "FSC 75"). In addition to the embossed information, the following information is printed on the front and back of the card, respectively.

FRONT OF THE CREDIT CARD:

U.S. GOVERNMENT NATIONAL CREDIT CARD

This card is valid only for the supplies and services listed on the reverse side when furnished (1) *to the vehicle bearing the tag or identification shown below or* (2) *if no tag number is shown to any properly identified U.S. Government vehicle,* boat or small aircraft. If found please return to GSA, YTF, Washington, DC 20406.

BACK OF THE CREDIT CARD:

In accordance with the terms of Defense Supply Center Contract Bulletin DSA600-3.33, when presented, this card may be used to purchase any of the following supplies or services for properly identified U.S. Government motor vehicles, boats, or small aircraft:

(a) For motor vehicles—regular and premium grade gasoline, leaded and unleaded; diesel fuel; regular and premium grade lubricating oil; lubricating services; oil filter elements; air filter service; tire and tube repairs; battery charging; washing and cleaning services; mounting and dismounting chains; permanent type antifreeze; emergency replacement of defective spark plugs, fan belts, windshield wiper arms and blades; lamps; and other minor emergency repairs.

(b) For boats—regular and premium grade gasoline, leaded and unleaded; diesel fuel; and regular and premium grade lubricating oil.

(c) For small aircraft—aviation fuel and lubricating oil.

USE OF THIS CARD FOR OTHER THAN OFFICIAL PURPOSES AS STATED ABOVE IS A CRIMINAL OFFENSE SUBJECT TO FINE AND/OR IMPRISONMENT. FSC 75, § 14. [Italic supplied.]

Under the applicable GSA regulations, the identification number on an SF-149 represents either the license tag of a specific vehicle, or a unique serial number assigned to that card. 41 C.F.R. § 101-38.1202(a)(1). Cards with vehicle license tags for identification numbers may be used to procure services or supplies only for that vehicle. Cards embossed with unique serial identification numbers may be used to procure supplies or services for "any properly identified U.S. Government vehicle, boat, small aircraft, nonvehicular equipment or motor vehicle that is leased or rented for sixty continuous days or more and is officially identified in accordance with [41 C.F.R.] § 101-38.305-1." *Id.* (The legend on the front of the card, as quoted above, generally restates these provisions.)

Section 101-38.305-1, referred to above, provides that "[e]ach motor vehicle acquired for official purposes * * * shall display official U.S. Government tags mounted on the front and rear of the vehicle * * *." Particular Government vehicles may be exempted from the requirement to display "official U.S. Government tags" whenever "conspicuous identification on the vehicles would interfere with the performance of the functions for which the vehicles were acquired and are used." 41 C.F.R. § 101-38.601. *See generally* 41 C.F.R. subpt. 101-38.6. However, under the GSA regulations,

SF-149's normally would not be used to service or supply vehicles when disclosure of the official status of the vehicles "would interfere with the performance of the functions for which the vehicles were acquired and are used." 41 C.F.R. § 101-26.406-1(a).

In addition to displaying U.S. Government license tags, official governmental vehicles are also required to display the words "U.S. Government," the agency name, and the words, "For Official Use Only." 41 C.F.R. § 101-38.401. This requirement is also subject to the exceptions, discussed above, for vehicles covered by 41 C.F.R. §§ 101-38.601 through 101-38.605.

As noted above, the statement printed on the back of the SF-149 stipulates that the card's use is subject to the terms of the Defense Supply Center Contract Bulletin DSA600-3.33. That bulletin contains, among other things, the standard terms of the contracts that oil companies enter into with DFSC. By those terms, the oil companies agree to "honor" the SF-149 and bill the Government at a later date for the supplies and services rendered. Clause No. L157 and L159. The standardized terms specifically provide that the oil companies, through local service stations with which they are affiliated, shall "deliver and provide petroleum products, related supplies and services called for in [the] contract when and in such quantities as may be ordered by the ordering officer * * * in consideration of which the contractor shall be paid at the contract price." Clause No. L157. The term "ordering officer" is defined to mean one of a number of high ranking Government officials (or their designees), or "the driver of a Federal vehicle or boat, or pilot of a Federal aircraft authorized to place orders under a service station contract." Clause No. L105(f)(xiii). Under the standard terms, title to the supplies obtained under the contract passes to the Government "upon formal acceptance, regardless of when or where the Government takes possession." Clause No. L6.03(a). The contractors are entitled to be paid "upon submission of proper invoices for supplies and/or services rendered and accepted." Clause No. L159(a). When submitted, the contractors' invoices must be accompanied by "delivery receipts" which show:

(i) Name and address of service station and date of delivery;
(ii) Item, quantity, and grade of product, other supplies or service delivered;
(iii) For each individual item delivered, the unit price with extended totals;
(iv) License tag or identification number of the vehicle;
(v) The signature of the credit card holder making the purchase, acknowledging receipt of delivery. Clause No. L158(a).

The Issue

Neither the DFSC contracts, nor the GSA regulations, directly or expressly address the question of who bears liability for the purchase of supplies or services through an unauthorized use of an SF-149. For example, a lost or stolen SF-149 might be presented to and honored by an oil company in order to service a nonofficial ve-

hicle, or an employee entrusted with a card might use it to service his or her privately-owned vehicle for personal use.

According to GSA, each year SF-149's are used in over 3.5 million transactions to purchase $70 million worth of fuel, oil, and other products and services from commercial service stations. GSA anticipates that its new "Credit Card Accounts Payable System" will detect and report many unauthorized uses of SF-149's. GSA asked us to determine whether the Government is required to pay those portions of bills that are found to represent unauthorized transactions. Among the factors GSA suggests we consider are whether (1) the expiration date embossed on the card had passed before the transaction occurred; (2) the purchaser was at that time a Federal employee; (3) the vehicle was appropriately marked and identifiable as a Government vehicle, and (4) the oil company was unaware of the illegal nature of the transaction.

Discussion

We understand that, in response to previous oil company inquiries, officials of the DFSC have taken the position that the contracts under which the SF-149's are used do not constitute an agreement by the Government to pay for unauthorized uses of SF-149's. That conclusion is based on DFSC's analysis of the contract clauses quoted above. The DFSC argues that the contracts only bind the Government to pay for orders placed and accepted by "ordering officers" (Clause No. L158, L159(a), L6.03(a)), who primarily are the drivers or pilots of Government vehicles who have been authorized to place orders (Clause No. L105(f)(xiii)). From this, DFSC concludes that a person who is not an "ordering officer," i.e., who has not been authorized to use an SF-149 for a private vehicle, or uses the supplies or services procured with an SF-149 for private purposes rather than official purposes, cannot bind the Government under the contract. Moreover, DFSC concludes that unauthorized uses of SF-149's do not accomplish delivery to or acceptance by the Government (as required in Clause No. L159(a)). This is because the person misusing the SF-149 was not acting as an agent of the Government. DFSC maintains that two of our previous decisions, 23 Comp. Gen. 582 (1944), and 32 Comp. Gen. 524 (1953), support these conclusions.

We generally agree with DFSC's construction of the relevant contract provisions and the applicable legal principles. With regard to DFSC's construction of the oil company contracts, we agree that the Government has not contracted to accept liability for unauthorized purchases involving SF-149's. The DFSC contracts, GSA regulations, and the terms of the SF-149 itself, expressly contemplate presentment of an SF-149 by a Government employee for use in purchasing supplies or services for a properly identified Government vehicle. The DFSC contracts only bind the Government to

pay for the supplies and the services ordered and accepted by authorized Government employees. The GSA regulations and the terms printed on the SF-149 itself clearly limit use of the card to the purchase by properly identified Government employees of specific services or supplies for a properly identified Government vehicle.

In the past, in the context of the theft and misuse of commercial credit cards assigned to the Government for official use, this Office has applied the established principle that the Government "is neither bound nor stopped by acts of officers or agents acting without authority," nor is it bound by "acts of persons [such as thieves] who never have been its agents." 23 Comp. Gen. at 584. *See also* 32 Comp. Gen. at 525. In those decisions, it was noted that:

> * * * [I]t is a basic principle of the law of agency that every person dealing with an agent is bound to investigate and assure himself that an agency [relationship] actually exists. * * *
>
> * * * A distinction between the liability of individuals and that of the Government with respect to their agents has long been recognized by the courts. Although the former are liable to the extent of the power apparently given to their agents, due to the necessity of protecting the public interests the Government is liable only to the extent of the authority or power it has actually given to its agents." 23 Comp. Gen. at 583-84. *See also* 32 Comp. Gen. 524-25.

Keeping these principles in mind, we turn to the specific questions raised by GSA.

(1) *Is the Government liable for a purchase made through the use of an expired SF-149?* Each SF-149 is embossed with a clearly designated expiration date. The use of expiration dates on credit cards is a common practice among companies that issue commercial credit cards, including most, it not all, of the oil companies that have contracted with DFSC to honor the Government's SF-149. It should be obvious to the oil companies that the honoring of an SF-149 after the expiration date on the card has passed is not consistent with the DFSC contracts and GSA regulations. Consequently, the Government clearly is not liable under the DFSC contracts to reimburse oil companies for transactions involving expired SF-149's. However, with regard to transactions involving expired SF-149's where, but for the expiration, the transaction would otherwise be legitimate, it may be possible, depending on the facts and circumstances of the particular case, to reimburse the oil company under the principles of *quantum meruit* or *quantum valebat. See, e.g.,* 62 Comp. Gen. 337, 338-39 (1983).

(2) *Is the Government liable for purchases made through the use of a SF-149 by a person who was not a Federal officer of employee?* Obviously, the acceptance of an SF-149 by an oil company contractor where the person offering the card is not properly identified as a Government employee transcends the bounds of the agreement between the oil company and the Government. Lost or stolen credit cards and vehicles constitute facts of life which are frequently encountered by merchants. Long ago, this Office pointed out that:

* * * The possession of a credit card, or of the official car identified thereon, in itself alone, does not justify an extension of credit to the bearer as a representative of the United States. The service station employees to whom such cards are presented should require competent evidence as to the identity and official status of the persons holding them. All Federal employees authorized to use official cars and purchase gasoline and oil on the credit of the Government have available means of readily establishing these facts. 23 Comp. Gen. at 583. *See also* 32 Comp. Gen. 525.

Oil company contractors are not significantly or unfairly burdened by the requirement that they investigate the bearer's actual authority to make a purchase using an SF-149 (Government employees involved in "undercover" or other assignments in which it would be inappropriate for them to carry credentials to establish their official status normally would not carry or use SF-149's. *Cf. e.g.*, 41 C.F.R. subpt. 101-38.6 *and* 41 C.F.R. § 101-26.406-1(a).) In any event, by accepting and SF-149, the oil company binds itself under the GSA regulations an DFSC contracts (as reiterated on the card itself) to verify the bearer's official status, and may not be reimbursed by the Government unless it can demonstrate that it did so.

(3) *Is the Government liable for transactions in which SF-149's were used to service or supply vehicles not appropriately marked and identified as official Government vehicles?* The DFSC contracts and the GSA regulations limit the card's use to the purchase of services or supplies for properly identified Government vehicles. Since GSA regulations require most official Government vehicles to display Government license tags and the words "U.S. Government" and "For Official Use Only," the oil companies are neither significantly nor unfairly burdened by the requirement to verify the vehicle's official status. *Cf.* 23 Comp. Gen. 582, *supra;* 32 Comp. Gen. 524, *supra.* (As noted above, SF-149's normally would not be used for vehicles involved in certain types of "undercover" work.) Where the vehicles are not so identified, the instructions on the SF-149 limit its use to the vehicle bearing the tag or identification listed on the credit card. Consequently, the oil companies have contractually bound themselves to verify the official nature of the vehicle, and may not be reimbursed unless they can demonstrate that they did so.

(4) *Is the Government's liability affected by the fact that the oil company may have been unaware of the illegal nature of the transaction?* Here, we must distinguish between *purchase* and subsequent *use.* As has been discussed, the authority to make a purchase using the SF-149 is reasonably easy to verify. If the merchant fails to compare the name of the SF-149 and the name on the employee's Government identification card and further fails to examine the vehicle tags or other identifying markings to be sure it is a Government car, he should bear the consequences of failing to do so.

Of course, it is possible that a given purchase may be entirely legitimate on its face, but the subsequent use of the gasoline pur-

chased may be unauthorized. For example, a Government employee with proper credentials might purchase gasoline for a properly identified Government vehicle, and then proceed to use the vehicle for personal (unauthorized) matters. In our opinion, merchants should not be held responsible for this later unauthorized use as long as all the required identifications were properly verified at the time the purchase was made.

Conclusions

Based on the foregoing discussion, we conclude generally that the Government should not pay for unauthorized transactions involving the use of SF-149's when (1) the expiration date embossed on the SF-149 passed before the transaction occurred; (2) the purchaser was not properly identified as a Federal agent or employee; or (3) the vehicle was not properly identified as an official vehicle. However, where these three items are satisfied, the Government should reimburse oil companies for otherwise legitimate purchases involving SF-149's, even though an authorized purchaser later made unauthorized use of the supplies or services so acquired (unless it can be demonstrated that the oil company or its agents or employees knew, or had strong reason to know, that the transaction was not authorized or would be used for unauthorized purposes). In those cases, after paying the oil company, the Government should seek reimbursement from the person who improperly acquired or misused the purchased services and supplies. Collection should be pursued in accordance with the Federal Claims Collection Standards, 4 C.F.R. ch. II, *as amended*, 49 Fed. Reg. 8889 (1984).

While we think these conclusions follow from existing law and the applicable contractual and regulatory provisions, we nevertheless urge GSA and DFSC to amend those regulations and contracts to expressly state and make clear the situations in which the Government will and will not be liable. This should reduce future disputes and guarantee that oil companies know and understand the obligations that they have assumed.

Finally, we suggest that GSA explore the feasibility of developing a system for reporting lost or stolen credit cards to the oil companies with which DFSC has contracted. This would enable the oil companies to distribute lists of lost/stolen cards to the individual retailers, similar to the lists used for commercial credit cards, and thereby help to reduce the potential for unauthorized use of the cards.

[B-215124]

Contracts—Negotiation—Offers or Proposals—Evaluation—Cost Realism Analysis—Adequacy

Protest contending that agency failed to conduct proper cost realism analysis resulting in defective evaluation and improper award to techically inferior, but 23-percent lower cost, proposal, is sustained where: (1) agency was concerned about the realism of the awardee's costs; (2) agency's cost realism analysis fails to assure that the awardee's proposed costs are realistic; and (3) agency's attempt to resolve question of cost realism by capping awardee's direct and indirect costs is of questionable efficacy in view of RFP provision which gives the awardee the right to reject, negotiate and dispute specific task orders leaving open the possibility that a contractor unable to perform within the confines of the cap will use its rights under the provision to excuse nonperformance.

Matter of: Advanced Technology Systems, Inc., March 18, 1985:

Advanced Technology Systems, Inc. (ATS), protests the Department of Housing and Urban Development (HUD) award of a cost reimbursement, requirements-type contract under request for proposals (RFP) No. HC-12450 to Group Operations, Inc. (GOI). ATS, relying on an RFP clause which states, in part, "an offeror's proposal will not be considered when costs are determined to be unrealistically low," contends that HUD should have rejected the GOI proposal as unrealistically low. ATS argues that GOI's offer was a "buy-in" and "non-responsive" to the RFP's realistic cost requirement quoted above.

We sustain the protest.

The solicitation is for automated data processing (ADP) development support services. The bulk of the work consists of furnishing technical personnel, although the successful offeror is required to also provide all necessary materials, services, equipment and facilities. Part of the work is to be performed onsite at HUD and part offsite at the contractor's facility. The RFP provided a fixed, lump-sum number of technical staff hours for each category of required personnel. Offerors submitted both technical and cost proposals describing their proposed approach to the work and the costs associated with that approach.

The RFP indicates that technical and cost factors will be evaluated for award. It is clear that the technical portion of the proposal will be point-scored and the cost portion examined for realism; however, there is no indication of the relative weight of the two factors. It appears that HUD intended to accord both factors substantially equal weight, which is consistent with our decision in *University Research Corporation*, B-196246, Jan. 28, 1981, 81-1 C.P.D. ¶ 50.

The source evaluation board (SEB) eliminated five of the eight proposals received from the competitive range after an initial evaluation. Oral discussions were held with the three remaining offerors, resulting in the following evaluation of best and final offers:

	Technical Score	Cost
GOI	57.5	$3,722,664
ATS	70.5	4,595,735
Third Offeror	59.3	4,824,059

ATS's technical score was 13 points, or 23 percent, better than GOI's; however, GOI's estimate of its cost was $873,071, or 23 percent lower, than ATS's costs. The SEB recommended (by a three to one margin) that the source selection official (SSO) award the contract to ATS. However, the SEB's contract advisor objected on the ground that both ATS and GOI were technically capable of performing the work and that ATS's 13-point technical edge over GOI was not worth the $873,071 difference. The SSO requested additional information on: (1) the nature of ATS's technical superiority; and (2) the reason for the $873,071 difference in proposed costs. The Defense Contract Audit Agency (DCAA) furnished information on GOI's current cost rate experience on other similar government contracts. After reviewing the DCAA information and acknowledging the concern of one SEB number that GOI was "low balling" its proposed personnel costs (direct labor rates), the dissenting contract advisor prepared a cost realism analysis for the SSO, which concluded:

> It is apparent after reviewing the DCAA information that GOI is willing to perform at a lower cost than what they are experiencing currently. This same situation occurred when ATS won their first contract with HUD. If a contract is negotiated with GOI, ceilings will have to be established on the cost items to prevent the Contractor from buying in and making up the difference after the contract award.

HUD reports that:

> After reviewing the cost realism analysis, the SSO overruled the SEB and recommended that a contract be worked out with GOI which would ensure that reimbursement costs would not exceed the costs proposed by GOI for each component cost category comprising the total contract cost. This was to include the option period of the contract as well as the 18-month base period.

On April 26, 1984, HUD awarded GOI the 18-month (with one 18-month option), cost-plus-fixed-fee contract in the amount of $3,722,644 ($1,822,673 for the base period and $1,899,991 for the option period). HUD justifies the award on the basis that:

> * * * GOI's technical score was within the competitive range, and GOI's proposal was determined to be most advantageous to the Government, price and other factors considered; e.g., the cost proposal offered a large saving to the Government.

When the Government contemplates the award of a cost-reimbursement contract, the issues of buy-in and cost realism become proper issues for our review, because, as a rule, buying in on a fixed-price contract (the submission of a below-cost proposal) provides no basis for protest as long as the offeror buying in is responsible since it is the offeror's loss and not the government's if the cost of providing the required service or item exceeds the contract

price. *Fresh Flavor Meals, Inc.*, B-208965, Oct. 4, 1982, 82-2 C.P.D. ¶ 310.

However, when the contract to be awarded is a cost-reimbursement contract, the risk of loss as a result of a cost overrun shifts to the government. It is therefore necessary in cost-reimbursement contracting to be aware of the possibility of a buy-in and guard against its occurrence by analyzing proposed costs in terms of their realism since, regardless of the costs proposed by the offeror, the government is bound to pay the contractor actual and allowable costs. *Bell Aerospace Company; Computer Sciences Corp.*, 54 Comp. Gen. 352 (1974), 74-2 C.P.D. ¶ 248. In this regard, Federal Acquisition Regulation, § 15.605(d), 48 Fed. Reg. 42,102 (1983) (to be codified at 48 C.F.R. § 15.605(d)), provides:

> (d) In awarding a cost-reimbursement contract, the cost proposal should not be controlling, since advance estimates of cost may not be valid indicators of final actual costs. There is no requirement that cost-reimbursement contracts be awarded on the basis of lowest proposed cost, lowest proposed fee, or the lowest total proposed cost plus fee. The award of cost-reimbursement contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The primary consideration should be which offeror can perform the contract in a manner most advantageous to the Government, as determined by evaluation of proposals according to the established evaluation criteria.

In this vein, we have held it improper to award a cost-reimbursement contract on the basis that the costs proposed are reasonable, *per se,* merely because they are low when compared to other offers, without an appropriate analysis adequately measuring the realism of such low costs. Moreover, where the award of the contract is based ultimately on the estimated cost for performance of the contract, a determination of cost realism requires more than the acceptance of proposed costs as submitted. *Joule Technical Corporation,* B-192125, May 21, 1979, 58 Comp. Gen. 550 79-1 C.P.D. ¶ 364. For these reasons, the evaluation of competing cost proposals requires the exercise of informed judgment which we believe must be left to the administrative discretion of the contracting agencies involved, since they are in the best position to assess "realism" of cost and technical approaches and must bear the major criticism for any difficulty or expenses resulting from a defective cost analysis. 50 Comp. Gen. 390 (1970). Since the cost analysis is a function of the contracting agency, we will not disturb an agency's determination unless it clearly lacks a reasonable basis. *Moshman Associates, Inc.*, B-192008, Jan. 16, 1979, 79-1 C.P.D. ¶ 23.

Notwithstanding the general rule that the government bears the risk of cost overruns in the administration of a cost-reimbursement contract, there is an exception where the contractor has agreed to a cap or ceiling on its reimbursement for a particular category or type of work. In such a case, any loss occasioned by a cost overrun will be borne by the contractor and not the government. 51 Comp. Gen. 72 (1971), at 77. For this reason there are many cases where

imposition of a cap or ceiling on direct and indirect costs can substitute for the performance of a cost realism analysis.

It is well established that selection officials (SSO) are not bound by the recommendations and conclusions of evaluators, like the SEB, and GAO will defer to an SSO's judgment, even when he disagrees with an SEB composed of technical experts. Moreover, the SSO's selection decision, reliance upon the results of technical/cost evaluations, and tradeoff decisions, if any, between technical superiority and cost are limited only by the tests of rationality and consistency with established evaluation factors. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 C.P.D. ¶ 325.

We agree with the protester that the award to GOI was inconsistent with the RFP's cost realism evaluation factor and that HUD's imposition of a cap on direct and indirect costs is of questionable efficacy, as a substitute for the performance of a cost realism analysis, under the particular circumstances of this case.

The record shows that HUD was concerned about the realism of GOI's proposed costs. HUD performed an inadequate cost realism analysis of GOI's proposed costs. The analysis consists of the following: (1) a statement that GOI understands that HUD intends to impose ceilings; (2) a calculation of GOI's base period (based on the rates which DCAA reports GOI is currently experiencing) showing an increase of $460,627 over GOI's proposed costs; (3) a calculation of ATS's costs based on ATS's ceiling rates; and (4) two comparisons—GOI's proposed cost versus ATS's proposed cost (showing GOI lower by $873,071 over 36 months) and GOI's current costs versus ATS's proposed ceiling costs (showing GOI lower by $431,546 over 36 months). None of the above provides a reason for concluding that GOI's proposed costs are realistic. HUD's cost analysis only compared the two proposals on the same basis once, simply subtracting GOI's proposed cost from ATS's proposed cost. Such calculation does nothing to assure realistic costs, but merely shows the difference between the two proposers. The other comparison utilized GOI's current cost experience against ATS's ceiling costs (the most performance by ATS would cost the government). This does not result in a usable cost analysis because of the different basis used for each offeror. We note ATS argues that if its proposed costs are compared with GOI's current costs, ATS is almost $100,000 lower.

In view of the above, the question becomes whether imposition of caps on GOI's proposed direct and indirect costs can substitute for an adequate cost realism analysis. We can only condone such a substitution when it is clear that the cap imposed will protect the government to the same extent that an adequate analysis would. While HUD appears to have capped GOI's indirect costs, it is not clear that GOI's direct labor costs are effectively capped. The record shows that GOI initially resisted HUD's plan to impose caps. In fact, GOI warned HUD, at the time HUD began negotiat-

ing the cost ceilings, that imposition of the ceilings would prevent GOI from using the higher skilled personnel which HUD actually required to perform the work.

We are concerned that the cap imposed on GOI's direct labor is a cap on the average cost of a particular labor category. The average results from the combination of the salaries of all GOI personnel within the given category (both high salary and low salary). HUD does not appear to have determined exactly what skill mix and therefore what salary mix was represented by the average which GOI agreed to cap. We cannot conclude that such an arrangement will assure HUD of the availability of the necessary mix of personnel (high salary v. low salary) within a particular labor category to perform the contract.

Moreover, Article VIII of the contract grants GOI the right to reject a HUD task order in the event that GOI believes the prescribed work cannot be accomplished within the hours designated in the task order. Assuming that higher skilled, and presumably higher paid, contractor personnel can perform tasks at a higher speed, we think that a contractor, who submitted unrealistically low proposed costs, would be forced by the caps to propose less skilled, lower paid and slower personnel in order to stay within the ceilings. Consequently, it can be anticipated that such a contractor would reject task orders on the basis that more time was required for performance. In this regard we note that the ceilings on GOI's proposed costs are well below the costs that GOI is currently experiencing. Article VIII directs:

> J. Immediately upon receipt of a rejected task specification, the Contracting Officer shall commence negotiations with the Contractor to resolve problems that made the task specification unacceptable. In the event no resolution on questions of fact can be obtained, the task specification in question may be subjected to General Provisions, Clause 13, entitled "Disputes."

We think that HUD's substitution of caps for an adequate cost realism analysis is ineffective because, at best, it sets up a situation certain to generate endless disputes in the event that the contractor actually had submitted unrealistically low proposed costs.

Consequently, notwithstanding HUD's imposition of cost ceilings, we cannot find that HUD realized the cost safeguard's thought necessary by the SSO and the SEB. We think that a proper cost analysis is necessary in this kind of procurement.

As noted above, the SSO overruled the SEB and made award to the lower technically rated offeror, GOI, based on its lower cost proposal. We find, based on the above, that such action was not rationally based in view of the lack of a cost analysis and the inadequacy of the cost ceilings. However, there was also no adequate cost analysis performed on ATS. At this time, it is impracticable to attempt to conduct a proper cost analysis.

Therefore, there was no assurance that award was made in the best interest of the government. In view of the stage of perform-

ance of the initial contract period and the time necessary to conduct a reprocurement, we recommend that the option not be exercised.

[B-215672]

General Accounting Office—Jurisdiction—Discrimination—Complaints Under Title VII—Civil Rights Act—Monetary Awards

In view of authority granted to the Equal Employment Opportunity Commission by statute, the Comptroller General does not render decisions on the merits of, or conduct investigations into, allegations of discrimination (including age discrimination) in employment in other agencies of the Govt. However, based upon the authority to determine the legality of expenditures of appropriated funds, he may determine the legality of awards agreed to by agencies in informal settlements of discrimination complaints.

Civil Rights Act—Title VII—Discrimination Complaints—Informal Agency Settlement—Without Discrimination Finding—Cash Award Limitations

An agency may settle a discrimination complaint informally for an amount which does not exceed the maximum amount that would be recoverable under Title VII of the Civil Rights Act, if a finding of discrimination were made. The amount that can be awarded under an informal settlement must be related to backpay and generally cannot exceed the gross amount of backpay less any interim earnings. The Equal Employment Opportunity Commission regulations direct use of the same standards in computing amounts payable in age discrimination cases. Therefore, an agency does not have the authority to make an award in informal settlement of an age discrimination complaint to the extent it exceeds the amount of backpay which could be recovered if a finding of discrimination were made.

Attorneys—Fees—Agency Authority to Award—Civil Rights Act Complaints

An amount agreed to in compromise settlement at the administrative level of a Federal employee's complaint under the Age Discrimination in Employment Act may not include attorney fees and costs. In 59 Comp. Gen. 728 (1980), the Comptroller General indicated that he would not object if regulations were promulgated authorizing Federal agencies to pay attorney fees in settling such cases. However, in view of the lack of specific statutory authority and subsequent court decisions holding that attorney fees are not payable at the administrative level in Federal employee age discrimination cases, that decision will no longer be followed concerning attorney fees in age discrimination complaint settlements. 59 Comp. Gen. 728 was overruled in part.

Courts—Judgments, Decrees, etc.—Payment—Permanent Indefinite Appropriation Availability—Administrative Settlement

The judgment fund provided by 31 U.S.C. 1304 does not encompass payment of awards made in administrative settlement of an age discrimination complaint. The language of the relevant provisions clearly contemplates final judgments of a court of law and settlements entered into under the authority of the Attorney General.

Matter of: Albert D. Parker, March 18, 1985:

The Savannah District, Corps of Engineers, Department of the Army, seeks to make a lump-sum payment in an informal settle-

ment of an age discrimination complaint filed by Mr. Albert D. Parker, a former employee of that agency.[1] The submission lacks enough information about the settlement for us to make a specific determination of the amount payable, but the amount of the proposed settlement appears to exceed the amount allowable under the guidelines outlined in this decision.

Background

Mr. Parker was a civilian employee of the Corps of Engineers in a GS-1171-11 appraiser position. He held one of two such positions located in Cary, North Carolina, in the North Carolina Area Real Estate Project Office, Real Estate Division of the Savannah District. On March 30, 1983, he requested advance sick leave of 245 hours and in April 1983, while he was on sick leave, he was visited by his immediate supervisor who informed him that his job was to be abolished effective June 30, 1983. Mr. Parker was also informed that only 24 hours of sick leave could be approved since that was the amount that would accrue to the date that his job would be abolished. He was told, however, that if he accepted an offer of reassignment, adjustment would be made for the remainder of advance leave he had requested. He was offered a position as a realty specialist, GS-1170-11, in Savannah, Georgia.

In May 1983, Mr. Parker accepted the offer, "subject to judicial discretion." He returned to duty on May 12, and contacted an Equal Employment Opportunity counselor on June 20, 1983. On June 28, 1983, he submitted a request for retirement in lieu of accepting the reassignment. His retirement was effective June 30, 1983. He filed a formal complaint on July 27, 1983, alleging discrimination on the basis of age.

An investigation was conducted by the United States Army Civilian Appellate Review Agency. Its report concluded that although management had articulated a legitimate nondiscriminatory reason for implementing the personnel action, the reason was a pretext to mask discrimination because of Mr. Parker's age and associated eligibility for retirement. The Appellate Review Agency's report recommended reinstatement of Mr. Parker to a position comparable to his former position with attendant backpay and benefits.

After negotiations with Mr. Parker and his attorney, the agency determined that it was in the best interest of the Government to accept a settlement of the complaint by paying Mr. Parker $45,000, plus attorney fees. On the basis of Mr. Parker's assertion that but for the action of the agency he would not have retired before July

[1] Mr. P. M. Baldino, Chief, Finance and Accounting Division, Directorate of Resource Management, Office of the Chief of Engineers, forwarded the Savannah District Disbursing Officer's request for an advance decision to us.

1, 1985, the agency calculated Mr. Parker's losses in the following manner:

$18,889.89—net backpay (July 1, 1983–July 1, 1984).

$29,219.62—net salary loss (July 1, 1984–July 1, 1985).

$20,359.56—annuity loss (at $130/monthly for 13 years).

The agency requests an advance decision concerning payment of this settlement in view of our decision 62 Comp. Gen. 239 (1983). The agency contends that its settlement does not fall within the prohibitions of that decision, and therefore may be paid. The agency also asks whether or not payment of this sum may be made from the permanent judgment fund.

Legal Framework

In view of the authority granted to the Equal Employment Opportunity Commission by statute, we do not render decisions on the merits of, or conduct investigations into, allegations of discrimination in employment in other agencies of the Government. See 29 U.S.C. § 633a (1982), and 62 Comp. Gen. 239 (1983). As is the case with actions brought under Title VII of the Civil Rights Act of 1964, the General Accounting Office has no authority to review the merits of age discrimination cases. However, we may determine the legality of awards agreed to by agencies in informal settlements of discrimination complaints, based upon our authority to determine the legality of expenditures of appropriated funds. See 62 Comp. Gen. 239, *supra.*

Although not stated in the agency's submission, we assume that since the complaint in this case was based on age discrimination, it was filed with the agency pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.,* as amended, rather than under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The Age Discrimination Act was passed in 1967 to protect older members of the nation's workforce from discrimination premised on age differences. *Lorillard v. Pons,* 434 U.S. 575 (1978).

Section 15 of the Age Discrimination Act, which was added by amendment in 1974, provides a cause of action for discrimination on account of age in Federal Government employment. 29 U.S.C. § 633a. Regulations developed pursuant to the Age Discrimination Act are found in 29 C.F.R. § 860.1, *et seq.,* and 29 C.F.R. § 1613.501, *et seq.* (1983).

The Age Discrimination Act is more than a simple extension of Title VII of the Civil Rights Act. Although, like Title VII, the Age Discrimination Act is directed toward elimination of discrimination, it has its own separate statutory scheme of remedies and enforcement provisions. *Fellows v. Medford Corp.,* 431 F. Supp. 199 (1977).

The Age Discrimination Act as originally enacted, specifically in 29 U.S.C. § 626, incorporated by reference parts of the Fair Labor Standards Act, including 29 U.S.C. §§ 216 and 217, which provide that only unpaid wages and compensation which would have been due from an employer who violated the Fair Labor Standards Act, are available for damages. See *Lorillard v. Pons, supra.* Section 15 of the Age Discrimination Act (29 U.S.C. § 633a) was added in 1974 to protect Federal employees from discrimination on account of age. A 1978 amendment, adding section 15(E), made the sections in the Fair Labor Standards Act inapplicable to claims of age discrimination in Federal Government employment. *Swain v. Secretary,* 27 FEP Cases 1434 (1982), aff'd without opinion, 701 F.2d 222 (App. DC 1983). Section 633a of title 29, United States Code, provides that the Equal Employment Opportunity Commission may enforce the provision:

> * * * through appropriate remedies, including reinstatement or hiring of employees with or without *backpay,* as will effectuate the policies of this section. * * * [Italic supplied.]

The statute specifically mentions backpay as a monetary award. It does not specifically provide for awards of compensatory or punitive damages. We have approved the interpretation of similar language in Title VII of the Civil Rights Act as limiting awards in informal settlements to an amount related to backpay and not to exceed the amount that would be recoverable if a finding of discrimination were made. 62 Comp. Gen. 239, 244.

Payment of Settlement

We do not question the agency's authority to make informal settlements in cases brought under the Age Discrimination Act. Nor do we question that informal settlement is encouraged under both that Act and Title VII of the Civil Rights Act. However, we question the propriety of payment of $45,000 in settlement of this claim.

The agency, in its submission, asserts that it has followed the procedures outlined in 29 C.F.R. § 1613.217 (1983), which allows informal settlement of complaints in Title VII cases. The regulations pertaining to age discrimination provide that acceptance and processing of age discrimination complaints shall comply with the principles and requirements of various provisions of the regulations governing Title VII complaints including 29 C.F.R. § 1613.217. See 29 C.F.R. § 1613.511. This appears consistent with the nearly identical language concerning remedies used in the two statutes as they relate to Federal employees. See 42 U.S.C. § 2000e-16(b) and 29 U.S.C. § 633a(b).

Under 29 C.F.R. § 1613.217 an agency may settle informally for an amount which does not exceed the maximum amount which would be recoverable if a finding of discrimination were made

under Title VII. We have held that the amount that may be awarded under an informal settlement must be related to backpay and generally may not exceed the gross amount of backpay the employee lost, minus any interim earnings and other deductions. 62 Comp. Gen. 239, *supra,* at 244-245.

It is our view that this settlement authorization and limitation also applies in Federal employee age discrimination cases. Thus, the payment agreed upon by the agency would be limited generally to the net backpay Mr. Parker could have received had he been successful in his discrimination complaint.

It appears that the amount of $45,000 is a compromise settlement agreed upon between the claimant and the agency. We do not find that a lump-sum compromise settlement is improper but the amount of the award may not exceed the amount of backpay which could be recovered under a finding of discrimination.

In computing the maximum settlement allowable the agency should determine the total pay and allowances which would have been paid from the date of separation to the date of settlement and deduct from that amount interim earnings and other deductions as prescribed by regulation. 62 Comp. Gen. at 245.

Attorney Fees and Costs

The agency proposes to pay the attorney fees and costs of the complainant as part of the settlement agreement. Although attorney fees are available at the administrative level in claims brought under Title VII of the Civil Rights Act (see 29 C.F.R. § 1613.217), we now hold that they are not available for claims brought under the Age Discrimination Act.

In this regard, we stated in 59 Comp. Gen. 728 (1980), that we would have no objection if the Equal Employment Opportunity Commission were to revise its regulations and provide payment of attorney fees at the administrative level in age discrimination cases. The Equal Employment Opportunity Commission did not modify the applicable regulations, and in light of subsequent events, we have reevaluated our decision and for the following reasons, as it relates to paying attorney fees in age discrimination cases, it is overruled.

In 59 Comp. Gen. 728, we noted that the "American rule" or "general rule" regarding attorney fees is that each party bears its own costs. The rule was clearly established in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). While recognizing that the matter was not entirely clear, we stated that, since an award of attorney fees had been provided under the acts prohibiting other types of discrimination, and since we found no indication that Congress intended to deny attorney fees in age discrimination cases, we would not object if the Equal Employment Opportunity Commission drafted regulations which would provide for

payment of attorney fees at the administrative level in age discrimination cases.

Subsequent to our decision, the courts have specifically held that attorney fees at the administrative level are not available in age discrimination cases. See, *Kennedy v. Whitehurst,* 690 F.2d 951 (1982); *Swain v. Secretary, supra; Lehman v. Nakshian,* 435 U.S. 156 (1981). The decisions emphasize the standard articulated in *Alyeska Pipeline, supra:* "specific statutory authorization for an award of fees is required before the incidence of counsel costs can be shifted." *Kennedy v. Whitehurst, supra.*

The court in *Kennedy,* reviewed the legislative history of the Age Discrimination Act and explained that the differences in enforcement schemes between Title VII of the Civil Rights Act and the Age Discrimination Act make clear that only Title VII permits award of attorney fees at the administrative level. Title VII of the Civil Rights Act requires an exhaustion of administrative remedies prior to the filing of a law suit. The Age Discrimination Act requires only that notice of the existence of a complaint be given to the Government before a lawsuit may be filed. Thus, attorney fees were intended to be available in Title VII cases, where the administrative process is mandatory, but were not provided in age discrimination cases which make the administrative process optional.

In view of the above, it is now our position that sufficient statutory authority does not exist which would allow the agency to award attorney fees at the administrative level. Accordingly, a settlement agreement in which the agency awards attorney fees at the administrative level would be prohibited.

Payment From the Permanent Judgment Fund

The agency asks whether the settlement, if proper, may be paid from the permanent indefinite appropriation for judgments established under 31 U.S.C. § 1304 (1982) (formerly 31 U.S.C. § 724a). This statute provides for payments when certified by the Comptroller General, of "final judgments, awards, and compromise settlements." 31 U.S.C. § 1304(a).

However, 31 U.S.C. § 1304 does not encompass payment of administrative awards. The language of the relevant provision clearly contemplates final judgments of a court of law and settlements entered into under the authority of the Attorney General. See *EEO Regulations-Attorney's Fees,* B-199291, June 19, 1981. Therefore, payment of the lump-sum settlement may not be paid from the permanent appropriation for judgments.

[B-216924, B-217057]

Contracts—Small Business Concerns—Awards—Responsibility Determination—Nonresponsibility Finding—Referral to SBA for COC Mandatory Without Exception

Section 401 of the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, 98 Stat. 3082, Oct. 30, 1984, prohibits the Small Business Administration (SBA) from establishing any exemption from requirement for referral of nonresponsibility determinations. That section of the law was effective upon enactment and therefore all such determinations must be referred to SBA for review under the SBA's Certificate of Competency procedures.

Bids—Prices—Firm—Firm Fixed Price Requirement

Where bidder includes in its bid statement that its price for option periods was "plus rate of inflation, fuel, labor and gravel," and where invitation for bids stated that the option years would be evaluated for award, bid was properly rejected for failure to offer firm, fixed price.

Contracts—Protests—Allegations—Bias—Unsubstantiated

The protester has the burden of proving bias or favoritism on the part of the procuring officials. Where there are conflicting statements of fact and the protester's position is supported by no other evidence, we conclude that the protester has failed to meet its burden.

Matter of: Sess Construction Co., March 18, 1985:

Sess Construction Co., protests the rejection of its bids under invitations for bids (IFB) Nos. R8-7-84-65 and R8-7-84-66 issued by the United States Forest Service for road maintenance work in the Biloxi Ranger District. The work under the IFBs consisted of blading aggregate surfaced roads, blading nonsurfaced roads and cleaning and reshaping ditches. Bids for both IFB's were opened on September 24, 1984 and covered maintenance work for a 1-year period with two 1-year options. Sess contends that the Forest Service's rejection of its bids was improper and has alleged that the Forest Service has unfairly discriminated against the firm.

For the reasons set forth below, Sess's protest under IFB No. R8-7-84-65 is sustained and its protest under IFB No. R8-7-84-66 is denied.

IFB No. R8-7-84-65

Six responses to the IFB were received by the Forest Service. Sess submitted the apparent low bid of $8,392 per year. This price was approximately 50 percent below the government estimate of $16,612 and because of this, the Forest Service requested that Sess verify its bid price. In addition, since Sess had not held any previous Forest Service road maintenance contract, the Forest Service requested a demonstration of the equipment which would be utilized.

Sess verified its bid price as the price which was intended. Thereafter, a demonstration of Sess's equipment was conducted. Based on that demonstration, the Forest Service determined that some of

Sess's proposed equipment would not perform the work required by the specifications and that providing alternate equipment to perform the work would pose a serious financial hardship on Sess. On this basis, the Forest Service found Sess nonresponsible and by letter dated November 5, 1984, informed Sess that its bid was rejected. On November 6, the contract was awarded to Mr. Bobby Hunt in the amount of $14,535.

Sess is a small business concern. The Forest Service, however, did not refer the matter of Sess's responsibility to the Small Business Administration (SBA) for review under the SBA's Certificate of Competency (COC) procedures. Sess's bid price was less than $10,000 and the Forest Service states that, under current SBA regulations, it is within the contracting officer's discretion as to whether a referral should be made when the contract value is less than $10,000. *See* 13 C.F.R. § 125.5(d)(1984). The Forest Service argues that its nonresponsibility determination was reasonable and that, under the circumstances, it was not required to refer the matter to the SBA for further review.

The record indicates that Sess applied to the SBA for a COC. Due to the recent enactment of the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, 98 Stat. 3082, October 30, 1984 (hereinafter referred to as the Act), the SBA is no longer empowered to establish any exemption from referral. Although the regulatory provision in effect at the time the contract was awarded did state that it was within the contracting officer's discretion to refer a nonresponsibility determination when the contract value is less than $10,000, section 401 of the Act, which was effective immediately upon enactment, provides that all nonresponsibility determinations must be referred to the SBA for review under the SBA's COC procedures, as long as the affected small business concern wishes its application to be considered. The SBA advised the Forest Service of this development and that notwithstanding the dollar value of this contract the matter of Sess's responsibility should have been referred to the SBA. Subsequently, the SBA considered Sess's application and by letter dated December 18, 1984, issued a COC.

In view of the change in the law and SBA's determination to issue a COC in this matter, we find that the Forest Service's award under this IFB cannot be upheld. Although we recognize that the contracting officer's actions in not referring the matter to SBA may have conformed with published SBA regulations at the time the determination was made, the legislative history concerning the enactment of section 401 clearly indicates that the provision was effective immediately upon enactment and was designed to "* * * overturn the agency's (SBA's) arbitrary regulation relating to the imposition of a dollar threshold for small business access to the certificate of competency program." S. Rep. No. 98-523, 98th Cong.,

2nd Sess. 55 (1984). Thus, under the law, the Forest Service was required to refer the nonresponsibility determination to SBA.[1]

Under the circumstances, and since SBA has issued a COC which found Sess to be fully capable of performing this contract, we recommend that the current contract be terminated for the convenience of the government and an award made to Sess. While the SBA has informally advised our Office that section 125.5(d) will be revised to eliminate the exemption from referral when the contract value is less than $10,000, we note that more than 4 months has elapsed since the enactment of the statute and the regulation has not yet been changed. Accordingly, by separate letter, we are advising the SBA to notify contracting agencies of the change in the law pending the publication of the revised regulation.

The protest under IFB No. R8-7-84-65 is sustained.

IFB No. R8-7-84-66

In its response to this IFB, Sess stated that its price for the option periods of the contract was "plus rate of inflation, fuel, labor and gravel." The Forest Service concluded that the statement qualified Sess's bid and the bid was rejected as nonresponsive.

We find that the Forest Service's rejection of Sess's bid was proper. Bid responsiveness requires an unequivocal offer to provide without exception exactly what is required at a firm-fixed price. *Medi-Car of Alachua County,* B-205634, May 7, 1982, 82-1 C.P.D. ¶ 439. If a bidder attempts to qualify its bid to protect it against future price changes, the bid must be rejected as nonresponsive. *Joy Manufacturing Co.,* 54 Comp. Gen. 237 (1974), 74-2 C.P.D. ¶ 183; Federal Acquisition Regulation, 48 C.F.R. § 14.404-2(d)(i) (1984)). We have held that only material available at bid opening may be considered in making a responsiveness determination and that post-opening explanations by the bidder cannot be considered. *United McGill Corporation and Lieb-Jackson, Inc.,* B-190418, Feb. 10, 1978, 78-1 C.P.D. ¶ 119.

Here, Sess's bid price for the option years was clearly conditioned on the rate of inflation, as well as the cost of labor, fuel and gravel. The IFB stated that the option years would be evaluated for award purposes and as a result of the statement included with its bid, Sess's total bid price could not be determined. Although Sess suggests that the deficiency be waived as a minor informality, Sess did not submit a firm, fixed price as required in advertised procurements and the Forest Service was justified in rejecting Sess's bid on this basis.

[1] This matter should have been referred even under the SBA regulation in effect at the time the contract was awarded. The contract value is determined by the awardee's bid price and since that amount exceeded the $10,000, the Forest Service was required to refer the matter. *Columbus Jack Corp.,* B-211829, Sept. 20, 1983, 83-2 CPD ¶ 348.

Remaining Allegations

Sess has raised additional charges which in Sess's view, demonstrate that the Forest Service acted in a biased manner towards Sess. Sess complains that the Forest Service improperly excluded Sess from the bidder's mailing list and that Sess was unfairly denied a pre-contract tour. In addition, Sess alleges that the contractors currently performing are not complying with the requirements set forth in the IFBs.

With respect to the mailing list, the Forest Service states that Sess was added to the list and should have been receiving copies of the solicitation. The Forest Service states that it is possible that an administrative error was made in mailing the invitations but that it is the Forest Service's policy to include all interested bidder's on the mailing list and there was no intention to exclude Sess. In addition, the Forest Service states that its personnel were present for a pre-contract tour at the location which was specified and that Sess must have gone to the wrong place. The Forest Service argues that Sess has been treated fairly and that there has been no discriminatory action taken towards the firm.

Based on the record, we cannot conclude that Sess was treated unfairly by the Forest Service. In this regard, we note that the protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. *Mechanical Equipment Company, Inc.*, B-213236, Sept. 5, 1984, 84-2 C.P.D. ¶ 256. Furthermore, where there are conflicting statements of fact and the protester's position is supported by no other evidence, we conclude that the protester has failed to meet its burden and we will accept the agency's position. *T.E. DeLoss Equipment Rentals*, B-214029, July 10, 1984, 84-2 C.P.D. ¶ 35. Moreover, where the subjective motivation of an agency's procurement personnel is being challenged, it is difficult for a protester to establish—on the written record which forms the basis for our Office's decision in protest—the existence of bias. *Joseph Legat Architects*, B-187160, Dec. 13, 1977, 77-2 C.P.D. ¶ 458. In view of the Forest Service's explanations regarding Sess's allegations, we find that the record does not support a finding of bias or unfair action towards Sess.

Finally, we note that Sess's complaint concerning the performance by the current contractors involve matters of contract compliance and the administration, which are the responsibility of the contracting agency, not our Office under our bid protest function. *Lion Brothers Company, Inc.*, B-212960, Dec 20, 1983, 84-1 C.P.D. ¶ 7.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committee on Government Operations and Appropriations

in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

[B-217722]

Appropriations—Limitations—Authorization Limitation

Executive branch is not bound by directions in appropriations committee reports indicating the total number of research grants to be funded by the Act appropriating fiscal year 1985 monies to the National Institutes of Health, Pub. L. No. 96-619. 98 Stat. 3305, 3313-14. Directions in committee reports, floor debates and hearings, or statements in agency budget justifications are not legally binding on an agency unless incorporated, either expressly or by reference, in an appropriation act itself or in some other statute.

Appropriations—Restrictions—"*Bona Fide* Needs"

Executive branch plan to fund some 646 National Institutes of Health research project grants for 3 fiscal years with monies appropriated to NIH for fiscal 1985 violates Bona Fide Need Rule, 31 U.S.C. 1502(a). Legislation authorizing grant program contains no express authority to obligate 1-year appropriations for the funding needs of subsequent years.

Appropriations—Impounding—Executive Branch's Failure to Expend Appropriated Funds

Executive branch plan to fund some 646 National Institutes of Health research project grants for 3 fiscal years with fiscal year 1985 monies does not at the time of this decision violate the Impoundment Control Act. The executive branch's intention to date, as evidenced by the (albeit improper) obligation of the funds, has not been to withhold or delay the availability of the funds for the program period.

To the Honorable Lowell Weiker, Jr., Subcommittee on Labor, Health and Human Services, and Education, Committee on Appropriations, United States Senate, March 18, 1985:

By letter of February 4, 1985, you raised various questions about the availability and use of funds appropriated to the National Institutes of Health (NIH) for bio-medical research grants in the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act for fiscal year 1985. Pub. L. No. 98-619, 98 Stat. 3305, 3313-14.

Specifically, you asked (1) whether the executive branch violated the language and spirit of the appropriations act by significantly deviating from a congressional directive setting a particular level of program activity for NIH new and competing research grants; (2) whether the executive branch would be usurping congressional prerogatives and violating congressional intent if it funds some 646 NIH grant projects for a 3-year period with funds that were appropriated only for the needs of fiscal year 1985; (3) for a description of the legislative history of a similar multi-year funding problem that was before the subcommittee in 1974; and (4) whether the described actions of the executive branch were in compliance with the Im-

poundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 332, codified at 2 U.S.C. §§ 681 *et seq.*, and other pertinent statutes.

For the reasons given below, we find that the executive branch is not legally bound to comply with the level of program activity set forth in congressional committee reports for new and competing NIH grants. On the other hand, the executive branch plan to fund some 646 NIH research grants on a 3-year basis with fiscal year 1985 funds is unlawful, because in the absence of specific statutory authority, such actions violate 31 U.S.C. § 1502(a). While the Administration's action in obligating the funds on a 3-year basis is improper, we cannot say that it is at this time a violation of the Impoundment Control Act.

I. Background

In your letter you stated that in arriving at the level of annual appropriations for the NIH, the Congress has traditionally based its decisions upon a complex set of factors which, taken together, represent the level of effort which it believes is necessary to fulfill the NIH mission. Among these factors are the number of new, competing renewal, and non-competing research grants applied for and funded, as well as the number of clinical trials, research centers, and training fellowships being supported by the agency. Also considered is the level of research effort being carried out through the agency's intramural program.

Consistent with these considerations, for fiscal year 1985 the House recommended an appropriation to NIH of close to $4.9 billion for bio-medical research grants, an increase of some $505.3 million over the Administration's budget estimates. The Committee stated that although the number of new and competing grants in recent years had stabilized at approximately 5,000, the award rates and paylines for these grants had declined and many high calibre investigators had not received funding. H.R. Rep. No. 911, 98th Cong., 2d Sess. 29-30 (1984). In this regard, the Committee was concerned that the President's budget request for fiscal year 1985 proposed significantly decreased appropriations which threatened the scope of the research being conducted. To change this situation, the House Committee recommended increased funding to support an estimated 6,200 new and competing research project grants *Id.* at 30.

The Senate Committee on Appropriations expressed the same concerns and recommended increased funding for some 1,850 new and competing grants over the 5,000 level requested. S. Rep. No. 544, 94th Cong., 2d Sess. 50 (1984); 130 Cong. Rec. S. 11688 (daily ed. Sept. 21, 1984) (statement of Senator Proxmire). Although the conference report did not mention the total number of grants intended for support, it recommended a compromise appropriation for NIH biomedical research grants between the amounts proposed by the

Senate and House, which was later enacted as proposed. H.R. Rep. No. 1132, 98th Cong., 2d Sess. 15–19 (1984).

Notwithstanding the number of grants which the Committees intended to support, the executive branch has decided to fund only 5,000 new and competing research project grants in fiscal year 1985. Moreover, to insure year-to-year stability in the number of grants NIH is able to support, and to lower fiscal commitments in fiscal years 1986 and 1987, the executive plans to fund some 646 of the 5,000 grants by committing enough fiscal year 1985 monies to take care of the grantees' estimated needs for 3 fiscal years.[1] In this manner, the entire fiscal year 1985 appropriation will be obligated. Department of Health and Human Services, III Justification of Appropriation Estimates for the Committee on Appropriations for Fiscal Year 1986, 1-3 (1985).

II. Legal Discussion

A. Conflict With Committee Directives on Number of Grants Awarded

The executive branch's plan to limit NIH to 5,000 new and competing bio-medical research grants in fiscal year 1985, does conflict with the Committee's intention to increase substantially the number of grants awarded. Nevertheless, if all the funds are properly obligated for purposes consistent with NIH's program authorization and appropriation statutes, we could not find that the law itself was violated. As explained in Section B, we do think that the multiyear funding proposed for a portion of the grants would be a violation of a statutory funding restriction but the fact that the total number of grants awarded does not correspond to the directives in the committee reports does not, by itself, amount to a circumvention of NIH's appropriation act.

It is a general principle of appropriation law that directions in committee reports, floor debates and hearings, or statements in agency budget justifications are not legally binding on an agency unless they are incorporated, either expressly or by reference, in an appropriation act itself or in some other statute. *See, e.g.,* 55 Comp. Gen. 307, 319, 325-26 (1975). The rule applies whether the legislative history shows mere acquiescence in an agency's budget request or is an affirmative expression of intent. As the lump sums appropriated to the various NIH institutes say nothing about the number of grants to be funded, there is no legal requirement that the committee directions be followed.

We add, however, that this does not mean that agencies are free to ignore the legislative history applicable to the use of appropriated funds, as was expressed by the Congress in the Committee re-

[1] For similar reasons, approximately 45 of 500 research centers to be funded in fiscal 1985 will be awarded 2 years of support from fiscal year 1985 funds.

ports described above. They do so at the peril of strained relations with the Congress. Thus, the executive branch has a practical, though not a legal, duty to abide by such expressions of intent. 55 Comp. Gen. at 319, 325.

B. Multiyear Funding

As described in the background section, the executive branch intends to use fiscal year 1985 appropriations to NIH to fund some 646 research project grants for 3 fiscal years. The legislation authorizing research grants to the various NIH units does not provide for multiyear grant funding. 42 U.S.C. §§ 241, 243, 281 *et seq.*, 300b-1. Moreover, none of the fiscal year 1985 appropriations to the various NIH institutes supporting the grants provide for this type of funding. Pub. L. No. 98-619, 98 Stat. 3305, 3313-14. As a matter of fact, with very few exceptions (*e.g.*, Department of Defense major weapons acquisitions, or General Services Administration leasing and public utilities authorities), most agencies do not have specific multiyear authority.

Without express statutory authority, no agency may obligate an appropriation made for the needs of a limited period of time (usually, 1 year, as in the present case) for the needs of subsequent years. This is a paraphrase of a law that first appeared on the statute books in 1789, and is found in its codified form at 31 U.S.C. § 1502(a). GAO refers to the statute in its decisions as the "Bona Fide Need Rule." *See, e.g.*, 58 Comp. Gen. 471, 473 (1979); 33 Comp. Gen. 57, 61 (1953).

From what can be gleaned from the sparse legislative history, the intent of the Congress when this law was first passed was to instill a sense of fiscal responsibility on the part of its newly formed departments and agencies. It wanted the balance of any appropriation not really needed for that year's operations to be returned to the Treasury so that it could be reappropriated the following year in accordance with the Congress' current priorities. Of even more importance to the Congress today, a limited period of availability means that an agency has to come back to its oversight or authorizing committees and then to its appropriations committees to justify continuing the program or to debate about how much is needed to carry on the program at the same or a different level.

These same concerns were raised by your subcommittee in 1974. S. Rep. No. 814, 93rd Cong., 2d Sess., 65-66. At that time, your subcommittee complained that unauthorized multiyear funding inhibited the Congress' ability to increase (or decrease) the levels of funding for specific programs because the agency need not return each year to justify the need—or lack thereof—of continued support for grants made in the previous year.

The report stated that traditionally the Congress had rejected this concept and had funded grants for only 1 year at a time. If

found that multiyear funding rendered the Congress powerless to increase the level of funding for any given priority program. Whatever the Congress added to the budget, a department could use to cover the following or future years' costs. The report reaffirmed the Congress' position that all grant awards be made on a 12-month basis unless specifically provided to the contrary by the Congress. Any attempt to provide multiyear grant funding or forward funding would be in direct opposition to the will of the Congress, and could violate the court rulings mandating the release of previously impounded funds. *Id.*

Similar concerns were expressed in floor debate. 120 Cong. Rec. 17659-62 (1974) (comments of Senators Magnuson and Bayh); *Id.* at 13276-78 (comments of Senator Magnuson). The debate also indicated that the problem had been resolved. Thus, Senator Magnuson stated that the Secretary of Health, Education and Welfare agreed that all multiyear funding would cease as of May 3, 1974—the date the Senate report was issued. *Id.* at 17659-60. Correspondence between Senator Magnuson and HEW Secretary Weinberger and OMB Director Ash also reflected the Committee's concerns with multiyear funding and the Secretary's decision to limit multiyear grants. We enclose copies of some of that correspondence.

As discussed in your letter, many of the same questions your subcommittee raised in 1974 are still applicable today. It is certainly true that to the extent that the Administration commits its fiscal year 1985 funds for the second and third years' needs of 646 grantees, these funds are unavailable for increasing the number of new and competing grants awarded, or for raising the award rates and paylines for high calibre investigators. It appears, then, that the problems which the Bona Fide Need Rule was designed to avoid are very much in evidence in the present situation.

Administration's Arguments [2]

The official reasons offered for the reduction in the total number of grants for research studies and research centers, and for the multiyear funding of some of these projects, are found in the President's budget justification for 1986. Department of Health and Human Services, III Justification of Appropriations Estimates for the Committee on Appropriations for Fiscal Year 1986, 1-3 (1985). There is no mention in that document of the appropriation restriction in 31 U.S.C. § 1502(a). The proposed actions were supported entirely on budgetary grounds; that is, to ensure year-to-year "stability" in the number of grants NIH is able to support, and to lower its financial commitments in fiscal years 1986 and 1987.

Informally, staff members of the HHS Office of General Counsel and of OMB have indicated that they are well aware of the restric-

[2] As you requested expedited consideration of this matter, we did not have time to seek formally the views of HHS or the Office of Management and Budget (OMB). (We understand that OMB orally directed the manner of funding.)

tions of the Bona Fide Need Rule (31 U.S.C. § 1502(a)), but thought that it didn't foreclose multiyear grants in this situation. They relied, they said, on discussions of the Rule in GAO's published manual, *Principles of Federal Appropriations Law,* at pages 4-9, 4-10, 13-16, and 13-17 (1982). Applying these principles, both HHS and OMB view each of the 646 grants as single research projects and contend that they are non-severable on the ground that there is a present need to have the research performed. Funds may thus be obligated in fiscal year 1985 to meet that need, even though performance may not be completed for 2 or more years.

We think that the principles discussed in our manual were applied inappropriately. Determination of what constitutes a bona fide need of a particular fiscal year depends largely on the facts and circumstances of each case. 37 Comp. Gen. 155, 159 (1957). Over the years we have held that where continuous and recurring services are needed on a year-to-year basis, contracts for the services are severable and must be charged to the fiscal year in which they are rendered. 33 Comp. Gen. 90, 92 (1953); 60 Comp. Gen. 219, 221-22 (1981). Thus, we have decided that contracts entered into with fiscal year appropriations purporting to bind or obligate the Government beyond the fiscal year involved must be construed as binding the Government only to the end of the fiscal year unless otherwise authorized by law. 48 Comp. Gen. 497, 499-500 (1969).

The legislation providing the principal basis for the NIH research grant program is very broad, anticipating extensive, continuous work "relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man * * *." 42 U.S.C. § 241. It is evident that the legislation reflects a Government policy to stimulate particular kinds of research that will be needed year-after-year for substantial periods of time, if not indefinitely. The House report accompanying the fiscal year 1985 appropriations act suggests that the research grant program has been ongoing for some 35 years. H.R. Rep. No. 911, 98th Cong., 2d Sess. 29 (1984). Thus, to the extent that the NIH grant program is continuous and involves projects that contemplate a number of years' work, they resemble continuous service or multiyear contracts and the same *bona fide* need principle would apply to them.

Although we have not been provided with information on the usual duration of NIH grants, it appears that some may take several years or longer to complete. For purposes of the bona fide need rule, we think the salient point is that the need for the grant work continues from year-to-year. In this regard, although both OMB and HHS suggest that the 646 grants are single projects, and thus for funding purposes are not severable, they also acknowledge that any number of these grants could be renewed in fiscal 1988. We also point out that neither the HHS budget justification nor the informal comments of HHS and OMB suggest that the 3-year funding

of the 646 grants is due to the research work being needed in fiscal 1985. The reasons given for this manner of funding are purely budgetary: to avoid significant fluctuations in the number of grants NIH is able to support and having to fund the same grants in fiscal 1986 and 1987.

At the same time, we recognize that there are fundamental differences between a contract for materials or services and a research grant. The severability concept is not altogether analogous to the NIH research grants, which resemble subsidies rather than contracts for services. In this respect, the grants are more like level-of-effort contracts. Nevertheless, consistent with the NIH legislation authorizing support for important investigations that may some day enrich our store of knowledge about "the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man * * *." 42 U.S.C. § 241, more often than not the grants do not contemplate a required outcome or product.[3] Thus, it cannot be said that there is a need for an end product in any particular fiscal year. As there is no such need, the bona fide need rule is violated when funds are obligated for more than 1 year for these grants.

We think the Senate report discussed above and the NIH practice of funding its research grants from year-to-year supports the view that decisions about funding the grants are to be made on an annual basis. Accordingly, until the Congress acts to renew its appropriations for a subsequent year, NIH has no authority to make a commitment to a researcher or research project for such subsequent year.

C. Impoundment

An impoundment is an action or inaction by an officer or employee of the United States that precludes the obligation or expenditure of budget authority provided by the Congress. The Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 332, codified at 2 U.S.C. §§ 681 and following, was intended to tighten congressional control over impoundments and to establish procedures that would provide a means for the Congress to pass upon executive branch proposals to impound budget authority. 54 comp. Gen. 453, 454 (1974). The Act covers both rescissions and deferrals. A rescission exists when 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 * * *

[3] There are, of course, research and development grants and other targeted, applied research grants in which a specific line of inquiry is requested to meet the Government's own needs which resemble Government contracts more closely. The GAO has recommended legislation to permit multiyear funding of this type of grant in appropriate circumstances in testimony before the House Committee on Science and Technology (April 5, 1979 and June 4, 1980), and in a report to the Congress, "Multiyear Authorizations for Research and Development," B-202294, PAD-81-61, April 21, 1981.

should be rescinded for fiscal policy or other reasons * * *." 2 U.S.C. § 683(a). A deferral is a withholding or delaying of the obligation or expenditure of budget authority provided for projects or activities or any other type of executive action or inaction that effectively precludes obligation or expenditure of budget authority. *Id.* § 682(1). The Act calls for the executive branch to submit proposed rescissions and deferrals for consideration by Congress. *Id.* §§ 683-84.

Consistent with the Impoundment Act, in B-200685, December 23, 1980, we pointed out that for an impoundment to occur, budget authority must be withheld or delayed from obligation by executive action or inaction. We also said that if a program decision did not preclude the obligation or expenditure of funds, an impoundment would not result. Thus, we cannot say that a violation of the Impoundment Control Act has taken place at this time because the Administration's intention to date, as evidenced by the (albeit improper) obligation of the funds, has not been to withhold or delay the availability of the funds for the program period.

[B-198137]

General Services Administration—Transportation Rate Audit—Utilization of Outside Auditing Firm—Compensation—Sources

Under 31 U.S.C. 3718(b), transportation audit contractors engaged by the General Services Administration (GSA) to assist in carrying out GSA's responsibilities under 31 U.S.C. 3726 may be paid from proceeds recovered by carriers and freight forwarders, but only for services attributable to the recovery of "delinquent" amounts (as defined in sec. 101.2(b) of the Federal Claims Collection Standards), as opposed to audits and other services in connection with non-delinquent accounts.

Miscellaneous Receipts—Debt Collections

The term "collection services," used in 31 U.S.C. 3718(a), does not include the servicing of non-delinquent accounts, but rather, is limited to actions taken to collect amounts that have become "delinquent," as defined in sec. 101.2(b) of the Federal Claims Collection Standards (to be codified in 4 C.F.R. ch. II). Therefore, the exception to the miscellaneous receipts act (31 U.S.C. 3302) contained in sec. 3718(b) authorizes agencies to pay debt collection contractors from the proceeds of their activities to collect delinquent amounts, but does not authorize payment from proceeds for contractors who service non-delinquent accounts.

Matter of: GSA Transportation Audit Contracts, March 20, 1985:

Under 31 U.S.C. § 3726 (1982), the General Services Administration (GSA) is responsible for performing post-audits of amounts paid by Government agencies to carriers and freight forwarders for transportation services. In carrying out its duties under this statute, GSA has engaged contractors to, among other things, examine bills already paid, identify overcharges or other erroneous payments made by the Government, request repayment on behalf of the United States for those erroneous payments, and take such

other actions as may be necessary and appropriate to effect collection of those amounts. Because of constrained budget resources, GSA would like to use the proceeds recovered under those contracts to reimburse its contractors for their services. The General Counsel of GSA asks whether the limited exception to the so-called "miscellaneous receipts" act, 31 U.S.C. § 3302, provided by section 13 of the Debt Collection Act of 1982 (as amended in 1983), 31 U.S.C. § 3718(a), provides the necessary authority.

As explained below, we conclude that for those services directly related to collection of an established and delinquent claim, the GSA contractors may be paid from the recovered proceeds. However, the majority of the described services are not debt collection services for which payment from proceeds was authorized by section 3718(b).

BACKGROUND

Under 31 U.S.C. § 3726, carriers or freight forwarders are entitled to be paid upon presentation of their bills for transportation services—in some cases, even before the transportation is completed. The Administrator of GSA then has the duty to conduct a post-audit of the charges and to deduct the amount of any overpayment identified from subsequent amounts owed to the provider of the services. GSA has been using private contractors to perform many of the tasks necessary to carry out its duties under this act and wishes to continue this program. According to the GSA submission, its contractors will perform the following functions:

1. Contractors will examine carriers' paid billings to identify overcharges and other improper payments.
2. Contractors will send notices of overcharge and other notices to carriers advising them of specific mistakes in their billings and make demand for refunds, with remittances to be made payable to the Government and sent to the contractor.
3. Contractors will collect remittances and forward same directly to GSA, with payment to the contractor to be made from these remittances.
4. Though carrier protests will initially be sent direct to GSA, contractors will examine each protest and draft a response for review and final determination by GSA, which is the procedure currently employed.
5. Contractors will perform such other functions which are consistent with the debt collection process as specified in the contract, such as follow-up letters and telephone calls.

GSA advises us that it will "retain the authority to resolve disputes, compromise claims, terminate collection actions, and initiate legal action." As indicated in B-198137, June 3, 1982, as long as GSA retains inherently governmental functions, such as those described above, we have no objection to the utilization of contractors to perform any or all of the five functions listed above. Our problem is with the source of funding proposed to pay for these services.

DISCUSSION

Because of a reduction in its budget authority, GSA would like to conserve its appropriations and to pay for the contractors' services under a contingency arrangement from the proceeds of any overcharge reimbursements collected from the carriers. The General Counsel is aware that 31 U.S.C. § 3302(b) requires, unless otherwise provided by law, that officials "receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable *without deduction for any charge or claim.*" [Italic supplied.] She suggests, however, that section 13 of the Debt Collection Act of 1982 (DCA), 31 U.S.C. § 3718, as amended by Pub. L. No. 98-167, 97 Stat. 1104 (1983), may provide the necessary "otherwise provided" authority.

Section 13 of the DCA provides that an agency "may make a contract with a person for collection services to recover indebtedness owed to the United States Government." It also provides that:

> Notwithstanding section 3302(b) of this title, a contract under subsection (a) of this section may provide that a fee a person charges to recover indebtedness owed United States Government is payable from the amount recovered. 31 U.S.C. § 3718(b).

The GSA General Counsel suggests that the term "collection services," be used as in section 13, may be construed to encompass the audit of the vouchers, the identification and processing of any overcharges discovered, the handling of any protests to the Government's claim for reimbursement, and finally, the collection of any indebtedness determined to be due. We do not agree with GSA's interpretation of the term, "collection services." In our view, section 13 refers to contracts for collection of amounts previously found to be past due and owing, having afforded the alleged debtor the right to protest, have his protest adjudicated administratively, and generally to have the benefit of all due process procedures to which he is entitled by law.

For example, the initial tasks to be performed by the GSA contractors entail the examination of bills paid by the Government in order to determine whether the payments were proper. Once an erroneous payment has been identified, the contractor is to send the overpaid company a letter which, among other things, explains the contractor's determination that a debt exists, and demands a refund on behalf of the United States by a certain date. Up to this point, there was no debt owed to the United States, since 31 U.S.C. § 3726 specifically provides for payment in the full amount of the carrier's bill, subject, of course, to later adjustments as a result of GSA's post-audit processes. After receipt of that initial letter, there is a debt or a claim, but we would not consider it to be delinquent until any dispute over the existence or amount of the Government's claim has been resolved administratively and the claim is not paid by the specified due date.

Conceptually, the tasks to be performed under these contracts fall into two categories: "account servicing" and "debt collection." "Account servicing" generally refers to the provision of such services as billing, accounting, record keeping, and receipt and processing of payments on *non-delinquent* accounts. These tasks appear to encompass the major portion of the services for which GSA has or plans to contract. "Debt collection," in contrast, generally refers to action taken to collect amounts that have become *delinquent.* In our opinion, section 13 does not address the use of private contractors to service non-delinquent accounts and therefore does not provide the "other authority" necessary to overcome the miscellaneous receipts statute, discussed earlier.

Although section 13 itself does not use the term "delinquent accounts," the legislative history of the DCA is replete with statements to the effect that Congress was primarily concerned with, and intended this act to address, the collection of delinquent debts.[1]

Moreover, section 13 provides that persons who enter into contracts to collect debts owed to the United States must comply with the provisions of the Fair Debt Collection Practices Act (FDCPA). That act prohibits the use of abusive, deceptive, and unfair debt collection practices (15 U.S.C. § 1692(e)), and imposes a number of affirmative disclosure requirements (*e.g.,* 15 U.S.C. § 1692(g)). The FDCPA definition of "debt collectors" specifically excepts "servicing agents." *See,* 15 U.S.C. § 1692a(6)(G)(iii). *See also* S. Rep. No. 382, 95th Cong., 1st Sess. 3-4 (The term, "debt collector" does not include "mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing."). As explained in Federal Trade Commission staff interpretives (the FTC has primary administrative responsibility for enforcing the FDCPA), the exception excluding servicing agents, "contemplates a situation in which a bona fide servicing arrangement is entered into prior to the time the debt goes into default." 2 FTC Interpretives 37 (June 14, 1978). It also observed that "servicing an account is quite different from engaging in collecting efforts," 2 FTC Interpretives 55 (July 28, 1978), and "Congress specifically meant to exclude from the [FDCPA's] coverage, mortgage service companies, and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing," 1 FTC Interpretives 55 (Jan. 25, 1978). Consequently, it would be illogical, contrary to the legislative history of section 13, and inconsistent with the position of the staff of

[1] *E.g.,* S. Rep. No. 378, 97th Cong., 2d Sess. 2-4 (1982); S. Rep. No. 287, 97th Cong., 2d Sess. 5, 14 (1981); 128 Cong. Rec. E4653 (daily ed. Oct. 1, 1982) (Rep Derwinski); 128 Cong. Rec. H8052 (daily ed. Sept. 30, 1982) (Rep. Conable); *Id.* at H8053 (Rep. Horton and Rep. Butler); 128 Cong. Rec. S12327-29 (daily ed. Sept. 27, 1983) (Sen. Percy); *Id.* at S12329 (Sen. Dole); 128 Cong. Rec. H1734 (daily ed. May 4, 1982) (Rep. Rostenkowski); 127 Cong. Rec. S5501 (daily ed. May 21, 1981) (Sen. Percy).

the agency charged with enforcement of the FDCPA to treat servicing agents as though they were debt collectors.

Finally, we point out that section 102.6 of the joint GAO and Department of Justice Federal Claims Collection Standards, which implements section 13 of the DCA, specifically provides that "all agencies have authority to contract for collection services to recover *delinquent* debts * * *." 49 Fed. Reg. at 8899 (to be codified as 4 C.F.R. § 102.6) [Italic supplied.] The comments accompanying the *Federal Register* publication of the revised FCCS specifically explain that section 102.6 "is intended to apply only to the recovery of delinquent debts and not to routine servicing arrangements for non-delinquent debts." 49 Fed. Reg. at 8892.

For these reasons, we conclude that the term, "collection services," as used in section 13, may not be construed to include "account servicing." Therefore, only the portion of the proceeds recovered by GSA's transportation audit contractors properly attributable to collection of "delinquent" amounts, as defined in section 101.2(b) of the FCCS, 49 Fed. Reg. at 8896, may be used to pay for the contractors' services. All other amounts collected by the GSA transportation audit contractors must be deposited into the Treasury, without deduction, as a credit to the appropriation or fund account against which the original payments were charged or to miscellaneous receipts if the accounts are not readily identifiable. *Cf.* 41 C.F.R. § 101-41.505.

[B-211373]

Health and Human Services Department—Office of Community Services—Regional Offices—Termination

The Department of Health and Human Services did not act improperly in fiscal year 1983 in terminating the functions of the regional offices of the Office of Community Services (OCS). There was no statutory requirement that the offices remain open, and the managers of the Department and the OCS had broad discretion to determine how they would carry out the OCS block grants program and how they would spend the money in the fiscal year 1983 appropriation to the OCS, Pub. L. No. 97-377, 96 Stat. 1830, 1892 (1982).

Appropriations—Impounding—Lump-Sum Appropriation—Full Amount Availability—Allocation

Expenditure by the Dept. of Health and Human Services of $1.776 million from funds appropriated to the Office of Community Services (OCS) for Community Services Block Grants, Pub. L. No. 97-377, 96 Stat. 1830, 1892 (1982), on the detail of some 78 OCS employees did not constitute a *de facto* impoundment. The expenditures constituted neither a failure to obligate or expend funds nor a withholding or a delaying of the obligation or expenditure of funds but rather reflected a management decision about how appropriated funds were to be expended.

Appropriations—Impounding—Impoundment Control Act—Applicability

Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 332, applies to appropriations covering salaries and expenses. There is nothing in the Act specifi-

cally differentiating between "program" appropriations and "salaries and expense" appropriations.

Appropriations—Augmentation—Details—Improper

Except under limited circumstances, nonreimbursable details of employees from one agency to another violates the law that appropriations be spent only for the purposes for which appropriated, (31 U.S.C. 1301(a)), and unlawfully augments the appropriations of the agencies making use of the detailed employees. The appropriations of a loaning agency may not be used in support of programs for which its funds have not been appropriated.

Details—Between Agencies—Non-Reimbursable Details

Nonreimbursable details of employees from one agency to another or between separately funded components of the same agency continue to be permissible where the details pertain to a matter similar or related to those ordinarily handled by the loaning agency, and will aid the loaning agency in accomplishing a purpose for which its appropriations are provided or when the fiscal impact on the appropriation supporting the detail is negligible.

Departments and Establishments—Services Between—Reimbursement—Required

To the extent that they are inconsistent with this decision, 13 Comp. Gen. 234 (1934), 59 Comp. Gen. 366 (1980), and all similar decisions, will no longer be followed. Since this decision represents a change in our views on nonreimbursable details, it only will apply prospectively.

Matter of: Department of Health and Human Services detail of Office of Community Services employees, March 20, 1985:

The American Federation of Government Employees (AFGE) has asked whether it was lawful for the Department of Health and Human Services (HHS) to detail on a nonreimbursable basis some 63 Office of Community Services (OCS) employees to other parts of HHS and 15 employees to a number of other Federal agencies. The details involved a cost of $1.776 million, and were paid for from fiscal year 1983 funds appropriated to the OCS for Community Services Block Grants. Pub. L. No. 97-377, 96 Stat. 1830, 1892 (1982). The AFGE contends that the details constituted an unauthorized use of funds and a *de facto* impoundment of the funds spent on the details. The AFGE also contends that HHS failed to carry out congressional intent regarding the closing down of OCS regional offices.

For the reasons given below, we conclude (1) that HHS did not act improperly in closing down its regional offices; and (2) that expenditure of the $1.776 million on the details did not constitute a *de facto* impoundment of OCS appropriations. On the other hand, although we do not find unlawful the nonreimbursable details of the 78 OCS employees, we have reconsidered our previous decisions on inter and intra-agency details in general, and conclude that they should no longer be followed. We now hold that these details may not be made on a nonreimbursable basis except under the circumstances described later in this opinion.

A. BACKGROUND

The Community Services Block Grant Act, Pub. L. No. 97-35, Title VI, Subtitle B, 95 Stat. 511 (1981), repealed the Economic Opportunity Act of 1964 and established the Office of Community Services to carry out a new program of block grant funding of local anti-poverty agencies by providing Federal funds to state governments.

We have been advised by an HHS Assistant General Counsel that from the beginning of this new program, HHS decided to administer it from its headquarters office. However, on October 6, 1981, HHS published in the *Federal Register* (46 Fed. Reg. 49211) a Statement of Organization, Functions and Delegations of Authority for OCS ("functional statement") which stated that the regional offices of OCS would carry out activities with respect to both the new and old grant programs. This division of responsibilities was never implemented by HHS. In fact, the only functions assigned to the regional offices by OCS were the monitoring and closing out of the old Economic Opportunity Act grants, and this work was completed in March 1983.

For fiscal year 1983, $360,500,000 was appropriated to the OCS for Community Services Block Grants. Pub. L. No. 97-377, 96 Stat. 1830, 1892 (1982). This figure was an increase of $257 million over the budget request, and, according to the committee reports, it was an amount sufficient to continue the block grants program at fiscal year 1982 levels. H.R. Rep. No. 894, 97th Cong., 2d Sess. 6, 92 (1982). In this regard, the Senate report directed that funds be expended during fiscal year 1983 "to staff the Office [of] Community Services at a level not lower than the number of on-board staff as of October 1, 1982." S. Rep. No. 680, 97th Cong., 2d Sess. 99 (1982).[1] Thus, the lump-sum included both monies for the block grants and for the salaries and expenses of OCS employees.

In March 1983, HHS informally arranged placements of regional office employees on unreimbursed details in other parts of HHS, and, in some cases, in other Federal agencies. The Department told us that some 78 employees were detailed in fiscal year 1983—63 within the Department and 15 outside. The 15 detailed outside the agency went to the Departments of Labor (1), Agriculture (1), Energy (2), and Housing and Urban Development (2), and to the Federal Emergency Management Agency (4), ACTION (2), the Veterans Administration (2), and the Nuclear Regulatory Commission (1). The functions performed by the detailed employees varied.

[1] For fiscal year 1984, $352,300,000 was appropriated for Community Services Block Grants. Pub. L. No. 98-139, 97 Stat. 871, 885. This amount represented an increase of some $349 million over the amount requested by the Administration. H.R. Rep. No. 357, 98th Cong., 1st Sess. 7 (1983). The conference report shows that for Federal administration of Community Services Block Grants, the Congress intended to provide for "70 full-time equivalent positions in the national office." H.R. Rep. No. 422, 98th Cong., 1st Sess. 19 (1983).

Many had nothing to do with their work at the OCS. The estimated costs for the salaries and expenses of all the detailed employees was $1.776 million.[2] At the end of fiscal year 1983, eight of those detailed were permanently reassigned to other Federal positions; 40 were retired, primarily because of a reduction-in-force (RIF); and all who remained received RIF notices. After the reduction-in-force, 24 were placed in other positions and eight were separated with severance pay.

The AFGE contends that HHS failed to carry out congressional intent to "fully staff the OCS, which necessarily includes the existing regional offices." It maintains that by limiting and then terminating the functions of the regional offices and detailing their employees elsewhere, thereby failing to carry out the terms of the HHS functional statement, the agency did not follow congressional intent to "keep OCS intact." The AFGE also maintains that detailing of the OCS employees constituted a *de facto* impoundment of OCS appropriations. Thus, its submission states: "If, rather than detailing the employees, OCS had furloughed or RIF'd them, thereby not spending money that would otherwise go for their salaries, there would be a traditional impoundment * * *. Here, OCS is failing to spend its appropriations on its own programs. That is precisely the nature of an impoundment." Furthermore, the Union argues that detailing the OCS employees to other parts of HHS and to other agencies and continuing to pay them out of OCS appropriations is a violation of 31 U.S.C. § 1301(a) which requires that appropriations be spent only on the objects for which they have been appropriated.

HHS advises us that the Community Services Block Grants Program for fiscal year 1983 was fully funded and was carried out completely. All fiscal year 1983 funds allocated were obligated.[3] It argues that OCS managers had broad discretion in determining what work OCS was to perform and that the head of OCS had discretion in granting to the regional offices only the functions of monitoring and closing out former grants. As regards impoundment, HHS contends that "[t]here is nothing in either the Impoundment Act, its legislative history, or the case law * * * which would lead to a conclusion that an impoundment occurs when the personnel of one agency are made available to assist another agency," and that "Congress did not intend the Impoundment Act to apply to funds appropriated solely for salaries and expenses."

Furthermore, HHS argues that the details were undertaken to avoid a reduction-in-force, particularly in light of committee report language evidencing a congressional intent that OCS maintain its

[2] HHS did not provide us with a breakdown on how much of this money was spent on the interagency details and how much on the intra-agency details.

[3] Nonetheless, the agency has informed us that some $6 million of $20 million carried over from fiscal year 1982 for financing a contemplated reduction-in-force remained unobligated.

staffing through fiscal year 1983 at the number of employees in place at the beginning of that fiscal year. *See* "Explanation of the Recommendations of the Senate Committee on Appropriations on the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriation Bill, 1983 (H.R. 7205)," 128 Cong. Rec. S14133, 14161-62 (daily ed. December 8, 1982).

HHS contends that the interagency details are justified on the basis of decisions by the GAO that in the absence of a written agreement providing specifically for the reimbursement by one agency for personal services provided by another, "the loan of personnel will be regarded as having been made as an accommodation for which no reimbursement or transfer of appropriations will be made * * *." 13 Comp. Gen. 234, 237 (1934). According to HHS, the intra-agency details were carried out in conformity with the requirements of section 3341 of title 5 of the United States Code. From the documents provided by HHS, it appears that these details were for 6 months.

B. LEGAL DISCUSSION

1. Congressional Intent

We agree with HHS that it was authorized to close down the OCS regional offices. As recognized by AFGE in its submission to us, "the functions of OCS, provided in the 1981 Act, are general in terms of what must be done to administer and monitor the state block grants * * *. Thus, the managers of HHS and OCS have broad discrection to determine exactly how much work they are going to have the agency do." We think this discretion extends to agency determinations of what functions will be carried out by various units within the agency. The HHS functional statement suggesting a regional office role does not bind the Secretary of HHS to carry out its provisions, nor does it limit the Secretary's statutory discretion in administering the program. Similarly, the functional statement does not create a legal obligation of the Government to the employees working in the regional offices. Cf. *Schweiker v. Hanson,* 450 U.S. 785, 789 (1981) (an internal claims manual for the use of Social Security Administration employees is not a regulation; it has no legal force and is not binding on the agency).

Further, in our reading of the relevant legislative history, we find no congressional intent to include the existing or proposed regional office structure or functions in committee recommendations that OCS expends funds sufficient to remain staffed at a level "not lower than the number of on-board staff as of October 1, 1982." S. Rep. No. 680, 97th Cong., 2d Sess. 99 (1982). Nothing in this statement directs the retention of a particular administrative structure, or suggests that regional office employees continue to work in the regional offices. The AFGE argues that the use of the appropriated moneys to pay salaries of employees who will not be doing the

work of the entity for which the appropriation was made is an unauthorized use of the appropriation. The Department counters by pointing out that by March 1983, the work of the OCS with respect to the block grants was completed and there was no further work for OCS staff to do even at headquarters. Since it felt obliged, because of the Committee directives, to maintain the specified staffing level, it detailed staff on a non-reimbursable basic to other intra- and inter-departmental units.

2. Impoundment

The Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 332, codified at 2 U.S.C. § 681 and following, was intended to tighten congressional control over impoundments, and to establish procedures that would provide a means for the Congress to pass upon executive branch proposals to impound budget authority. 54 Comp. Gen. 453, 454, (1974). The Act covers both rescissions and deferrals. A rescission exists when 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 * * * should be rescinded for fiscal policy or other reasons * * *." 2 U.S.C. § 683(a). A deferral is a withholding or delaying of the obligation or expenditure of budget authority provided for projects or activities, or any other type of executive action or inaction that effectively precludes obligation or expenditure of budget authority.[4] *Id.* § 682(1).

Consistent with the Act, expenditure of the $1.776 million on the nonreimbursable details did not constitute a *de facto* impoundment. The expenditures constituted neither a failure to obligate or expand funds nor a withholding or a delaying of the obligation or expenditure of funds, but rather reflected a management decision about how appropriated funds were to be expended. In this regard, we have held that the Act does not apply to program implementation decisions, as such, irrespective of their impact on budget authority. B-200685, December 23, 1980. (Where a program decision does not preclude obligation or expenditure of funds, impoundment would not result.)

As an auxiliary matter we should point out that we disagree with HHS' contention that "Congress did not intend the Impoundment Act to apply to funds appropriated solely for salaries and expenses." First, it would appear that HHS is characterizing incorrectly the 1983 appropriations to OCS for block grants. The appropriation is a lump sum that covers both the grants and the salaries and expenses of the Federal employees implementing the grant program; there is no specific appropriation for salaries and expenses. In any event, we find nothing in the Impoundment Control

[4] The Act calls for the executive branch to submit proposed rescissions and deferrals for consideration by Congress. 2 U.S.C. §§ 683-84.

Act specifically differentiating between "program" appropriations and "salary and expense" appropriations. *See* B-115398.32, November 20, 1974 (to the extent the plan for reductions in Federal positions will result in net savings of salaries and expenses, the plan would require special messages under the Impoundment Control Act).

Although the Act and its legislative history do indicate that the Act was aimed at failures of the executive branch to carry out congressional "programs", it seems evident that, in most instances, Government programs require Government employees to carry them out. Therefore, reducing the number of Federal employees working on a program could very well effect the extent to which a program can be implemented. In this regard, it makes no difference whether the appropriation is one that provides lump sums that include monies both for program activities and the salaries and expenses of the employees involved, or one appropriating monies strictly for salaries and expenses covering employees whose activities could pertain to several or many programs.

3. Nonreimbursable Details

The record shown that HHS detailed some 78 OCS employees to various Government agencies outside of HHS and to other divisions within HHS, as we understand it to perform work that, for the most part, had nothing to do with the fiscal year 1983 appropriations to OCS for community services block grants. HHS maintains that the details were necessary to avoid a reduction-in-force and to carry out Congress' intention to staff OCS in fiscal 1983 at the number of employees in place on October 1, 1982, S. Rep. No. 680, 97th Cong., 2d Sess. 99 (1982). Although we are not convinced that a reduction-in-force was HHS' only alternative,[5] at this time, some two years after they were carried out, we will not object to the details. Nevertheless, as the size of details far exceed those we have permitted in the past, we think this case provides an appropriate opportunity to reconsider our general position on their propriety.

A "detail" is the temporary assignment of an employee to a different position for a specified period, with the employee returning to regular duties at the end of the detail. Federal Personnel Manual, ch. 300, § 8-1 (Inst. 262, May 7, 1981). The detailing of Fed-

[5] For example, HHS could have continued the regional office structure, provided work at its headquarters for the 78 employees, attempted to arrange reimbursable details under section 601 of the Economy Act, 31 U.S.C. § 1535, or, consistent with our views below, attempted to arrange nonreimbursable details involving work which would have aided HHS in accomplishing a purpose for which its OCS appropriations were provided. We point out as well that the legislative history shows there was a conflict between the executive and legislative branches about the extent to which the OCS grant program was to be carried out. The Congress intended the fiscal year 1983 grant program to be funded at the same level as that for fiscal year 1982. H.R. Rep. No. 894. 97th Cong., 2d Sess. 6 (1982). This represented some $257 million more than the amount proposed by the executive department.

eral employees from one agency to another on a nonreimbursable basis already had been a Government practice for a number of years prior to the Treasury Comptroller discussing the issue in 14 Comp. Dec. 294 (1907). In that case, the Comptroller stated that the practice originated in instances in which the head of one department had available an officer, clerk, or employee who could perform a service for another department and whose services were not needed for the time engaged on the detail. It was therefore in the interest of good Government and economy to utilize the employee's services. *Id.* at 296.

The legal question raised by nonreimbursable details was whether they were consistent with the law requiring that appropriations be spent only for the purposes for which appropriated, 31 U.S.C. § 1301(a), and the rule prohibiting unlawful augmentations of agency appropriations.

In past GAO decisions analyzing the relationship of details to the purpose law and the augmentation question, we said that appropriations of a loaning agency need not be reimbursed by those of a receiving agency when the work entails no additional expenses since the agencies of the Government fundamentally are branches of one whole system. The performance of services at no increased cost is a matter of comity in the interest of Government service generally, and is not to be treated in the same basis as a commercial arrangement between two unrelated business organizations. A-31040, May 6, 1930, cited in 10 Comp. Gen. 275, 278 (1930). Thus, we held that appropriations of the loaning agency normally should pay the salaries of the detailed employees. Reimbursement from the receiving agency to the loaning agency would be authorized only when the loaning of services to, or the doing of work for, another department or establishment resulted in expenditures additional to regular salaries and expenses. 10 Comp. Gen. 193, 196 (1930). Accordingly, we reasoned that nonreimbursable details did not violate the purpose law or the augmentation rule.

Nevertheless, the detailing of Federal employees from one agency to another on a nonreimbursable basis was of concern to the Congress. In 1932 the Congress passed the Economy Act, section 601, of which authorized the departments of the Federal Government, or units of a single department, operating under separate appropriations to enter into written agreements for the performance of services by the personnel of one department for the other or, one unit of a department for another, for which reimbursement or transfer of appropriations might be made. 31 U.S.C. § 1535. Section 601 was enacted partly in response to our nonreimbursable detail rule. 57 Comp. Gen. 674, 677 (1978).

The bill on which section 601 of the Economy Act was based, H.R. 10199, 71st Cong. 2d Sess., authorized among other things, interagency procurement of work with reimbursement to be based on "actual cost". During hearings on the bill, Congressman French,

the bill's sponsor, stated that the Comptroller General's decisions permitting nonreimbursable details prevented "the free use by the Government of its own facilities for the reason that no department can afford to neglect its own work and use the time of its employees on work for another department." Hearings on H.R. 10199 before the House Committee on Expenditures in the Executive Departments, 71st Cong., 2d Sess. 5. He also said that if the department obtaining the service did not reimburse the loaning agency, the purpose law and augmentation rule would be violated. *Id.* at 4. Moreover, the House Reports accompanying both H.R. 10199 and an almost identical provision that was included as section 801 of H.R. 11597, 72d Cong., 1st Sess., stated that it was unfair for the loaning department to have to pay the cost from its appropriations and that "work done should be paid for by the department requiring such * * * services."[6] H.R. Rep. No. 2201, 71st Cong., 2d Sess. 2-3 (1931); H.R. Rep. No. 1126, 72d Cong., 1st Sess. 15-16 (1932). Thereafter H.R. 11597 was incorporated as Part II of H.R. 11267, 72d Cong., 1st Sess., which became the Legislative Branch Appropriation Act for fiscal year 1933, Pub. L. No. 72-212, 47 Stat. 382, 417-18. That law contained the Economy Act. *See generally* 57 Comp. Gen. 647, 677-80 (1978).

Notwithstanding the legislative history of the Economy Act, we have continued to permit nonreimbursable details. Nearly all cases involving nonreimbursable details considered since passage of the Economy Act have involved limited numbers of employees for limited periods of time.[7] Thus, in 13 Comp. Gen. 234 (1934), we sustained a nonreimbursable detail of one employee from the Interstate Commerce Commission to the United States Shipping Board at a cost of $200.[8] We said that in the absence of an Economy Act Agreement, the loan of personnel should be regarded as an accommodation for which no reimbursement or transfer of appropriations for salaries should be made.

More recently, we premitted details of eight employees from numerous agencies to the National Commission on the Observance of International Women's Year and the State Department at a cost of approximately $220,000 over a 2-year period. We said that, under our prior decisions, non-reimbursable details of personnel were not

[6] The Chief Coordinator of the Bureau of the Budget, who prepared the bill, maintained that the Comptroller General's ruling in effect "penalizes the performing department's appropriation * * * and makes it loath to perform services for other departments and establishments for fear that its own work might be crippled thereby * * *." Hearings on H.R. 10199 before the House Committee on Expenditures in the Executive Departments, 71st Cong., 2d Sess. 13-14.

[7] Congressman French suggested that even Economy Act transfers should be limited in scope. Thus, he did not think "any legislation ought to authorize one bureau or department to transfer its work in a large way, to another department. * * *" Hearings on H.R. 10199 before the House Committee on Expenditures in Executive Departments, 71st Cong., 2d Sess. at 6.

[8] In 59 Comp. Gen. 366, 367-68 (1980) we reaffirmed the position we took in 13 Comp. Gen. 234 (1934).

prohibited by the law requiring that appropriations only be spent on the objects for which they were appropriated, provided that (1) the employees detailed were not required by law to be engaged exclusively on work for which their salaries were appropriated, and (2) the employees' services could be spared for the details. B-182398, March 29, 1976.

In two analogous decisions, we held on the basis of the purpose law that an agency could make nonreimbursable details to congressional investigating committees only in instances where (1) the committee's investigation involved matters similar or related to those ordinarily handled by the agency, thus furthering the purpose for which the agency's appropriations were made, and (2) the services of the employee could be spared without detriment to the agency's work and without necessitating employment of an additional employee. 21 Comp. Gen. 954, 956-57 (1942); 21 Comp. Gen. 1055, 1057-58 (1942). Moreover, in 21 Comp. Gen. at 1057-58, we said that it was not enough that there was a mutuality of interest between the work of the congressional investigating committee and the executive agency, or that the knowledge or information gained by a congressional investigating committee might be of interest or even helpful to an executive agency, "but it must appear that the work of the committee to which the detail or loan of the employee is made will actually aid the agency in the accomplishment of a purpose for which its appropriation was made such as by obviating the necessity for the performance by such agency of the same or similar work." Although both these cases involved details of employees by executive branch agencies to congressional committees, the interpretation of the purpose law seems equally applicable to details between agencies.

The discussion above shows that the purpose law has been used both to support and to criticize nonreimbursable details. In reviewing our cases, we conclude that the latter position is correct. We no longer accept the view that because the agencies of the Government fundamentally are branches of one whole system, these details are consistent with the purpose law and thus the appropriations of the loaning agency should not be increased at the expense of those of the receiving agency when the detail involves no additional expense. Although Federal agencies may be part of a whole system of Government, appropriations to an agency are limited to the purposes for which appropriated, generally to the execution of particular agency functions. Absent statutory authority, those purposes would not include expenditures for programs of another agency. Since the receiving agency is gaining the benefit of work for programs for which funds have been appropriated to it, those appropriations should be used to pay for the work. Thus, a violation of the purpose law does occur when an agency spends money on salaries of employees detailed to another agency for work essentially unrelated to the loaning agency's functions. Moreover, it fol-

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lows that the appropriations of the receiving agency are unlawfully augmented by the amount the loaning agency pays for the salaries and expenses of the loaned employees. The legislative history of section 601 of the Economy Act, discussed earlier, shows that the Congress recognized this problem and enacted section 601 partly as a remedy.

Nonreimbursable details raise additional problems. To the extent that agencies detail employees on a nonreimbursable basis instead of through Economy Act agreements, which require reimbursement, they may be avoiding congressional limitations on the amount of moneys appropriated to the receiving agency for particular programs. Similarly, agencies could circumvent personnel ceilings by receiving detailed employees.

Congressional concerns with nonreimbursable details was expressed during the process of enacting amendments clarifying the authority for employing personnel in the White House Office and the President's authority to employ personnel to meet unanticipated needs. Pub. L. No. 95-570, 92 Stat. 2445, 2449-50. Prior to those amendments the law allowed details of "[e]mployees of the executive departments and independents establishment * * * from time to time to the White House Office for temporary assistance." *See* Pub. L. No. 80-771, 62 Stat. 672, 679. As amended, the law currently requires reimbursement to the loaning agency "for any period occurring during any fiscal year after 180 calendar days after the employee is detailed in such year", and the President to report to the Congress for each fiscal year, among other things, the number of individuals detailed to the White House for more than 30 days, the number of days in excess of 30 each individual is detailed and the aggregate amount of reimbursement made. 3 U.S.C. §§ 112, 113. The committee reports and floor debate accompanying the amendments show that the Congress intended to place restrictions on nonreimbursable details to the White House. S. Rep. No. 868, 95th Cong., 2d Sess. 1, 4, 11 (1978); H.R. Rep. No. 979, 95th Cong., 2d Sess. 10-11 (1978); 124 Cong. Rec. 20806-08 (1978) (Comments of Senators Sasser and Percy); 124 Cong. Rec. 10109-11 (1978) (Comments of Representatives Schroeder and Harris).

Although we conclude that nonreimbursable interagency details generally are improper, there are limited circumstances in which they still may be allowed. Consistent with our decisions in 21 Comp. Gen. 954, 956-57 (1942) and 21 Comp. Gen. 1055, 1057-58 (1942), pertaining to details to congressional committees, details between executive branch agencies are permissible where they involve a matter similar or related to matters ordinarily handled by the loaning agency and will aid the loaning agency in accomplishing a purpose for which its appropriations are provided.

In addition, we adopt the guidance provided in the Federal Personnel Manual (Ch. 300, subchapter 8, Inst. 262, May 7, (1981) for intra-agency details and apply it to interagency details as well. The

FPR permits such details for brief periods when necessary services cannot be obtained, as a practical matter, by other means and the numbers of persons and cost involved are minimal. *Id.* § 8-3. While the purpose restriction technically applies even in such cases, we would not feel obliged to object when the fiscal impact on the appropriation is negligible. We also leave open the question whether nonreimbursable details may be permitted when an agency is faced only with the choice of implementing those details or carrying out a reduction in force.

The analysis of the statutory appropriation restriction which led us to conclude that nonreimbursable interagency details are improper applies equally to intra-agency details. Congressional control over the funding levels of various programs can be thwarted just as effectively when their respective appropriations are swelled by an unreimbursed detail within the same department.

Moreover, congressional disquiet with GAO-sanctioned past practices which regarded unreimbursed details as an "accommodation" and which led to enactment of the "Economy Act" (see earlier discussion) applied equally to intra-agency and interagency details. All Economy Act transactions must be made pursuant to a written agreement on a reimbursable basis.

We recognize that not all inter- or intra-agency provisions of goods or services are made pursuant to the Economy Act. (The Economy Act was enacted to provide authority for such exchanges in the absence of some other specific statutory authority.) However, it does not follow that because a service or procurement is authorized, that it is necessarily authorized to be provided on a nonreimbursable basis, unless the statutory authority so states. In the instant case, we note that intra-agency details are specifically authorized by 5 U.S.C. § 3341. However, section 3341 is silent on the matter of reimbursement.

The intra-agency detail authority first was provided for in the Act of March 3, 1853, 10 Stat. 189, 211, and, subsequently, became section 166 of the Revised Statutes. It was amended by the Act of May 28, 1896, 29 Stat. 140, 179 and was codified, as it presently appears, by Pub. L. No. 89-554, 80 Stat. 378, 424. In 1894, the United States Attorney General was asked whether clerks drawing salaries from a lump-sum appropriation for a specific purpose legally could be detailed to perform work in other divisions of the same department funded by separate appropriations. In reliance on section 166 of the Revised Statutes, the Attorney General found that the clerks could be so detailed; however, they could not be paid from appropriations of the detailing division, unless such payment specifically was authorized by law. 20 Op. Atty. Gen. 750, 751-52 (1894).

Consistent with the Attorney General's opinion, we think it the better view that section 166, as amended, did not intend nonreimbursable details but merely provided authority to make the details.

In this regard, we point out that there are other statutes authorizing details which specifically provide that the details may be done on a non-reimbursable basis. Thus, for example, section 3343 of title 5, which authorizes details to international organizations, states that the details may be made "without reimbursement to the United States by the international organization * * *."

To the extent that this decision prohibits nonreimbursable details except under the limited circumstances described, we recognize it could have a widespread effect on current agency practice. Accordingly, since our decision represents a change in our views, it will only apply prospectively. To the extent that they are inconsistent with this decision, 13 Comp. Gen. 234 (1934), 59 Comp. Gen. 366 (1980), and all similar decisions, will no longer be followed.

[B-217555]

Appropriations—Availability—Christmas Cards

General Accounting Office is unable to act on Congressman's request to invoke $300 penalty against agency head who sent holiday greeting letters as penalty mail because jurisdiction over penalty mail is with the Postmaster General. However, postal regulations were relaxed in 1984 giving the impression that it might be permissible to mail Christmas cards at Government expense. GAO believes that agency heads are still obliged to follow the longstanding injunction of this Office against sending Christmas cards at public expense absent specific statutory authority for such printing and mailing. If our rules are followed, agency heads must determine that it is not proper to mail holiday greetings as penalty mail.

To The Honorable Fortney H. Stark, House of Representatives, March 20, 1985:

Your letter of December 27, 1984, asked us to investigate a possible violation of the penalty mail provisions by the Director of the Federal Emergency Management Agency, Louis O. Giuffrida. Your request arises in connection with a holiday greeting letter you received from Mr. Giuffrida in a penalty cover. The General Accounting Office has no jurisdiction over what may be transmitted as penalty mail. B-128938, January 10, 1979; *See* 24 Comp. Dec. 111 (1917). These standards are set by the Postmaster General. However, since appropriations pay the postage on penalty mail items (not to mention the cost of preparing the items themselves), an agency head responsible for interpreting and enforcing the Postal Service's rules on penalty mail use must apply those rules with reference to Comptroller General decisions. Because the agency head is the mailer in this case, we think it is appropriate to offer you our independent analysis of the situation, even though we have no official role in determining the issue or in enforcing the penalty for misuse of penalty mail. For the reasons explained below we think the holiday greeting letter was a violation of our longstanding rule against sending Christmas cards with appropriated funds, and consequently, an improper use of penalty mail.

Penalty mail is authorized by 39 U.S.C. §§ 3201-09 (1982). The permissible contents of penalty mail are specified in the Domestic Mail Manual (DMM) (*incorporated by reference,* 39 C.F.R. § 111.1 (1984)). The Manual provides that penalty mail is strictly limited to:

> * * * official mail sent by agencies of the United States Government containing matter relating exclusively to the business of the Government of the United States * * *. DMM § 137.21, *as amended,* 49 Fed. Reg. 33567 (1984).

In addition, the DMM has traditionally included an express prohibition on mailing Christmas cards as penalty mail. *See, eg.,* DMM § 137.22a (1983) (copy enclosed). However, the Postal Service amended the Manual in August of 1984. Agency heads are now required to issue guidelines governing:

> * * * the circumstances, if any, when officers and employees may mail retirement announcements, Christmas cards, job résumés, complaints, grievances, and similar materials as penalty mail. * * * DMM § 137.241, 49 Fed. Reg. 33567 (1984).

The revision creates the impression that there might be some circumstances in which Christmas cards could legitimately be sent at public expense as penalty mail. Since the DMM must be read in conjunction with other rules applying to expenditures of appropriated funds, an agency head would not be free to conclude that the revision opened a loophole for Christmas card mailings.

Our Office has long taken the position that the cost of greeting cards is a personal expense of the officer who authorizes their use, and, therefore, is not properly charged to appropriations. We first applied this doctrine to Christmas cards in 7 Comp. Gen. 481 (1928). We reasoned first, that there was no specific authority to send cards and second, that sending the cards did not materially aid in the accomplishment of the purpose for which the appropriation was made. Based on these two premises, and citing earlier decisions by the Comptroller of the Treasury, we concluded that the cards were a personal expense of the officer who ordered and sent them.

We further clarified our position in 37 Comp. Gen. 360 (1957). There, the Christmas cards bore the imprint of the agency name, rather than the signature of an individual. We still found them to be a personal expense of the official who ordered the cards. We applied the same analysis as in 7 Comp. Gen. 481; namely, that if not specifically authorized by law Christmas cards could not be considered an expense necessary to carry out the agency mission. We pointed out that the true purpose of the cards was apparently, "to secure the recipient's good-will and cooperation in carrying out [the] Agency's work." *Id.* at 361. We stated that such a purpose would not materially aid in achieving the purpose for which the agency's appropriation was made. *Cf.* B-205292, June 2, 1982 (July 4th fireworks display may not be charged to appropriated funds although intended to establish good relations with surrounding community).

The question remains whether the letter from Mr. Giuffrida is a Christmas card. The whole text of the letter, which is signed by Mr. Giuffrida, reads as follows:

> The entire staff of the Federal Emergency Management Agency joins me in wishing you a joyous holiday. We look forward to working with you and your staff throughout the coming year.

The letter transacts no official business. Its sole purpose is to extend Mr. Giuffrida's personal greetings with the obvious intent of securing "the recipient's good-will and cooperation." This is the essence of a Christmas card as described in 37 Comp. Gen. 360, discussed above. Therefore, we must conclude that the letter was a "Christmas card" for which appropriations should not have been charged.

We applied the same kind of analysis in B-149151, July 20, 1962 where we held that other kinds of greeting cards were prohibited. The cards in that case read "Thank you for Hospitality."

We are sending a copy of this letter to Mr. Giuffrida and we will make this opinion available to the public 30 days after its issuance.

[B-218208.2]

Contracts—Protests—General Accounting Office Function—Independent Investigation and Conclusions—Speculative Allegations

A protester has the burden of presenting sufficient evidence to establish its case. General Accounting Office does not conduct investigations to establish the validity of a protester's assertions.

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Error of Fact or Law—Not Established

Prior decision is affirmed on request for reconsideration where protester has not shown that the dismissal of its protests resulted from an error of law or fact.

Bidders—Responsibility *v.* Bid Responsiveness—Certification Requirements

Standard representations and certifications in the bid form such as affiliation and parent company data and certificate of independent pricing concern bidder responsibility, not the responsiveness of the bid, and, therefore, may be supplied after bid opening.

Bids—Signatures—Corporate Seal

Absence of corporate seal on bid does not render bid nonresponsive since evidence of the signer's authority to bind the company may be presented after bid opening.

Bonds—Bid—Corporate Seal Missing

Bid bond is not invalid as a result of the absence of corporate seals of bidder and surety. Corporate seals may be furnished after bid opening. In addition, validity of bid bond is not affected by time limitation on authority of surety's representative where it is undisputed that surety's representative had authority to execute bid bond at the time the bond was executed.

Matter of: Siska Construction Company, Inc.—Request for Reconsideration, March 21, 1985:

Siska Construction Company, Inc. (Siska), requests that we reconsider our decision in *Siska Construction Company, Inc.*, B-217066, Feb. 5, 1985, 85-1 C.P.D. ¶ —, in which we dismissed Siska's protest of the rejection by the National Park Service, Department of the Interior, of Siska's bid under a small business set-aside procurement, for construction and renovation work at Lowell National Historical Park, Massachusetts. Also, in our February 5, 1985, decision, we dismissed Siska's protest concerning the resolicitation for the construction and renovation project at Lowell National Park. In addition to its request for reconsideration, Siska also protests the propriety of the awardee's bid. Award was made to Trust Construction on February 6, 1985, and Siska timely protested.

We affirm our prior decision and deny Siska's protest concerning the awardee's bid.

In our earlier decision, we dismissed as untimely Siska's protest of the rejection of its bid under the original solicitation. In addition, we dismissed as untimely Siska's protest of the agency's extension of the period for receipt of bids under the readvertised procurement. We also dismissed Siska's objections to bids received under the resolicitation where Siska made unsupported general allegations regarding the size status of some of the other bidders and the receipt of multiple bids from allegedly affiliated bidders, without identifying those firms. We stated that we would not consider the merits of a protest in which the protester did not identify which bidders were the subject of its allegations and to which each allegation pertained. Furthermore, we stated that, generally, multiple bids from more than one commonly owned and/or controlled company are not improper unless such bids are prejudicial to the interests of the government or other bidders. Lastly, we advised Siska that our Office does not consider size status protests in view of the statutory authority of the Small Business Administration to make conclusive determinations on such matters.

In its request for reconsideration, Siska alleges that a number of circumstances suggest that we did not consider its protests on the merits because of pressure exerted by the congressman who represents the congressional district which includes Lowell National Park and the place of business of the awardee. Although the congressman did indicate to our Office his interest that the protests be resolved expeditiously, our decision, of course, was based solely on our evaluation of the legal merits of the case following a careful review of the entire written record submitted by Siska and the procuring agency. We determined that Siska's protests were properly for dismissal on the basis of the facts and for the reasons set forth in our decision.

Siska first asserts that an objective consideration of its protests would have included an investigation into its allegations and a request that Siska provide us with additional information or clarification if any was needed. It is well established, however, that it is the protester who bears the burden of proving its case. Our Office does not conduct investigations for the purpose of establishing the validity of a protester's assertions. *A-1 Pure Ice Company,* B-215215, Sept. 25, 1984, 84-2 C.P.D. ¶ 357. Moreover, our Bid Protest Procedures afford all parties reasonable notice and an opportunity to be heard. Our decision was based on the written record which included Siska's protest letters and its comments on the agency's report.

Siska next suggests that we dismissed as untimely its protests of the rejection of its bid and of the extension of the period for receipt of bids under the resolicitation as a device to avoid the merits of these issues. Siska contends that if these protests were in fact untimely, our Office would have dismissed them "months ago." The untimeliness of Siska's protests was not definitely established until our Office received the agency's report on Siska's protest, Siska's response to that report, and a copy of the agency's bidders mailing list used in the procurement. A proper determination of the timeliness issue required our examination of that information. Our dismissal of Siska's protests as untimely was based upon the chronology of events as established by the entire written record.

In this regard, our Bid Protest Procedures applicable to this case require that a request for reconsideration contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted. A request must specify any errors of law made or information not previously considered. 4 C.F.R. § 21.9(a) (1984). In its request for reconsideration, Siska has not pointed out any errors in our understanding of the chronology of pertinent events which affected the timeliness of its protests. Also, Siska has not pointed out any specific errors of law in the application of our timeliness rules, contained in our published procedures, to the facts of this case.

Siska also has objected to our dismissal as "untimely" of its protest against the bids submitted by other bidders on the basis that Siska cannot be expected "to foretell who the bidders might be and protest in advance of their submitting a bid." This is a misstatement of our holding and of the facts of the case. Siska's letter alleging that other bidders were ineligible for award because they were affiliated or were not small business concerns was dated 2 days after bids were opened under the resolicitation. We did not require it, as Siska alleges, to "see into the future." Furthermore, our dismissal of this aspect of Siska's protest was not based on timeliness, but on the fact that Siska did not identify which bidders were the subject of its allegations.

Accordingly, our prior decision is affirmed.

In conjunction with its request for reconsideration, Siska has also raised a number of objections concerning the propriety of the awardee's bid. Siska questions the accuracy of the Certification of Independent Price Determination, *see* Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.203-2 (1984), and the statement concerning Parent Company and Identifying Data, *see* FAR, 48 C.F.R. § 52.214-8, in the awardee's bid, because certain information available to Siska suggests that the awardee is affiliated with another firm. Siska alleges that the awardee and another bidder, Devi Realty, operate from the same address, share the same telephone number, and that the president of Devi is the husband of a vice president of the awardee. These facts do not establish that the Certificate of Independent Price Determination was violated or that the awardee erroneously represented that it was not "owned or controlled" by a parent company.

The types of representations and certifications listed pertain to the bidder's responsibility and are not necessary to decide whether the bid is responsive. *See Marathon Enterprises, Inc.,* B-213646, Dec. 14, 1983, 83-2 C.P.D. ¶ 690, and *Dependable Janitorial Service and Supply, B-190956, Apr. 13, 1978, 78-1 C.P.D.* ¶ 283. The failure of a bidder to complete such items may be corrected after bid opening as a minor irregularity. See *Dependable Janitorial Service and Supply,* B-190956, *supra,* 78-1 C.P.D. ¶ 283 at 3, and *Southern Plate Glass Co.,* B-188872, Aug. 22, 1977, 77-2 C.P.D. ¶ 135. We note that the purpose of the Certification of Independent Price Determination is to assure that bidders do not collude to set prices or to restrict competition by inducing others not to bid. *Protimex Corporation,* B-204821, Mar. 16, 1982, 82-1 C.P.D. ¶ 247. We have stated that evidence that two bidders have the same business address and may have common officers and directors does not establish that the bidders falsely certified in their bids that their bid prices were arrived at independently. See *Aarid Van Lines, Inc.,* B-206080, Feb. 4, 1982, 82-1 C.P.D. ¶ 92. In any event, it is within the jurisdiction of the Attorney General and the federal courts, not our Office, to determine whether a criminal statute has been violated. *Aarid Van Lines, Inc.,* B-206080, *supra.*

Siska also alleges that the awardee's bid should not have been accepted because the awardee's corporate seal did not appear on the Certificate of Authority to sign bids/proposals. The failure of a bidder to furnish a corporate seal with its bid may be waived or cured as a minor informality since the decisions of this Office provide that evidence of an agent's bidding authority may be furnished after bid opening. See *Excavation Construction Incorporated,* B-180553, May 31, 1974, 74-1 C.P.D. ¶ 292.

Siska further maintains that there were defects in the bid bond furnished with the awardee's bid which should have led to the bid's rejection. First, Siska states that the bid bond lacked the corporate seals of the awardee and the surety. The failure to affix corporate

seals to the bid bond does not render the bid nonresponsive and such seals may be furnished after bid opening. See *Securities Exchange Commission,* B-184120, July 2, 1975, 75-2 C.P.D. ¶ 9, and B-164453, July 16, 1968. Last, Siska contends that the bid bond which was executed on November 28, 1984, had expired prior to the contract award in February 1985 since the power of attorney of the surety's attorney-in-fact expired on December 31, 1984. It is not disputed that the surety's attorney-in-fact had authority to execute the bid bond on the date it was executed. The termination of the attorney-in-fact's authority subsequent to the execution of the bid bond would not affect the validity of the bid bond since the rights and liabilities of the parties became fixed upon the execution of the bid bond. *See* B-178730, Nov. 6, 1973. The bid bond provided that the surety's obligation under the bid bond would not be affected by any extension of time for acceptance of the bid which the principal (the bidder) may grant to the government.

Accordingly, we conclude that the bid bond submitted by the awardee was proper in form and did not render the bid nonresponsive.

[B-214585]

Grants—Federal—Earmarked Authorization

The National Endowment for Democracy, a private non-profit organization, was authorized to receive $31.3 million in fiscal year 1984 in grant monies, to be provided by USIA. Funding, however, was subject to earmarks of $13.8 million and $2.5 million for two specific subgrantees. Subsequent to enactment of the authorization, the Endowment received $18 million in its fiscal year 1983 appropriation. General Accounting Office concludes that, contrary to the actual disposition of grant funds by the Endowment, the earmark language of the authorization was binding on the Endowment, and that the Endowment must comply with earmark requirements in future grant awards.

To The Honorable Hank Brown, House of Representatives, March 22, 1985:

By letter dated October 12, 1984 (supplemented by your letter of February 4, 1985), you requested that this Office provide you with a legal ruling as to whether the National Endowment for Democracy, in providing grant funds to subgrantee organizations during fiscal year 1984, complied with section 503(e) of the National Endowment for Democracy Act, which earmarks specific funding levels for two named subgrantee organizations. This letter responds to your request. As explained in detail below, we conclude that the Endowment's disposition of grant funds did not comply with the statutory earmark language.

BACKGROUND

The National Endowment for Democracy was established on November 18, 1983, as a private nonprofit District of Columbia corporation. It was created, among various purposes, to use private-

sector initiatives to promote democratic institutions abroad. The existence of the Endowment was statutorily recognized 4 days after its creation in the National Endowment for Democracy Act, Pub. L. No. 98-164, tit. V, 97 Stat. 1017, 1039-42 (1983) (22 U.S.C.A. §§ 4411-4413 (West Supp. 1984)). That Act requires the Director of USIA to make an annual grant to the Endowment, from the USIA's "salaries and expenses" account, or from funds specifically appropriated therefor. 22 U.S.C.A. § 4412(a). Funds so provided are to be used by the Endowment to carry out its specified purposes, which include the provision of assistance to third-party organizations, "especially the two major American political parties, labor, and business." 22 U.S.C.A. § 4411(b). Two of those third-party organizations are specifically identified in the authorizing statute, which also specifies minimum amounts to be provided to them by the Endowment, as follows:

> Of the amounts made available to the Endowment for each of the fiscal years 1984 and 1985 to carry out programs in furtherance of the purposes of this Act—
> (1) Not less than $13,800,000 shall be for the Free Trade Union Institute; and
> (2) Not less than $2,500,000 shall be to support private enterprise development programs of the National Chamber Foundation. 22 U.S.C.A. § 4412(e) (West Supp. 1984).

Contained as a separate title in the same public law that includes the National Endowment for Democracy Act is the Department of State Authorization Act for fiscal years 1984 and 1985. Section 205 of that Act provides that "not less than $31,300,000" of the amounts appropriated for the USIA for fiscal years 1984 and 1985 shall be available for a grant to the National Endowment for Democracy. Pub. L. No. 98-164, tit. I, § 205, 97 Stat. 1017, 1031 (1983).

On November 28, 1983, six days following enactment of the National Endowment for Democracy Act (and the accompanying funding authorization), the Department of State and Related Agencies Appropriation Act, 1984, was enacted into law. That Act contained the fiscal year 1984 appropriation for the Endowment, significantly lower than the amount authorized:

> For grants made by the United States Information Agency to the National Endowment for Democracy as authorized by the National Endowment for Democracy Act, $18,000,000: *Provided,* That these funds shall be available for obligation only upon enactment into law of authorizing legislation. Pub. L. No. 98-166, tit. III, 97 Stat. 1071, 1098 (1983).

The Endowment held its first organizational meeting on December 16, 1983, and, after extensive negotiations, received an $18 million grant from USIA under an agreement signed on March 19, 1984.[1]

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[1] The negotiations were complicated by the Endowment's contention that it was entitled to a grant for the full amount of the authorization, $31.3 million (presumably with USIA making up the balance from its own salaries and expenses account). The Endowment eventually accepted the lesser grant, while reserving the right to continue "with efforts to procure additional funding." *See* minutes of the April 3, 1984 Board of Directors meeting. For a general review of the establishment of the Endowment, *see* our report "Events Leading to the Establishment of the National Endowment for Democracy," GAO/NSIAD-84-121, July 6, 1984.

On April 9, 1984, the Board of Directors approved a fiscal year 1984 budget, based on the $18 million grant, as follows:

—$11 million for the Free Trade Union Institute;

—$1.7 million for the National Chamber Foundation's Center for International Private Enterprise;

—$1.5 million each for the International Institutes of the Democratic and Republican Parties; and

—$2.3 million for Endowment administration, and for discretionary grants to other organizations.

Actual grant amounts were based on specific grant proposals from the third party organizations, with totals corresponding to the above budgetary figures. Consequently, grants to the two statutory subgrantees (the Free Trade Union Institute and the National Chamber Foundation) were actually less than the amounts specified in section 503(e) of the authorizing legislation, a fact not disputed by the Endowment.

DISCUSSION

The legal question presented here is whether the earmarking language specified in the Endowment's authorizing legislation was binding on the Endowment, notwithstanding the fact that the actual appropriation act provided funding at a level significantly less than the full amount authorized.

A review of the authorization and appropriation acts in question here reveals no obvious conflict between the two. The program authorization for the Endowment specifies that "of amounts made available" to the Endowment, no less than $13.8 million is for the Free Trade Union Institute, and $2.5 million is for the National Chamber Foundation. The amount actually provided to the Endowment totaled $18 million, a figure clearly less than the total amount authorized, but sufficient to meet the earmark requirements and still leave $1.7 million for the Endowment's administrative costs (and for discretionary grants, to the extent that any funds were left over). USIA, although agreeing with the Endowment's distribution, concludes that a "literal reading" of the earmark seems to require that it be complied with. Furthermore, in similar circumstances we have concluded that earmark language should be applied.

In B-207343, August 18, 1982, the funding authorization for the ACTION agency included a specific earmark of $16 million for the VISTA program, out of a total appropriation of $25.8 million. The earmark language in the ACTION authorization provided that "[o]f the amounts appropriated under this section, not less than $16,000,000 shall be first available for carrying out [the VISTA program]." The actual appropriation was contained within a larger lump-sum figure incorporated by reference in the continuing appropriations resolution for that year. That resolution, however, re-

duced each appropriation account by 4 percent, with a simultaneous requirement that no program or project within each account be reduced by more than 6 percent.

The ACTION agency concluded that the earmark language of the authorization act could not be reconciled with the reduced level of funding provided in the appropriations act. The principal basis for this conclusion was ACTION's view that compliance with the earmark language would require offsetting reductions of more than 6 percent in other programs within the same title of the Domestic Volunteer Service Act of 1973. Our decision, however, disagreed with ACTION's conclusion that the two statutes could not be reconciled. We noted that the appropriation "account" in question was for all programs under the Act, and not just for title I; therefore, ACTION could make offsetting reductions (up to 6 percent) in a large number of programs within the same account, in order to retain VISTA funding at the earmarked level.

In the present case, however, the Endowment contends that the express language of the two enactments cannot be reconciled in a way that would provide a program consistent with the overall requirements of the authorizing legislation. In a submission prepared at the request of this Office, the Endowment's attorneys stated that allocation of the amounts earmarked would have left an insufficient sum for meaningful funding of other programs and administration, and that the Endowment would not have been able effectively to fulfill its statutory mission. In addition, the Endowment contends that the legislative history of the appropriations act supports the view that Congress did not intend the authorization earmarks to govern distribution of the lesser amount actually provided.[2]

With regard to the Endowment's first argument, we cannot agree that compliance with the authorization earmark would have prevented the Endowment from effectively fulfilling its statutory mission. Although we recognize that a variety of organization categories are identified in the authorization act's delineation of the Endowment's purposes, we cannot agree with the Endowment's contention that the statute imposes a legal obligation to provide assistance to all such groups. The Endowment's interpretation of the purposes clause, in effect, treats all mentioned categories of organizations as if earmarked for funding, when in fact only two organi-

[2] These two factors are cited by the Endowment in arguing that the present case is not comparable to the ACTION case described above. The Endowment also attempts to distinguish the present case on the grounds that it, unlike ACTION, is required to fund only those programs consistent with the purposes specified in the authorizing legislation. Every recipient of Federal grant funds, however, is required to utilize those funds only for purposes specified in the legislation authorizing the grant. 31 U.S.C. § 1301(a) (1982); *see* 42 Comp. Gen. 682 (1963) (use of NIH grant for purposes other than those authorized). In this respect, the Endowment is no different than ACTION.

zations, the Free Trade Union Institute and the National Chamber Foundation, are so treated under the statute.

A review of the legislative history of the authorization supports our view. The principal beneficiaries of the Endowment's failure to comply with the authorization earmarks were the international affairs institutes of the Democratic and Republican political parties, and, indeed, the two political parties are described as potential beneficiaries in the purposes clause of the act. *See* 22 U.S.C.A. § 4411(b). At one time prior to its enactment, the authorization bill specifically earmarked funding for the two parties ($5 million each), in the same section now earmarking funds for the Free Trade Union Institute and National Chamber Foundation. *See, e.g.*, H.R. Rep. No. 130, 98th Cong., 1st Sess. 90 (1983). The participation of the two political parties in the Endowment's programs, however, was an issue subject to much opposition during consideration of the bill in the House. *See, e.g.*, 129 Cong. Rec. H3811-21 (daily ed. June 9, 1983). The House eventually deleted the earmark language for the political parties, as well as all but one reference to the parties in the purposes clause of the bill. *Id.* at H3814-18. No similar attempt was made during consideration of the bill in the Senate, where all four earmarks were retained. *See* 129 Cong. Rec. S12703-21 (daily ed. September 22, 1983). In conference, all previous references to the two political parties were restored to the purposes clause, but the deletion of earmarks for these organizations remained unchanged. The Conference Report noted that earmarks for the party institutes were dropped without prejudice to their receipt of funds from the Endowment. H. Rep. No. 563, 98th Cong., 1st Sess. 77 (1983).

The fact that earmarking for the two political party institutes was deleted while similar earmarking for labor and business was retained by the Congress demonstrates that Congress intended to give priority to the latter two groups over the former. The retention of references to the two political parties as examples of eligible recipients, without retention of mandatory earmark language concerning such organizations, indicates an intention that such groups be funded to the extent possible, but not to the detriment of the two organizations for which earmarks were specified.

In addition to the foregoing, we do not agree with the Endowment's view that the legislative history of the appropriation act supports the allocations actually made. The original House version of the fiscal year 1984 appropriation bill contained an appropriation for the Endowment equal to the full amount authorized ($31.3 million). *See* H.R. Rep. No. 226, 98th Cong., 1st Sess. 60 (1983). The Senate version contained no such funding, but was amended on October 21, 1983, to appropriate $23 million for the Endowment. *See* 129 Cong. Rec. S14441 (daily ed. Oct. 21, 1983). The House later reduced the amount further, to the level eventually enacted ($18 million). 129 Cong. Rec. H9592 (daily ed. Nov. 9, 1983). The only de-

tailed explanation of any of these decreases (from the authorization figure) is contained in the floor discussion during Senate consideration. This language has been cited by the Endowment to support its view that Congress did not intend the two labor and business organizations to receive all funds earmarked for them:

> I would have much preferred an amendment to provide the full $31,300,000 fiscal year 1984 funding for the National Endowment for Democracy. I therefore regret that the Appropriations Committee will accept an amendment funding only three-quarters of the amount authorized for the Endowment. However, I understand that there will be some delay in the establishment of the various institutions that will be receiving grants, therefore $23 million should cover the costs associated with the startup of this program. 129 Cong. Rec. S14442 (daily ed. Oct. 21, 1983) (remarks of Senator Pell).

It is not clear, however, that Senator Pell's remarks were directed at every potential receipient organization. While it is true that the two political party institutes were not operational at the time of these proceedings (the organizations were incorporated in April of 1983 but were not funded or staffed until April of 1984), the AFL-CIO had been carrying out such activities for three decades. *See.* 129 Cong. Rec. H3813 (daily ed. June 9, 1983) (remarks of Congressman Gilman). Similarly, although the National Chamber Foundation did not create its Center for International Private Enterprise until June 1983, privately-funded programs carried out by the U.S. Chamber of Commerce (with which the National Chamber Foundation is affiliated) were in existence well before creation of the Endowment. *See* Report of the Democracy Program pp. 38-39 (November 30, 1983). It is not clear, therefore, that Senator Pell intended his remarks to refer to those two programs. Furthermore, the relevance of these remarks to the $18 million appropriation ultimately passed is questionable. When Senator Pell made his remarks an additional $5 million was under consideration which, if appropriated, would have provided further amounts for grants to unearmarked organizations.

Additionally, remarks by Senator Hatch during the same proceedings specifically refer to the earmark intended for labor:

> Mr. President, it will come as no surprise to my colleagues in this body that I have a particular commitment to support the superb work done on behalf of free trade unionism abroad by the AFL-CIO international programs. Therefore, I take special pride in the fact that the AFL-CIO especially should find it possible to utilize the funds earmarked for its work under the Endowment in the very near future on behalf of efforts to strengthen democratic trade unions. I urge the support of my colleagues in a vital means to strengthen democratic process throughout the world. It is my understanding that this amendment [to provide funding at a $23 million level] is acceptable to the managers of the bill. 129 Cong. Rec. at S14441.

These remarks clearly do not reflect an intention to override the earmark provisions of the authorization act by reducing overall funding levels.

In addition to those arguments addressed above, the Endowment states in its submission to us that the two labor and business organizations agreed with, and did not apply for more than, the amounts actually provided to them. According to the Endowment,

it would have been unlawful to provide these organizations with more than they had requested. In later correspondence, the Endowment characterized this argument as its "primary submission." We agree that in the absence of an application or a proposal to spend the earmarked amounts, awards should not be made, but the consequence of this is not to free the unobligated earmarks for other projects. Under the earmark language we are asked to interpret, funds are not available for other than the earmarked purpose and, to the extent they have been misdirected, should be returned to USIA. In its subsequent submission, the Endowment cites *Train v. City of New York*, 420 U.S. 35 (1975) in support of its argument. This case involved the obligation of less than available amounts; it does not involve the use of unused appropriations for alternative purposes.

Moreover, unlike the Endowment, we do not afford a great deal of significance to the fact that the two statutory subgrantees acceded in the Endowment's distribution of grant funds, since ultimate control of those funds clearly rests with the Endowment itself. We do not agree with the Endowment's implication that its hands were tied by the fact that the two statutory subgrantees did not submit grant proposals for the full amount of the earmarks. Rather, it appears that those proposals were drawn to correspond to budget amounts set in advance by the Endowment's Board of Directors. It seems unlikely to us that the two organizations in question would not have presented grant requests for the full amounts contained in the earmarks, if given the opportunity by the Endowment.[3] The kind of earmarking of an appropriation used by Congress in this case would appear to be a device designed to prevent the very allocation that took place here.

Based on the foregoing analysis, it is our conclusion that the earmark language of the Endowment's authorization was binding on the Endowment in its distribution of grant funds, even though actual appropriation levels were less than the full amount contemplated under the authorization.

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[3] Documents dating from the period in which the original grant agreement was negotiated with USIA, in fact, reflect concern by labor that the agreement might improperly give the Endowment discretion to deviate from the earmark language of section 503(e). *See* letter from Lane Kirkland, AFL/CIO President, to Allen Weinstein, NED Acting Director, dated February 13, 1984 ("I, therefore, cannot support a grant agreement that suggests that Section 503(e) has some true meaning that cannot be discerned from its plain language."). Mr. Weinstein's response, dated February 21, 1984, describes the authorization and appropriations acts as "two conflicting texts," and indicates that earmark language was tied to the "benchmark" of $31.3 million contained in the authorization. Mr. Weinstein reminded Mr. Kirkland that USIA was unwilling to negotiate using that figure. The two labor and business organizations appear to have accepted this view, although it is likely that they did so with the understanding that the earmarks would be honored should NED persuade USIA to provide additional funding.

REMEDIAL ACTION

As a general rule, grant funds that have been misapplied by a grantee must be recovered by the grantor agency, even in those cases where expenditures have been incurred innocently by the grantee. *See* 51 Comp. Gen. 162 (1971). In the present case, grant funds were misapplied to the extent that non-earmarked organizations—although otherwise eligible as receipients—received Endowment funding from the earmark.

It is apparent here, however, that the Endowment's officers and Board of Directors believed that subgrant allocations were made in accordance with the statutory requirements; it seems to us that this belief was the result of a misinterpretation that is understandable in view of the legislative background described previously. In light of this, we would not object if USIA, as the grantor agency, does not recover fiscal year 1984 funds from the Endowment that were provided to non-earmark subgrantees. Recovery of funds provided these subgrantees would place both the subgrantees and the Endowment in jeopardy, since all appear to have no significant alternative source of fu ıding from which disallowed grant costs could be paid.

With regard to fiscal year 1985 funds, we note that there is now a specific prohibition on the provision of funds to the international affairs institutes of the two major political parties. *See* Department of State and Related Agencies Appropriation Act, 1985, Pub. L. No. 98-411, tit. III, 98 Stat. 1545, 1570 (1984). We understand that, of $18.5 million appropriated for the Endowment for fiscal year 1985, the Endowment has allocated the following sums for the first half of the fiscal year: $11,560,788 to the Free Trade Union Institute, $1,438,326 to the National Chamber Foundation, and $1,080,565 to other private sector organizations. This leaves $4,420,321 to be allocated for the second half of the fiscal year. In accordance with the conclusions stated above, the Endowment should ensure that its allocations to the two earmarked organizations for the second half of the fiscal year are in amounts sufficient to fulfill the requirements of section 503(e) of the authorizing legislation.

We hope the foregoing is of assistance to you. As agreed to by your staff, we are sending copies of this letter to the Endowment and to USIA.

[B-214919]

Public Health Service—Commissioned Personnel—Dual Employment

An active duty Public Health Service commissioned officer provided medical consulting services for which he was paid on an hourly basis under personal services contracts with the Social Security Administration over a period of 13 years. The officer was not entitled to receive compensation for services rendered under this arrangement because as an officer of the Public Health Service, a uniformed service,

he occupied a status similar to that of a military officer and his performance of services for the Govt. in a civilian capacity was incompatible with his status as a commissioned officer. Also, receipt of additional pay for additional services by such an officer is an apparent violation of a statutory prohibition, 5 U.S.C. 5536.

Public Health Service—Commissioned Personnel—Dual Employment

Compensation paid to an active duty commissioned officer of the Public Health Service for medical consulting services he performed under personal services contracts with the Social Security Administration constituted erroneous payments because he was entitled to receive only the pay and allowances that accrued to him as a member of the uniformed services. He is, therefore, indebted to the Govt., for the compensation paid to him for the services he rendered to the Social Security Administration.

Set-Off—Pay, Etc. Due Military Personnel—Private Employment Earnings

The debt of an officer of the Public Health Service, occasioned by his receipt of erroneous pay from the Social Security Administration, may be collected by administrative offset against his current Public Health Service pay, or upon his separation or retirement from the Service, offset may be affected against any final pay, lump-sum leave payment and retired pay to which he may be entitled. The 10-year limitation on collection by setoff does not apply in this case where facts material to the Govt.'s right to collect were not known by Govt. officials until 13 years after the erroneous payments began. Amounts collected are to be deposited into the general fund of the Treasury as miscellaneous receipts.

Statutes of Limitation—Debt Collections—Military Personnel

The Government's claim against a member of the uniformed services for erroneous dual pay is not barred from court action if the facts material to the claim were discovered within less than 6 years of the date that an action is filed. Nor is the claim barred from consideration under the statute waiving the Govt.'s claims for dual pay if not received in the General Accounting Office within 6 years when it was received in that Office within 6 years of the last date of an unbroken period during which the individual occupied a status in which he was to receive compensation.

Compensation—Double—Military Personnel in Civilian Positions—*De Facto* Status

An active duty commissioned officer of the Public Health Service who illegally performed personal services under contract for the Social Security Administration is not entitled to retain compensation he received for the performance of those services on the basis of *de facto* employment or *quantum meruit,* and his debt may not be waived, in the absence of clear and convincing evidence that he performed the civilian Govt. services in good faith.

Matter of: Public Health Service Officer, March 22, 1985:

This action responds to a request for an advance decision regarding the legality of payment of compensation to an active duty commissioned officer of the Public Health Service for work he performed as a Federal civilian medical consultant for the Social Security Administration.[1] We conclude that the officer's performance of

[1] The request for this decision was submitted by Mr. Thomas S. McFee, Assistant Secretary for Personnel Administration, Department of Health and Human Services, Washington, D.C.

compensated services for the Social Security Administration was improper, and he is liable to the Government for the compensation paid to him for those services.

Background

This case concerns a physician who is a commissioned officer in the Regular Corps of the Public Health Service. He has been on continuous active duty since 1959, and is currently assigned to the National Institute on Aging, National Institutes of Health, at the Gerontology Research Center, Baltimore, Maryland. As a commissioned officer he receives the pay and allowances to which he is entitled as a member of the uniformed services. This officer also worked, under a series of personal service contracts, as a medical consultant to the Office of Disability Programs, Social Security Administration, from 1970 until July 1983, when an investigation of his dual employment was commenced by the Office of the Inspector General of the Department of Health and Human Services.[2]

Medical consultants working for the Social Security Administration under personal services contracts, as this officer was, are paid by the hour for hours spent working at the Social Security Administration facility. The number of hours a consultant works and for which he or she is to be paid is documented by sign-in and sign-out sheets maintained by the office of the project officer who is responsible for medical consultant contracts. Generally, the officer in this case performed his consulting services for the Social Security Administration outside his normal hours of duty at the Gerontology Research Center. Those hours were from 8:30 a.m. until 5 p.m. However, it is stated that based on information obtained from agency time records, there were "many occasions" when he signed in for work at the Social Security Administration prior to 5:30 p.m., which is said to be the earliest time, after his regular duty hours, in which he reasonably could have traveled from his duty station at the Gerontology Research Center to the site where he performed his contract services. These records would, therefore, seem to indicate that the officer has periodically received pay for services performed under his contract with the Social Security Administration for the same time he was to be performing his duties as an officer of the Public Health Service at the Gerontology Research Center.

Regulations of the Department of Health and Human Services require that employees (including Public Health Service commissioned officers) obtain administrative approval, in writing, prior to engaging in professional and consultative services outside of their regular duties (45 C.F.R. § 73.735-708). However, the record shows that this officer did not seek or receive approval from the National Institute on Aging or the National Institutes of Health to engage

[2] Both the Public Health Service and the Social Security Administration are agencies within the Department of Health and Human Services.

in the consultant services he performed for the Social Security Administration, although he did request and obtain administrative approval for other outside professional activities.

The officer states that he cannot recall that such formalized administrative procedures for accepting outside professional commitments were in effect in 1970 when he began working under these contracts, and that when he later became aware of the advance administrative approval requirement, he did not deem it necessary to seek approval for activity with which he had been involved for so long. He states further that to the best of his knowledge he has never received a copy of the Department of Health and Human Services Standards of Conduct, although he has seen references to them in Public Health Service circulars. In spite of the fact that he did obtain the required administrative approval for other outside professional activities, he states that he never informed anyone at the Gerontology Research Center of his consulting services for the Social Security Administration because he considered that his "personal business," which he does not discuss with his professional associates.

Certain of this officer's personnel records (curriculum vitae) that he filed in connection with his most recent request for renewal of his Social Security Administration contract (and with the Gerontology Research Certer) incorrectly indicate that he was employed by the Department of Medicine, Baltimore City hospitals, not by the Public Health Service. Social Security Administration Officials responsible for approving his contracts with that agency have stated that they were not aware that he was a Government employee. It appears that the contract officers were misinformed or misled regarding his employment in a Government position due to his omission or misrepresentation concerning his status in the Public Health Service.

Between October 1978 and June 1983 while he was on active duty as a Public Health Service commissioned officer, this officer received a total of $77,704 for medical consulting services he performed under contract for the Social Security Administration. The amount he received for contract services performed between 1970 and 1978 has not yet been determined because necessary records, now filed at the Federal Records Center, have not yet been obtained by the Department of Health and Human Services.

Questions Presented

In connection with the facts and circumstances of this case, the Department of Health and Human Services has asked the following questions:

1. Is the long-standing rule, articulated in prior decisions of the Comptroller General, which prohibits military members on active duty from concurrently engaging in compensated Federal civilian employment, also applicable to members of a non-

military Uniformed Service—specifically, to officers of the PHS Commissioned Corps?

2. If the above-referenced rule is applicable to members of PHS, was it violated in the present case?

3. If item number 2 is answered in the affirmative, is there legal authority to recover the improper SSA compensation?

4. If item number 2 is answered in the negative, is there legal authority to recover the improper SSA compensation because of [the] prohibition against contracting with Federal employees set forth in 41 CFR 1-1.302-3(a) and (b)?

5. If SSA payments are recoverable, what is the appropriate mechanism for accomplishing such recovery? Specifically, may the funds be recovered by PHS through administrative offset against the officer's active duty or retired pay? If so, what would be the proper disposition of such recovered funds? May they be transferred from PHS to the SSA account from which originally disbursed?

6. If the SSA payments are recoverable, is there any authority under which recovery may be waived?

7. If the SSA payments are recoverable, is there any recognized principle under which [the officer] could assert a right to retain any portion of these payments? For example, could he contend that he was entitled to retention of such payment as a 'de facto' employee or under the principles of quantum meruit or similar contract-type remedies?

Status of a Public Health Service Commissioned Officer

While the Public Health Service is not an armed service,[3] it is one of the "uniformed services," along with the National Oceanic and Atmospheric Administration, and the Armed Services—the Army, Navy, Air Force, Marine Corps and Coast Guard. 42 U.S.C. § 201(p); 37 U.S.C. § 101(3). We have held that officers of the Regular component of the Commissioned Corps of the Public Health Service.

As noted in the agency's submission, we have long held that any agreement or arrangement by a member of a military service for the rendition of services to the Government in another position or employment is incompatible with the member's actual or potential military duties, and additional payment therefor is not authorized unless there is specific statutory authority authorizing it.[4] We have held that the fact that military service members may have hours of relaxation and relief from the actual performance of duty during which they may attend to personal affairs, including the perform-

[3] Except in time of war, or emergency involving the national defense when the President may declare the Commissioned Corps of the service to be a military service. 42 U.S.C. § 217 (1982). hold a status like that of Regular commissioned officers of the armed forces. 51 Comp. Gen. 780 (1972). That is, Regular commissioned officers of the Public Health Service are appointed by the President with the advice and consent of the Senate 42 U.S.C. § 204 (1982), as are Regular officers of the armed services, 10 U.S.C § 531 (1982), 14 U.S.C. § 211 (1982). Public Health Service officers are appointed to grades which correspond to grades of Army officers and are compensated under the pay and allowance system applicable to armed services officers. 42 U.S.C. § 207 (1982, and 37 U.S.C. § 101, *et seq.* (1982). The provisions pertaining to retirement of commissioned officers of the Public Health Service, 42 U.S.C. § 212, are similar to those pertaining to officers of the armed services. 51 Comp. Gen. 780 (1972). And, Public Health Service officers enjoy most of the benefits, rights, privileges and immunities enjoyed by armed services officers, including medical care for themselves and their dependents, and survivor benefits. 42 U.S.C. §§ 213, 213a; 10 U.S.C. chapt. 55.

[4] See, *e.g., Air Force Dental Officers*, B-207109, November 29, 1982; *Martin P. Merrick and Albert Jackson, Jr.*, B-20533, December 30, 1981. 47 Comp. Gen. 505 (1968); 46 Comp. Gen. 400 (1966).

ance of other duty, is not the test of whether the other duty is incompatible. The obligation to render military service is the superior—the controlling—obligation. 18 Comp. Gen. 213, 216 (1938). The time of one in the military service is not his own, however limited the duties of a particular assignment may be, and any agreement or arrangement for the rendition of services to the Government in another position so employment is incompatible with military duties, actual or potential. 18 Comp. Gen. at 217.

While the Commissioned Corps of the Public Health Service is included among the military services only when, in time of war or national emergency, the President declares the Corps to be a military service, it is one of the uniformed services and its members hold a status like that of military officers. Under the pay system applicable to members of the uniformed services, members are entitled to pay based on their status as members and not based on the rendition of specific numbers of hours of duty. 37 U.S.C. § 204. They occupy the status of uniformed service members 24 hours a day, notwithstanding that they may actually only perform duties during certain hours, and their pay is paid on the basis of that status and not the hours of duty they perform. They are not entitled to any additional pay for performing services for another component of the Government. See, e.g., 5 Comp. Gen. 206 (1925).

In addition to the general rule of incompatibility, under 5 U.S.C. § 5536 an employee or a member of the uniformed services whose pay is fixed by statute or regulation is specifically prohibited from receiving additional pay "for any other service or duty," unless specifically authorized by law. That statutory prohibition has been held not to apply where there are two distinct offices, places or employments, each of which has its own duties and its own compensation which both may be held by any one person at the same time. *United States v. Saunders,* 120 U.S. 126 (1887). However, that exception to the prohibition would not appear to apply in this case because the status of commissioned officer is not compatible with the holding of any other Federal Government position.

Furthermore, both the Public Health Service and the Social Security Administration are components of the Department of Health and Human Services (previously the Department of Health, Education and Welfare) and this officer was performing medical services for both. If the officer's services were needed by the Social Security Administration, he could have been detailed there to provide the additional services on a part-time basis at no extra cost to the Government.[5]

Thus, while an officer of the Public Health Service Commissioned Corps may receive permission to pursue private employment

[5] See *Woodell v. United States,* 214 U.S. 82 (1909), and *Mullett v. United States,* 150 U.S. 566 (1893), where employees assigned additional duties to perform for agencies other than their employing agencies were held not entitled to additional compensation in view of R.S. § 1765, the predecessor to 5 U.S.C. § 5536.

which does not interfere with the performance of his or her duties as an officer of the Corps, he or she may not be otherwise employed by the United States.

For these reasons, in answer to question 1, it is our view that the rule prohibiting payment to members of the military services for services rendered to the Government in a civilian capacity is applicable to commissioned officers of the Regular Corps of the Public Health Service. As to question 2, the officer involved in this case should not have been paid additional compensation to perform consulting services for the Social Security Administration. 47 Comp. Gen. 505, *supra; Air Force Dental Officers,* B-207109, *supra.*

Improper Payments of Compensation

Since the officer in this case was only entitled to receive pay from the Government for the performance of his official duties as an active duty commissioned officer of a uniformed service, he was not entitled to the additional compensation for the personal contract services rendered to the Social Security Administration. Therefore, all such compensation paid to him constituted erroneous payments. 47 Comp. Gen. at 506-507; *Air Force Dental Officers,* B-207109, *supra,* at 13.

Persons who receive public funds erroneously paid by a Government agency acquire no right to those funds and are liable to make restitution. *United States v. Sutton Chemical Co.,* 11 F.2d 24 (1926); *Dr. Frank A. Peak,* 60 Comp. Gen. 71 (1980). We thus conclude that the officer in this case is indebted to the Government for compensation paid to him on account of his personal services contracts with the Social Security Administration. 46 Comp. Gen. at 402. Question 3, therefore, is answered in the affirmative, and question 4 requires no answer.

Debt Collection and Setoff

Question 5 concerns the procedures for the collection of the debt that has resulted from erroneous payments made to this officer and the proper disposition of the funds collected.

It appears that the provisions of 5 U.S.C. § 5514, which specifically authorize collection of erroneous payments made to "an employee, member of the Armed Forces or Reserve of the Armed Forces" by deduction in reasonable amounts from the individual's current pay, do not apply to Public Health Service commissioned officers since such officers are not included in the definitions of the categories of individuals covered by that statute. That is, the statute covers only "employee[s]" and members of the "Armed Forces," neither of which is defined to include Public Health Service officers, members of the "uniformed services." See 5 U.S.C. §§ 2101, 2105.

In this case the general provisions of 31 U.S.C. §§ 3711-3720, which provide for the collection of claims of the Government, are applicable. Under those provisions, and implementing regulations, the head of the agency is to try to collect a claim arising out of the activities of, or referred to, the agency. 31 U.S.C. § 3711(a). Under certain conditions he may collect the claim by administrative offset, which means withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government. 31 U.S.C. § 3701(a). These provisions are broad enough to encompass withholding money payable to the officer in this case for pay and allowances, accrued leave or retired pay due him, where the more specific provisions of 5 U.S.C. § 5514 are not applicable to him. See 31 U.S.C. § 3716(c)(2).[6] The procedural standards promulgated jointly by the Attorney General, and the Comptroller General and agency regulations implementing 31 U.S.C. § 3711, *et seq.*, should be followed in taking the collection action. See 4 C.F.R. Parts 101-105, as revised, 49 Fed. Reg. 8896 (1984), particularly sections 102.1-102.3.

Concerning the proper disposition of the erroneous payments upon collection, a refund of payments or fees paid in consideration of some benefit to the Government is to be deposited into the general fund of the Treasury as miscellaneous receipts, since to credit an appropriation with a refund of earned payments would constitute an augmentation of the appropriation. See 39 Comp. Gen. 647 (1960), and 31 U.S.C. § 3302(b) (1982) (previously 31 U.S.C. § 484). Therefore, payments that are refunded by the officer or collected from him by setoff or other means should be transferred to the general fund of the Treasury.

Statutes of Limitations

Although not specifically stated in the submission to us, the question arises whether collection of the payments which the officer received more than 6 years prior to the discovery of the matter by the Inspector General may be time-barred. The statute of limitations in 28 U.S.C. § 2415(d) could, under certain circumstances, prevent court action to recover overpayments if the complaint is not filed within 6 years after the right of action accrues. However, periods during which facts material to the right of action are not known and reasonably could not be known by officials, whose responsibility it is to take action, are excluded from the limitation

[6] See also B-215128, December 14, 1984, 64 Comp. Gen. 142. We note that 31 U.S.C. § 3701(d) provides that debt collection under 31 U.S.C. §§ 3711-3720 is not applicable to a claim or debt under the Social Security Act (42 U.S.C. § 301, *et seq.*). That exclusion does not apply to debts owned by persons employed by agencies administering the Social Security Act, unless the debt arose under that Act. 4 C.F.R. § 102.19(b), 49 Fed. Reg. 8902 (1984). Thus, 31 U.S.C. § 3701(d) would not preclude the application of 31 U.S.C. §§ 3711-3720 in this case where the debt is for erroneous payments of pay.

period. 28 U.S.C. § 2416(c). Moreover, in appropriate circumstances outstanding claims may be recovered by administrative setoff under 31 U.S.C. § 3716 for up to 10 years. And, this 10-year limitation does not apply in a case such as this where facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the officials of the Government charged with the responsibility to discover and collect the debt. 4 C.F.R. § 102.3(b)(3), as revised, 49 Fed. Reg. 8898 (1984).

It is also noted that 31 U.S.C. § 3712(d) establishes a statute of limitations for claims arising from receipt of dual pay. That provision is as follows:

> (d) The Government waives all claims against a person arising from dual pay from the Government if the dual pay is not reported to the Comptroller General for collection within 6 years from the last date of a period of dual pay.

In considering a question arising under 31 U.S.C. § 237a, the statute from which 31 U.S.C. § 3712(d) is derived, we held that no part of a dual pay claim against an employee is waived under this provision if the debt is reported to this Office within 6 years of the last date of an unbroken period during which a person drew dual compensation. 43 Comp. Gen. 165 (1963). The record in this case states that the officer has engaged in the performance of the services in question while also serving as a commissioned officer in the Public Health Service since 1970. It is further stated that on or about July 30, 1983, he was ordered to cease work under his contract in effect at that time until inquiries into the matter of his contract services were settled. Thus, it appears that he was performing contract services and was in receipt of pay for those services at least through July 1983. The Government's claim against him on account of his receipt of erroneous pay for these services was received in this Office on April 10, 1984. Accordingly, if this officer has been under contract each year since 1970 to render services for the Social Security Administration, it would appear that no part of the Government's claim against him for compensation which he received for those services since 1970 is barred under 31 U.S.C. § 3712(d). See B-203209, July 15, 1981. Therefore, the entire amount of the Government's claim that has accrued since 1970 may be collected by administrative setoff.

Potential Defenses to Recoupment Action

Questions 6 and 7 concern whether this officer is entitled to retain the erroneous payments on the bases that he was *de facto* employee of the Social Security Administration or under *quantum meruit* or similar principles, or to have the Government's claim against him waived.

A. De Facto Employment

A *de facto* officer or employee is one who holds a public office or position with apparent right, but without actual entitlement because of some defect in his qualifications or in the action placing him in the office or position. *Air Force Dental Officers,* B-207109, *supra,* at 12. In certain cases where an individual was discovered to have been improperly serving the Government in dual capacities, we have held that the services performed by that individual could be considered as having been rendered in a *de facto* status. In those cases the recoupment of pay for services performed, or forfeiture of other entitlements, was not required. 52 Comp. Gen. 700 (1973); 40 Comp. Gen. 51 (1960).

However, in this case the applicability of the principle of *de facto* employment is similar to that in *Air Force Dental Officers,* B-207109, *supra.* In that decision we addressed the question of the applicability of the doctrine of *de facto* employment to two Air Force dentists who had performed fee contract services for the Veterans Administration. There we said that although it is not clear whether the *de facto* employment doctrine is applicable to fee basis physicians since they do not hold a public office or position with the contracting agency (45 Comp. Gen. 81 (1965)), the doctrine is generally for application only if the individual claiming relief on that basis can demonstrate his good faith in having improperly entered into the subject employment. See *Air Force Dental Officers,* B-207109, *supra* at 13. See also *Victor M. Valdez, Jr.,* 58 Comp. Gen. 734 (1979).

As is stated previously, the record indicates that the officer in this case never sought or obtained administrative approval from the National Institute on Aging or the National Institutes of Health to perform consulting services under contract for the Social Security Administration. While this officer has offered various explanations for the discrepancies and improprieties surrounding his performance of contract services, we find his explanations and justifications unpersuasive. On the basis of the facts as presented to us, it appears that he deliberately concealed his performance of contract services from those who might have questioned or sought to prevent his continued services in this capacity. Although he was on notice that administrative approval was required, he failed to comply with that requirement. Under these circumstances it appears doubtful that he acted in good faith in requesting and performing the contract services while an active duty commissioned officer of the Public Health Service. In the absence of clear and convincing evidence that he did, in fact, act in good faith in contracting for and performing these contract services, he does not qualify under the principle of *de facto* employment to retain the compensation paid to him for rendering those services. *Air Force Dental Officers,* B-207109, *supra,* at 16.

B. Retention of Fees on Quantum Meruit Basis

There is a well-established rule that the Government is not obligated to pay contractors or others who have provided services without proper authorization. *General Clinical Research Center,* B-212430, June 11, 1984. However, where performance by one party has benefited another, equity requires that the party receiving the benefit should not gain a windfall at the expense of the performing party, even through the contract between them was unenforceable. The courts and our Office have recognized that in these instances, the Government is obliged to pay the reasonable value of the services on an implied contract for *quantum meruit.*

Before we will authorize a *quantum meruit* payment, we must make a threshold determination that the services would have been a permissible procurement if the proper procedures had been followed. Then we must find that (1) the contractor acted in good faith, (2) the Government received and accepted a benefit, and (3) the amount claimed represents the reasonable value of the benefit received. *See* 33 Comp. Gen. 533, 537 (1954); 40 Comp. Gen. 447, 451 (1961); and B-207557, July 11, 1983.

We do not question, in general, the procurement of the subject medical consulting services by the Office of Disability Programs of the Social Security Administration. It was not proper, however, for the agency to negotiate such a contract with an active duty commissioned officer of the Public Health Service.

Nevertheless, and, even if such a contract were authorized, a significant impediment to this officer's entitlement to retain compensation he received under these personal service contracts is the apparent lack of good faith on his part in providing those services. By his own admission, at the time he began performing these services he had doubts as to the propriety of his participation in the Social Security Administration Office of Disability Programs, yet he did not inquire into the matter to the point of obtaining an authoritative response. The fact that over a period of 13 years he continued to request renewal of his contract to perform contract services within the same Government department in which he was regularly employed without ever requesting approval to perform those services, as required for any outside professional activities under department regulations, precludes a determination that he acted in good faith. We conclude, therefore, that this officer has no remedy for retention of erroneous pay on the basis of an invalid contract for *quantum meruit.*

C. Waiver

The Comptroller General is authorized to waive, in whole or in part, a claim for the recovery of an erroneous payment of pay or allowances made to an employee of an agency or a member of the uniformed services if the collection of the debt "would be against

equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584(a); 10 U.S.C. § 2774(a). A claim may not be waived under this authority if in the opinion of the Comptroller General there is, in connection with the claim, "* * * an indication of fraud, misrepresentation, fault, or lack of good faith" on the part of the employee or member. 5 U.S.C. § 5584(b); 10 U.S.C. § 2774(b).

In cases in which an employee has received erroneous payments in contravention of the dual compensation laws, we have looked favorably on requests for waiver where the individual had made no secret of dual employment and had no reason to know in the circumstances that he was in violation of those laws. See, e.g., *Reserve Members Restored to Duty,* 57 Comp. Gen. 554 (1978); 53 Comp. Gen. 377 (1973).

Under the circumstances of the case now before us, however, we do not consider waiver of the Government's claim appropriate. As previously stated, the fact that this officer failed to seek approval of this subject outside employment in accordance with applicable regulation, of which he had knowledge, and, from all appearances, took steps to prevent staff members where he was assigned as a Public Health Service officer from knowing of his involvement in this particular outside professional activity, indicate that he was not without fault and did not act in good faith in the matter. Thus, we may not waive the Government's claim against him for compensation he received to which he was not entitled.

[B-215702]

Meetings—Attendance, etc. Fees—Meals Included

Employees of the National Park Service sought reimbursement for meal costs incurred while attending a monthly Federal Executive Association luncheon meeting. Meal cost may not be reimbursed. The meetings were held at the employees' official duty station and the employees meals were not incidental to the meetings, a prerequisite for reimbursement, since the meetings took place during the luncheon meals. B-198471, May 1, 1980, explained. This decision distinguishes B-198882, Mar. 25, 1981.

Matter of: Randall R. Pope and James L. Ryan—Meals at Headquarters Incident to Meetings, March 22, 1985:

This responds to a request from an authorized certifying officer of the National Park Service, Midwest Region, asking whether two employees may be reimbursed for luncheon meal expenses incurred while attending a Federal Executive Association meeting within the employees' duty station area. We conclude that the meals may not be reimbursed upon the vouchers as submitted.

It is the policy of the Midwest Region of the National Park Service for a Park Service representative to attend monthly luncheon meetings of the Omaha-Lincoln Federal Executive Association (FEA). The purpose of these meetings is to enable representatives of various Government agencies to meet and discuss issues of

mutual concern and interest. In May 1984, Mr. Randall Pope attended the FEA meeting in Millard, Nebraska, located within the corporate limits of Omaha, his official duty station. He submitted a claim for reimbursement that included $5.25 representing the cost of a meal served at the meeting. In June 1984, Mr. James Ryan, the Associate Regional Director, attended a meeting held in Omaha, also his official duty station, and submitted a claim for reimbursement of $6 for the cost of a meal.

The certifying officer asks whether these two employees may be reimbursed for their expenses in light of the apparent conflicting holdings in our decision in *Frank W. Kling*, B-198882, March 25, 1981, where reimbursement under similar circumstances was denied, and 38 Comp. Gen. 134 (1958), which allowed reimbursement.

As a general rule, an employee may not be paid a per diem allowance in lieu of subsistence at his permanent duty station. Federal Travel Regulations, para. 1-7.6a (Supp. 1, September 28, 1981), *incorp. by ref.* 41 C.F.R. § 101-7.003 (1982). We have consistently held that, absent specific statutory authority, the Government may not pay subsistence expenses or furnish free meals to civilian employees at their official duty stations. Our decision in *Frank W. Kling*, B-198882, *supra*, reflected this general rule. There, the heads of various law enforcement agencies in Detroit, Michigan, attended monthly luncheon meetings to maintain and facilitate open communication within the law enforcement community. We held that an IRS employee could not be reimbursed for these luncheons, even though they benefitted his agency, since they were held at his official duty station thus clearly in contravention of Federal Travel Regulations (FTR), para. 1-7.6a. *See also*, 53 Comp. Gen. 457 (1974).

Reimbursement is available if an employee pays a fee to attend a conference at his official duty station and a meal is provided at no additional or separable cost. This was our holding in 38 Comp. Gen. 134 (1958). Specific authority for such reimbursements is found in 5 U.S.C. § 4110 (1982) which provides:

> Appropriations available to an agency for travel expenses are available for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.

Reimbursement under 5 U.S.C. § 4110 has been allowed in limited circumstances where the only charge made in connection with a meeting was for meals. In B-198471, May 1, 1980, reimbursement for meals only was authorized for employees attending the 3-day 1980 annual meeting of the President's Committee on Employment of the Handicapped. A luncheon and two banquets were integral parts of the annual meeting. The decision explained that where meals are not included in a registration fee, reimbursement is appropriate only if (1) the meals are incidental to the meeting. (2) attendance of the employee at the meals is necessary to full partici-

pation in the business of the meeting; and (3) the employee was not free to partake of his meals elsewhere without being absent from essential formal discussions, lectures or speeches concerning the purpose of the meeting.

What distinguishes the above case from the *Kling* case, *supra,* and from the case at hand is that the President's annual meeting was a 3-day affair with meals clearly incidental to the overall meeting, while in the other cases the only meetings which took place were the ones which took place during a luncheon meal. It is therefore difficult to determine whether the meals were incidental to the meetings or whether the meetings were incidental to the meals. In order to meet the three part test, a meal must be part of a formal meeting or conference that includes not only functions such as speeches or business carried out during a seating at a meal but also includes substantial functions that take place separate from the meal. In any event, we are unwilling to conclude that a meeting which lasts no longer than the meal during which it is conducted qualifies for reimbursement. We therefore conclude that reimbursement for meal expenses in this case should not be allowed even though participation at the meetings was clearly beneficial to the employing agency.

[B-207731]

Fees—User Fees—Recovery of Cost—By Government Employees Requirement

Department of Agriculture proposal to permit contractor employees to collect recreation fees in national forests is permissible. General Accounting Office decision in 62 Comp. Gen. 339 (1982), holding that a similar proposal involving volunteers was not permissible, is not pertinent in view of current plan to use contractor employees. Further, in view of a recent change in Office of Management and Budget Circular No. A-76, the collection of established fees should not be considered to be an inherent governmental function, and therefore need not be performed only by government employees. This decision distinguishes 62 Comp. Gen. 339.

Matter of: Collection of User Fees in National Forests by Contractor Personnel, March 25, 1985:

This decision is in response to a request from the Secretary of Agriculture for reconsideration of our decision in 62 Comp. Gen. 339 (B-207731, April 12, 1983). In that decision we declined to approve the proposal of the Department of Agriculture to permit individuals who are designated for public volunteer service pursuant to the Volunteers in the National Forests Act of 1972 to collect camping fees and similar types of recreation user fees. The Department now contemplates having the fees collected by contractor employees, rather than by volunteers. Based on that change, and a recent change in Office of Management and Budget (OMB) Circular No. A-76, we conclude that the Department of Agriculture proposal, as now contemplated, would be permissible.

In 62 Comp. Gen. 339 (1982), we reviewed a Department of Agriculture proposal to use public volunteers to collect recreation user fees in national forests. The volunteers were to be retained pursuant to the Volunteers in the National Forests Act of 1972, which authorizes the use of volunteers "for or in aid of interpretive functions, visitor services, conservation measures and development, or other activities in and related to areas administered by the Secretary [of Agriculture] through the Forest Service." 16 U.S.C. § 558a (1982). The volunteers were to periodically empty campground collection boxes, in which campers were expected to deposit their payments.

We concluded that the volunteer collection plan proposed by the Department of Agriculture was not permissible for three reasons: (1) there was no indication that Congress intended that volunteers under the Volunteers in the National Forests Act would perform such a function, (2) "fee collection is an inherent governmental function which may be performed only by Government employees," and (3) it would have been difficult or impossible to obtain necessary surety bonds to protect the Government against loss. 62 Comp. Gen. at 342-43.

We conclude that our analysis in 62 Comp. Gen. 339 is not applicable in the instant case in view of a critical change in the Department of Agriculture's proposal and a change in an OMB Circular and our interpretation of it.

Initially, we note that under the proposal as now contemplated, the fee collection will not be done by volunteers, but rather by contractor personnel. Accordingly, our first objection in 62 Comp. Gen. 339, the use of volunteers for purposes not contemplated by the Congress, is no longer relevant.

Second, we no longer find it necessary to reach the conclusion that "fee collection is an inherent governmental function which may be performed only by Government employees." 62 Comp. Gen. at 342. That conclusion was based in large part on our reading of OMB Circular No. A-76, March 29, 1972, entitled, "Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government." Circular No. A-76 included "monetary transactions and entitlements" within a group of functions which could not be contracted out "due to a special relationship in executing governmental responsibilities." We concurred in the conclusion of the Department of Agriculture legal staff that "the contracting out of the collection function was thus precluded, and that, by analogy, 'the delegation of such function outside the Department [of Agriculture] to a non-employee would appear to be inappropriate.'" 62 Comp. Gen. at 340-41.

However, subsequent to our decision in 62 Comp. Gen. 339, the Office of Management and Budget revised Circular No. A-76 so that it now defines a Government function as:

* * * a function which is so intimately related to the public interest as to mandate performance by Government employees * * * [including] those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. * * * OMB Circular No. A-76, August 4, 1983.

In B-215326, December 14, 1984, 64 Comp. Gen. 149, a case involving a General Services Administration proposal to sell used government vehicles on consignment through private auction houses, we interpreted revised Circular No. A-76. We concluded:

Although "monetary transactions and entitlements" are still defined as inherently governmental under the revised definition, it appears in the context of this case that only the setting of a minimum fee should be viewed as an inherently governmental function because it requires discretion and judgment. The administrative task of collection, however, need not be so considered, in our view. * * *

Here, the contractor personnel will merely be performing the "administrative task of collection" and will not be involved in setting fees or any other discretionary governmental function. Accordingly, our analysis in 62 Comp. Gen. 339 is no longer pertinent, and we conclude that the collection of established fees would not constitute an inherent governmental function which could not properly be delegated to contractor personnel.

Finally, we conclude that the proposal of the Department of Agriculture would provide sufficient protection of the Government's interests. The Department has recognized that "a system of internal controls, guarantees, and adequate safekeeping facilities * * * would be required." We recommend that that system include bonding of the contractor employees. Because profit-making contractors, rather than volunteers, will be involved in the instant case, we do not question the availability of adequate bonding in these circumstances. B-215326, December 14, 1984, 64 Comp. Gen. 149.

[B-214551]

Appropriations—Housing and Urban Development Department—Obligation

The Department of Housing and Urban Development should treat the amounts it obligates by letter-of-intent for Public Housing Authorities' operating subsidies under subsection 9(a) of the United States Housing Act of 1937 (42 U.S.C. 1437g(a) (1982) as estimates subject to later adjustments on the basis of its regulatory criteria when all the necessary information is available.

Appropriations—Housing and Urban Development Department—Obligation

Amounts obligated on an estimated basis during one fiscal year which are later found to be in excess of a Public Housing Authority's operating subsidy eligibility under 42 U.S.C. 1437g(a) (1982) and under 24 C.F.R. part 990 must be deobligated and returned to the Treasury at the close of the fiscal year. It is a violation of the *bona fide* need rule, 31 U.S.C. 1502, to send the funds instead to the Authority's operating reserve to offset the amount of subsidy needed for the following fiscal year.

Matter of: HUD Obligation of Public Housing Authority Operating Subsidy Funds by Letters-of-Intent, March 25, 1985:

The Inspector General, Department of Housing and Urban Development (HUD), has asked for a decision on the legality of HUD's interpretation of its authority in obligating annual appropriations to pay operating subsidies to State Public Housing Authorities for low-income housing projects. He is particularly concerned because when HUD is unable to determine the exact amount payable to the Authorities before the end of the fiscal year, it obligates an estimated amount by means of a letter-of-intent, but then treats it as a firm obligation rather than as an estimate subject to adjustment. As a result, if the exact amount to which the State Authority is entitled is later determined to be less than the amount obligated, the Authority is permitted to retain the excess funds in an operating reserve in order to reduce its subsidy needs in subsequent years.

We agree with the Inspector General that HUD should treat the amounts obligated by means of letters-of-intent as estimates, which should be adjusted appropriately as soon as HUD has determined the exact amount of its subsidy liabilities for the fiscal year in question.

Except when exercising its limited authority to redistribute excess funds on an emergency basis to specific lower income housing projects, pursuant to 42 U.S.C. § 1437g(d), HUD should deobligate amounts which exceed its liability, and return the surplus unobligated budget authority to the Treasury at the close of the fiscal year, pursuant to 31 U.S.C. § 1552(a)(2)(1982).

BACKGROUND

Under the United States Housing Act of 1937 (Act), as amended, 42 U.S.C. §§ 1437 *et seq.* (1982), the Secretary of HUD is authorized to provide various forms of financial assistance to States (or political subdivisions of States) to develop and operate low income housing projects. An assistance commitment is made, subject to the availability of funds, in an annual contribution contract entered into between HUD and a State Public Housing Authority.

Section 9 of the Act, as amended, 42 U.S.C. § 1437g (1982), authorizes the Secretary of HUD to make annual contributions specifically for the operation of lower income housing projects. The statute provides that:

> * * * The contributions payable annually under this section shall not exceed the amounts which the Secretary determines are required (A) to assure the lower income character of the projects involved, (B) to achieve and maintain adequate operating services and reserve funds. * * *

Standards for determining the proper amount of contributions are set forth in regulations, known as the Performance Funding

System, 24 C.F.R. part 990. The regulations include a formula based on the amounts needed to operate a "prototype well-managed project." 42 U.S.C. § 1437g(a); 24 C.F.R. 990.101(c). The subsidy amount is generally the difference between the State Authority's projected expenses and projected operating income for the year. The Authority is required to submit this information in the form of an annual operating budget for each project covered by its annual contribution contract, which must then be approved by HUD.

In some cases, however, HUD has to obligate appropriations for operating subsidies on the basis of estimates rather than approved operating budgets. This occurs primarily in the case of Authorities having fiscal years which coincide with the Federal Government's fiscal year and which have not had time to submit approvable operating budgets. In such cases, HUD issues a document known as a letter-of-intent which contains an estimate of its total subsidy obligation on the basis of which it records the obligation.

It was a GAO decision—or rather, a misinterpretation of that decision—which gave rise to the practices of which the Inspector General now complains. In our decision on HUD's Obligating No Year Contract Authority, B-197274, February 16, 1982, we held that HUD's use of *reservation* and *notification* letters under various housing assistance programs under *section 8* of the 1937 Act, as amended, 42 U.S.C. § 1437f (1982), to determine when no-year contract authority was considered obligated for purposes of reporting to the Congress, was inappropriate. At the time the reservation and notification letters were issued, HUD had taken no action imposing a legal liability upon the Government which could result in the expenditure of funds at a later time or which could mature into a legal liability of the Government by virtue of actions on the part of other parties beyond the control of the Government. Unlike the section 9 program we have been discussing, HUD had not entered into an annual contribution contract or any other firm commitment prior to issuing the letters. Therefore, no "obligation" as such had been incurred. The recording of obligations on the basis of such preliminary documents presented a misleading picture to the Congress as to the need for funds for new projects.

Following our decision, several HUD Regional Accounting Divisions stopped disbursing *section 9* subsidy payments based upon letters-of-intent because they were concerned that our decision on the *section 8* program prohibited such payments. In response, relying upon advice obtained from HUD's Office of General Counsel, the Assistant Secretary for Housing issued a memorandum on April 20 1982, addressing this concern.

Applying the test contained in our decision of February 16, 1982, HUD's Deputy Assistant Secretary concluded that: "letters-of-intent constitute valid documents for obligating and disbursing operating subsidies, *but only if they do not condition the obligation of funds on future discretionary actions by the Department (e.g. future*

downward adjustments)." The Deputy Assistant Secretary concluded that subsequent adjustments to estimates based on the HUD regulations, established conditions not "beyond the control of the United States" and therefore, the letters-of-intent could not be used to obligate appropriations if they contained that condition. The result was that the estimated amounts contained in the letters-of-intent were transformed from estimates into fixed obligations, not subject to deobligation.

HUD was then confronted with a dilemma. It could not deobligate any excess funds obligated but neither could it disburse them, because of the requirement in 42 U.S.C. § 1437g that annual contributions may not exceed the amount determined to be necessary. It resolved the matter by sending any excess to the appropriate State Authority's operating reserve fund. The Authority, in such cases, would use the funds to offset operating expenses in subsequent fiscal years, thus reducing the amount of HUD's subsidy obligation for those years. The net effect was an increase in the amount of obligation authority available to HUD in a subsequent fiscal year by use of an amount appropriated in a prior fiscal year.

This practice was approved in a legal opinion issued by HUD's General Counsel on June 17, 1983. The Inspector General included a copy of the opinion with his request and we have considered it in formulating this opinion. HUD's Office of General Counsel has indicated informally that the legal opinion continues to represent the views of that Office.

DISCUSSION

1. Adjustment of Estimated Amounts

HUD should consider the amounts which it obligates by letters-of-intent for section 9 operating subsidies to be estimates subject to adjustment. The letters-of-intent amendments which HUD made following our February 1982 decision were, as indicated earlier, based on a misinterpretation of our February 1982 decision.

The 1982 opinion questioned whether reservation and notification letters used in four housing programs under section 8 of the Act, as amended, 42 U.S.C. § 1437f (1982) constituted obligating documents under 31 U.S.C. § 1501 (then 31 U.S.C. § 200). We found in the case of each of the four programs that the letters could not obligate no-year budget authority because they did not authorize applicants to incur any costs for which HUD would be liable for payment prior to the final approval of an application for assistance and before entering into a contribution contract. Thus the letters-of-intent could not bind HUD or "mature into a legal liability by virtue of actions on the part of the other party (the applicants) beyond the control of the United States."

In contrast, the section 9 operating subsidy letters-of-intent are issued *after* HUD has entered into annual contributions contracts

which make the United States liable for subsidy payments in some amount, even though the exact amount cannot be determined until the operating budget has been reviewed and approved.

A major purpose of the recording statute, 31 U.S.C. § 1501, is to provide to the Congress a reasonably precise picture of an agency's financial requirements so that it can assess more accurately that agency's appropriation needs for the upcoming fiscal year in question. A rule which prohibits an agency from recording an obligation if its underlying obligation is subject to a condition *precedent,* the satisfaction of which is in the Government's control, results in a more accurate picture of an agency's needs being presented to the Congress because unless and until the agency acts to satisfy the condition, it really has no need for funds. This was the situation we dealt with in our 1982 decision.

In the instant case, the approval of the operating budget is a condition *subsequent,* which merely permits HUD to adjust its estimate on the basis of its new information. To say that HUD should not record binding liabilities as obligations merely because HUD cannot determine the exact amount of its liability under its regulations until a later time runs contrary to the recording statute's purposes of having obligations be accurate reflections of agency financial requirements.

HUD is required to adjust the amount of its estimated operating subsidy for the section 9 program up or down, as appropriate, once it has approved the operating budget. Any suggestion in the letters-of-intent that the estimated amount is fixed and not subject to later deobligation, if excessive, is invalid.

2. Adding Excess Amounts to Operating Reserves

Generally, a fiscal year appropriation may be obligated only to meet a legitimate, or *bona fide,* need arising in the fiscal year for which the appropriation was made. 31 U.S.C. § 1502. *See* 58 Comp. Gen. 471, 473 (1979); 54 Comp. Gen. 962, 966 (1975); B-183184, May 30, 1975. While actual expenditures of funds previously obligated may take place after the close of the fiscal year, the need for which they are being expended must have arisen prior to the close of the fiscal year.

The Congress makes an annual appropriation for payment of section 9 contributions to assist the Authorities in meeting that year's deficits in operating revenue caused by the low-income nature of the project. Thus, when HUD adds the excess over-obligated letter-of-intent funds to an Authority's operating reserve so that its subsidy needs for the next fiscal year are reduced, it is not using such funds to meet a legitimate need of the fiscal year for which they were appropriated. Rather, the excess funds are being used to meet a need arising during a subsequent fiscal year to the one for which

the appropriation is intended to apply. Accordingly, HUD was violating the *bona fide* need rule in the absence of specific authority to so use the excess obligation.

We are aware of only one instance in which HUD received specific authority to use its annual section 9 appropriation for operating subsidies payable in fiscal year 1983. HUD's fiscal year 1983 appropriation act provides:

> * * * That funds heretofore provided under this heading in Public Law 97-101 shall remain available for obligation for the fiscal year ending September 30, 1983, and shall be used by the Secretary for fiscal year 1983, requirements in accordance with section 9(a), notwithstanding section 9(d) of the United States Housing Act of 1937, as amended. Pub. L. No. 97-272, Sept. 30, 1982, 96 Stat. 1161.

As far as we are aware, this exceptional authority was not repeated in any subsequent fiscal year appropriation acts. Therefore, HUD should discontinue the practice of adding over-obligations to the operating reserves of the State Authorities immediately, unless it is able to obtain comparable legislative carry-over authority.

[B-214716.4]

Leases—Negotiation—Evaluation of Offers Basis

Even though solicitation evaluation criteria could have been better written, the contracting agency did not act improperly where it used an annual basis for evaluating costs, because the solicitation stated that offers would be so evaluated and the selection made meets government's needs.

Leases—Negotiation—Changes, etc.—Award Basis—Notice Requirement

Estimate of overtime usage developed for purpose of evaluating cost of competing offers could be revised without advising offerors of the change, and without allowing them to amend their proposals, because the estimate was not stated in the solicitation and offerors were neither aware of nor entitled to rely on the original, defective estimate.

Contractors—Responsibility—Determination—Review by GAO—Affirmative Finding Accepted

Whether an awardee under a contract to lease real property will be able to deliver title and occupancy of the premises is a matter of responsibility that General Accounting Office will not consider absent evidence of possible fraud by contracting officials or the existence of definitive responsibility criteria in the solication.

Matter of: Bullock Associates Architects, Planners, Inc., March 25, 1985:

Bullock Associates Architects, Planners, Inc. protests the award of a lease to Magnolia-Boyd Corporation under Veterans Administration (VA) solicitation for offers (SFO) VACO83-210 for outpatient clinic space in Pensacola, Florida. According to Bullock, VA's decision is the result of an improper application of the SFO evaluation criteria. Bullock asserts that its proposal is both the least costly and most favorable to the government. Further, Bullock charges that Magnolia-Boyd's proposal is a nullity because, Bullock

says, Magnolia-Boyd does not have title to the property offered. We deny the protest.

Subsequent to filing this protest, Bullock filed suit in the United States District for the District of Columbia. We consider the protest in light of the indication in a January 4, 1985 order, transmitted to our Office by the protester on February 15, that the court desires our opinion in this matter.[1] See, e.g., *Applicators, Inc.*, B-215035, June 21, 1984, 84-1 CPD ¶ 656.

This procurement was the subject of our decision, *Magnolia-Boyd Corporation, et al.*, B-214716 *et al.*, Oct. 5, 1984, 84-2 CPD ¶ 388, where we substained a protest filed by Magnolia-Boyd of the proposed award of a lease to Bullock. Magnolia-Boyd contented that an initial VA selection of Bullock was improper because VA had not applied the SFO evaluation criteria properly and had incorrectly evaluated total rental price. We sustained that firm's protest because we concluded that VA had improperly considered certain overtime charges. Had these charges been considered correctly, we found, VA would have concluded that Magnolia-Boyd submitted the lowest cost offer and that Magnolia-Boyd was in line for award. We recommended that VA correct its evaluation of proposals and make an appropriate award.[2]

As indicated in our prior decision, VA evaluated offers by taking four cost factors into account:

1. Rent;
2. The cost of services included in rent but subject to an annual adjustment based on the consumer price index;
3. The cost of government provided services; and
4. The cost of any lump-sum payment for preparing the premises for occupancy.

VA calculated the present value of these costs on the basis of annual cost per square foot of usable space. The methodology for doing so was set out in the SFO and is explained in our prior decision.

In the current protest, Bullock contends its proposal would have been evaluated as low had VA applied the discount factors as discussed in our prior decision. Bullock charges that VA improperly favored Magnolia-Boyd by overstating the government's cost of pro-

[1] In addition to a copy of the court's order, Bullock forwarded a list of 35 enumerated questions, the answer to which Bullock suggested would be of interest to the court. There is no indication in the court's order that this is the court's desire, or that the court is even aware of Bullock's list, and we, therefore, decline to respond to the questions Bullock posed.

[2] Concerning Bullock's role in the prior case, we point out that Bullock was expressly invited by our Office to respond to the agency report and to attend the conference conducted in that case. Bullock elected not to participate. For that reason, Bullock is not a party entitled to request reconsideration of our decision under 4 C.F.R. § 21.9 (1984). We have considered Bullock's present protest insofar as it challenges VA's actions subsequent to our prior decision, but we stand on our prior decision to the extent Bullock may be indirectly seeking its reconsideration.

viding services and utilities charged to Bullock and the VA improperly reduced the amount of overtime usage assumed in accounting for off-hours charges for heating and air conditioning of the building. Bullock also argues that its proposal should have been selected because it was otherwise more advantageous to the government than was Magnolia-Boyd's proposal.

We disagree.

Bullock's first line of argument, that VA disregarded our decision in reevaluating offers, focuses on footnote 2 of our decision. In the body of that decision, we stated that we calculated the present value of payments on an annual basis because, as the decision indicates, we construed the SFO as providing for such an evaluation. In footnote 2, we observed that the SFO price evaluation clause was inconsistent with the SFO provisions concerning the payment of rent because rent was due on a monthly basis.

Bullock maintains that VA should have reevaluated offers by using discount factors based on monthly payments. We think, however, that VA acted properly in using the annual basis and that our reasons for rejecting the monthly basis approach in our original decision remain sound. It is well settled that offers must be evaluated on the basis stated in the solicitation. *Everhart Appraisal, Inc.*, B-213369, May 1, 1984, 84-2 CPD ¶ 485. In this instance, the SFO clearly provided that rent would be discounted on an annual basis, Magnolia-Boyd's selection will meet VA's needs and, as we observed in our prior decision, the time for protesting the apparent discrepancy between the SFO evaluation and payment provision had long since passed.[3]

Concerning Bullock's contention that VA overstated the government's cost of providing services and utilities for the property it proposed, we point out that VA evaluated those costs by using data Bullock submitted with its offer. Bullock cannot fault VA for its own errors if VA was unaware of them; moreover, if Bullock's cost data was overstated, Bullock has not explained where the error is.

Likewise, Bullock has not explained why it believes VA's action in reducing its estimate of overtime usage was improper. Bullock only says it was injured because, had it known of the reduced requirement, it might have reduced its prices on other items.

We agree with Bullock that, had the SFO indicated that VA would calculate overtime charges on the basis of 10 hours per week, VA could not have reduced the number of hours on which it based its calculation without advising offerors of the change. *Everhart Appraisal Services Inc., supra.* However, the SFO did not indi-

[3] We also noted in our prior decision that the difference between discounting on an annual or monthly basis appeared to have no significant impact on our decision, a fact which our examination of VA's revised pricing indicates is still true.

cate the number of hours VA would use and there is no indication in the record that offerors were aware of the original estimate.

In the circumstances, no offeror had any right to rely on the original 10-hour figure, and since the record indicates VA subsequently determined that 10 hours per week exceeded its need, we can see no basis for legal objection to its decision to correct its analysis so the final evaluation would accurately reflect its actual requirements.

We also reject Bullock's assertion that its offer should have been accepted because it was the most advantageous once technical considerations are taken into account. As our prior decision indicates, there appears to have been some confusion between offerors concerning the role that factors other than price would play in the selection of an awardee. However, this confusion was largely resolved by VA in the cover letter transmitted with SFO, which reads:

> As stated in the solicitation, price per net square foot will be the primary determining factor in the award of this lease. The basic effect of the Award Factors will be that where offers are received that are substantially equal in price, those offers which satisfy all the award factors will be favored over those that do not.

In Bullock's protest submissions to our Office, the protester urges that this language removes all doubt concerning the evaluation of technical factors; Bullock urges that it should receive the contract based on factors other than price because, it says, the offers received were substantially equal in price. According to Bullock an *in camera* examination of the record by our Office should confirm this.

Our examination of the record, however, does not support Bullock's position. Our original decision was based on calculations that showed a relatively small difference in the evaluated price of the Magnolia-Boyd and Bullock proposals. Upon reexamining the data, VA determined that its allowance for overtime charges was excessive because it was based on an allocation of too many overtime hours. The effect of VA's reevaluation of overtime charges is an increase of approximately $4,400 per year in the evaluated price differential between the Bullock and Magnolia-Boyd proposals. In the circumstances, we see no basis for questioning VA's view, implicit in it's award decision, that offers were not substantially equal in price.

Finally, Bullock contends that Magnolia-Boyd's proposal is null and void because Magnolia-Boyd lacks the legal right to possess and develop the parcel of land offered to VA. Bullock also contends that the contracting officer was required to reject the Magnolia-Boyd offer because that firm cannot meet the occupancy date established in the solicitation.

Bullock has offered no evidence to support these assertions, which in any event, do not state a basis for protest. Whether an offeror will be able to deliver title and occupancy are matters con-

cerning its ability to fulfill the obligations it offered to assume, and thus, raises concerns that go to that firm's responsibility. VA's decision to proceed with award to Magnolia-Boyd imports an affirmative determination of responsibility, based largely on business judgment, which our Office will not question absent evidence of possible fraud on the part of contracting officials, or the existence of definitive responsibility criteria in the SFO. *Alan Scott Industries, et al.*, B-212703, *et al.*, Sept. 25, 1984, 84-2 CPD ¶ 349. No such circumstances are present here.

The protest is denied.

[B-214765]

Compensation—Premium Pay—Limitations on Payment

Civilian marine employees whose pay is set administratively under 5 U.S.C. 5348(a) (1982) are not subject to pay caps on their premium pay increases. The pay cap language does not apply to premium pay. In addition, the Court of Claims overturned one agency's attempt to limit such increases in fiscal years 1979 and 1980, and there is no evidence of subsequent legislative intent to overrule that decision. See *National Maritime Union v. United States*, 682 F.2d 944 (Ct. Cl. 1982).

Matter of: Crews of Vessels—Pay Limitation on Premium Pay, March 25, 1985:

ISSUE

The issue in this decision is whether the premium pay received by civilian marine employees (crews of vessels) is subject to certain pay limitations imposed by statute. We hold that the premium pay of these employees whose pay is set under 5 U.S.C. § 5348(a) (1982) is not subject to the pay caps imposed by statutes in recent fiscal years, for the reasons stated below.

BACKGROUND

This decision is in response to a request from Robert P. Gajdys, Chief, Personnel Division, National Oceanic and Atmospheric Administration (NOAA), concerning the overtime and premium pay received by NOAA wage marine employees. This decision is subject to our labor-management procedures contained in 4 C.F.R. Part 22 (1984), and in that regard we received comments on this question from two other federal agencies and five labor unions. Those comments are summarized below.

NOAA Question

The request from NOAA states that NOAA ships which are engaged in nautical surveys and oceanographic and biological research are manned by civilian employees whose rates of pay are fixed administratively pursuant to 5 U.S.C. § 5348(a) (1982). That statute provides that the pay of crews of vessels shall be fixed and

adjusted consistent with the public interest and in accordance with the prevailing rates and practices of the maritime industry.

The request states further that in fiscal years 1979 and 1980, NOAA capped the basic pay of its wage marine employees based on the determination that it would be inconsistent with the public interest to increase pay rates above the statutory pay caps imposed on most other federal employees. Although NOAA also capped overtime and premium pay in those years, that was held to be an abuse of discretion and was reversed in *National Maritime Union v. United States,* 682 F.2d 944 (Ct. Cl. 1982).

Since 1981, NOAA has applied the pay caps enacted by the Congress to the basic pay of its wage marine employees, but not to the overtime and premium pay of those employees. However, NOAA is aware of an opinion by the Office of General Counsel, Office of Personnel Management (OPM), to the effect that any premium pay received by wage marine employees that is calculated from basic pay is subject to the pay cap.

The request from NOAA states that NOAA and the Office of General Counsel, Department of Commerce, agree with OPM's opinion, but NOAA points out that the Military Sealift Command (MSC), Department of the Navy, does not agree with OPM opinion and does not apply the pay cap to the overtime and premium pay of MSC's wage marine employees. Since NOAA is reluctant to impose a pay cap unilaterally in view of prior court decisions overturning NOAA pay practices,[1] the agency asks our opinion whether the pay caps for fiscal years 1981 through 1983 apply to the overtime and premium pay received by wage marine employees and, if so, what action should be taken to reduce those overtime and premium pay rates.

OPM Opinion

The OPM opinion referred to by NOAA was contained in a letter dated December 2, 1983, to the Department of the Interior, concerning the application of the fiscal year 1983 pay cap to the pay of wage marine employees. The OPM opinion cited Public Laws 97-276, section 109, and 97-377, section 107,[2] which, in subsection (a) of the cited sections of each law, limited pay increases to prevailing rate employees and crews of vessels paid under 5 U.S.C. § 5348 to the pay increase granted General Schedule employees (4 percent). See also Federal Personnel Manual (FPM) Bulletin 532-47, November 18, 1982. The OPM letter next cites subsection (e) of the cited sections of both Public Laws which provides:

(e) For the purpose of administering any provision of law, rule, or regulation which provides premium pay, retirement, life insurance, or any other employee ben-

[1] *National Maritime Union v. United States,* cited above, and *Blaha v. United States,* 511 F.2d 1165 (Ct. Cl. 1975).

[2] Public Law 97-276, § 109, Stat. 1186, 1191-92, October 2, 1982; Public Law 97-377, § 107, 96 Stat. 1830, 1909-10, December 21, 1982.

efit, which requires any deduction or contribution, or which imposes any requirement or limitation, on the basis of a rate of salary or basic pay, the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay.

The OPM opinion, citing FPM Bulletin 532-47, states that where an agency administratively, by rule or regulation, adopts a pay practice under which premium pay is calculated from basic pay, the premium pay would be subject to the same 4 percent pay limitation. Since the pay of crews of vessels is set administratively by the employing agency [3] and since the agency would adopt a pay practice through a rule or regulation, the OPM opinion concludes that the pay cap applies to any premium pay calculated from the basic pay of wage marine employees.

The OPM opinion takes notice of the decision in *National Maritime Union*, cited above, where the court overturned NOAA's action in fiscal years 1979 and 1980 to limit increases in premium pay for wage marine employees to that amount provided to other prevailing wage employees. The OPM opinion distinguishes the court's decision in that case since the limitation did not depend on statutory pay caps but rather was an administrative decision by NOAA which was in conflict with the pay practices of MSC.

Interior Views

In response to our request for comments, Morris A. Simms, Director of Personnel, Department of the Interior, took notice of the OPM opinion, referred to above, and agrees that overtime and premium pay for fiscal years 1981 through 1983 should be capped. The letter also points out Interior's past practice to cap premium pay of the "relatively small number of vessel employees" employed by Interior.

DOD Views

We also received comments from the Deputy Assistant Secretary of Defense (Civilian Personnel Policy and Requirements) which state that the ruling in the *National Maritime Union* decision governs this question and that new legislation enacted subsequent to that considered by the court has not materially altered the court's decision.

The letter states that DOD concluded in 1979 that the then-applicable pay cap[4] applied only to basic pay. See also the Presidential Memorandum dated January 4, 1979, concerning the application of a 5.5 percent limitation on federal pay which is set administratively. Since then, DOD has capped only basic pay and not overtime and premium pay for fiscal years 1980 through 1983.

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[3] *International Organization of Masters, Mates and Pilots v. Brown*, 698 F. 2d 536 (D.C. Cir. 1983).

[4] Public Law 95-429, § 614(a), 92 Stat. 1001, 1018-19, October 10, 1978.

The letter from DOD states further that OPM's opinion conflicts with the decision in *National Maritime Union* where the court overturned NOAA's decision to cap premium and overtime pay rates in fiscal years 1979 and 1980. In addition, DOD points out that the language of the pay caps in Public Laws 97-276 and 97-377 (fiscal year 1983) can be traced back to Public Law 95-429 (fiscal year 1979) when DOD adopted its policy which was later reviewed by the court in the *National Maritime Union* case. The letter from DOD concludes that MSC's interpretation of premium pay for mariners is legal, reasonable, and in accord with the public interest.

Union Comments

In accordance with our labor-management procedures contained in 4 C.F.R. Part 22 (1984), we requested and received comments from five unions representing wage marine employees.

The International Organization of Masters, Mates and Pilots argues that capping premium pay would depart from the intent of the law as well as from the court's ruling in the *National Maritime Union* case. We received similar comments from the Marine Staff Officers and the Seafarers International Union.

The Radio Officers Union, D-3, argues that there has been no change in the language of the pay caps since fiscal year 1979 which would support a theory that the Congress intended to overrule the court's decision in the *National Maritime Union* case. Furthermore, the union contends that premium pay in the maritime industry is not subject to a simple calculation method as described in the pay legislation, citing Appendix One of the decision in *Blaha.*[5]

Finally, District No. 1, Pacific Coast District, Marine Engineers' Beneficial Association, points out that the "*vast* majority of Federal sector mariners" are employed by MSC. The union argues that application of the pay cap legislation is arbitrary and that there is no definitive interpretation of subsection (e) (quoted earlier) as it relates to premium pay. Finally, the union argues that premium pay for civilian mariners is not "calculated from base pay" but rather is based on prevailing premium rates paid in the maritime industry as required by 5 U.S.C. § 5348.

OPINION

In order to place the issues raised here in perspective, we must go back to the situation presented in *National Maritime Union,* cited above. That case addressed pay rates for federal mariners during fiscal years 1979 and 1980. For those two fiscal years, the basic pay of all federal mariners subject to 5 U.S.C. § 5348(a) was limited, in accordance with a presidential memorandum, to the

[5] *Blaha,* cited above in Footnote 1.

rates allowed under the statutory pay caps applicable to other federal employees. While the 1979 and 1980 pay cap language did not refer to 5 U.S.C. § 5348(a), the court held that the discretion allowed in fixing the mariners' pay under section 5348(a) was sufficiently broad to support capping their basic pay by administrative action.

The court then turned to the overtime and premium pay rates for the mariners for fiscal years 1979 and 1980. Unlike the treatment of basic pay which was capped for all mariners, federal agencies differed here in that NOAA extended the pay caps to overtime and premium pay rates but MSC did not. The court described the Government's position in this regard as follows:

> Defendant [the Government] responds with a general theory for the application of pay ceilings to overtime and premium pay. Defendant suggests that the pay ceilings apply to base pay and, by implication, to all pay calculated from base pay. Thus, the fiscal 1979 and 1980 pay caps applied to overtime pay, which is calculated from base pay, but not to premium pay, which is set independently, based on prevailing rates. Defendant therefore confesses judgment for premium pay not paid by NOAA and reserves the right to make a counterclaim for overtime pay improperly paid by MSC. 682 F.2d at 955.

The court accepted the Government's confession of judgment as to NOAA's action in capping premium pay. It went on to hold that whatever discretion the Government might have possessed to cap overtime pay rates in 1979 and 1980 was abused since NOAA and MSC had acted inconsistently. Therefore, the court overturned NOAA's action in capping overtime pay as well. *Id.* at 955–56.

Against this background we turn to OPM's opinion "that any premium pay received by these employees [the mariners] that is calculated from basic pay is subject to the pay cap." The OPM opinion recognizes the argument that the *National Maritime Union* case "could be pertinent," but responds:

> * * * as we indicated above, however, in fiscal year 1983, both basic pay and premium pay calculated [from] basic pay is specifically limited by statute. The holding in *National Maritime Union of America, supra,* therefore would not be controlling. * * *

We have two fundamental problems with the OPM analysis. First, we find no change in the pay cap language subsequent to *National Maritime Union* that would affect the holding of the case with respect to premium pay. It is true that the statutory pay cap language for fiscal year 1981 and thereafter expressly covers the basic pay of federal mariners fixed pursuant to 5 U.S.C. § 5348(a). However, the court in *National Maritime Union* affirmed the Government's action in capping 1979 and 1980 basic pay for the mariners through administrative action, yet concluded at the same time that premium pay for the mariners was not capped. Thus, we see no reason why the fact that basic pay for the mariners is now capped by statute rather than by administrative action would be material to the holding in *National Maritime Union* as it applies to

premium pay. If anything, Congress' action in expressly covering the mariners' basic pay in the pay cap language but including no comparable language on premium pay tends to reinforce the conclusion that premium pay is not capped.

The only other pay cap language referred to by OPM is subsection (e), quoted in full previously, which states in relevant part:

> (e) For the purpose of administering any provision of law, rule, or regulation which provides premium pay * * * on the basis of a rate of salary for basic pay, the rate of salary or basic pay payable after the application of this section shall be treated as the rate of salary or basic pay.

Essentially the same language was included in the 1979 and 1980 pay cap statutes that were before the court in *National Maritime Union.* Thus, there is nothing new in this language that would change the impact of *National Maritime Union.*[6] While the quoted language was not specifically addressed in the *National Maritime Union* case, this probably is because the language seems to have little relevance to the issue of whether premium pay is capped. By its plain terms, the quoted language provides only that when premium pay is calculated from a rate of basic pay which is capped, the capped basic rate, as opposed to the basic rate that would have applied absent the cap, shall be used for the calculation. This language has no application whatever to premium pay which is not calculated from basic pay. And even if premium pay is calculated from basic pay, the language affects only the basic pay component of the calculation; it does not limit either the aggregate amount of premium pay that can be received or the percentage rate used to calculate premium pay from basic pay.

We have a second fundamental problem with the OPM opinion. The opinion asserts only that premium pay is capped when it is "calculated from basic pay." However, as discussed previously, the Government in *National Maritime Union* conceded that premium pay was not subject to the pay cap because it was not, in fact, calculated from basic pay but was "set independently, based on prevailing rates." The OPM opinion does not suggest that the method or methods used to calculate premium pay for federal mariners have changed since the *National Maritime Union* case. On the contrary, we have been advised informally that premium pay calculation practices remain as they were at the time of *National Maritime Union.* Thus, it is our understanding that premium pay rates generally are established and expressed as dollar amounts reflecting prevailing rates, rather than as a percentage of basic pay, *i.e.,* 1½ times base pay.

In view of this, it is unclear to us what, if any, premium pay would be reached by the OPM opinion even if the *National Maritime Union* case did not exist. In any event, for all of the reasons

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[6] See Public Law 95-429, footnote 4, *supra,* § 614(b), 92 Stat. 1018; Public Law 96-74, § 613(a), 93 Stat. 559, 576, September 29, 1979.

given above, it appears to us that the *National Maritime Union* case remains fully controlling with regard to the premium pay of mariners fixed under 5 U.S.C. § 5348.

Finally, we note that while the Government in *National Maritime Union* treated "premium pay" and "overtime pay" as two different categories of pay calculated through different means, the submission to us in the present case characterizes "overtime pay" as one form of "premium pay." The OPM opinion refers only to "premium pay" without elaboration on whether it uses this term to include or exclude "overtime pay." We recognize that there may be categories of "overtime pay" for mariners, perhaps occasionally referred to as "premium pay," in which the rate is established as a percentage of basic pay. We also recognize that the court in *National Maritime Union* may have left the door open for the Government to exercise its discretion to cap such overtime pay administratively if done prospectively and uniformly by all agencies. However, this is not the case now. Therefore, we find no basis to conclude that any "overtime" rates or "premium" pay rates for federal mariners are currently subject to the pay cap.

Accordingly, we hold that the overtime and premium pay increases granted to civilian marine employees under 5 U.S.C. § 5348(a) are not subject to the pay cap limitations.

[B-215281.3 & .4]

Bids—Invitation for Bids—Cancellation—After Bid Opening—Compelling Reasons Only

Agency did not have a compelling reason to cancel an invitation for bids and resolicit, and a protest requesting reinstatement of the IFB is sustained where, even though the bidding schedule did not enumerate all of the tasks comprising the agency's needs, the remainder of the IFB and the attached standard specification did fully enumerate these tasks; award to the low responsive bidder based on such a clear statement of the work required would meet the agency's actual needs and would not be prejudicial to other bidders.

Bids—Responsiveness—Pricing Response—Ambiguous

An ambiguity as to the low bidder's intended price does not render the bid nonresponsive or otherwise unacceptable; where the bid would be low by a significant margin under the least favorable interpretation, the intended price can be clarified after bid opening.

Contracts—Protests—Moot, Academic, etc. Questions—Solicitation Cancelled

A protest that specifications in a resolicitation are inadequate is dismissed as academic where award is recommended under the original solicitation.

Matter of: Energy Maintenance Corporation; Turbine Engine Services Corporation, March 25, 1985:

Energy Maintenance Corporation (EMC) protests the United States Coast Guard's cancellation of invitation for bids (IFB) No.

DTCG40-84-B-0173 (hereinafter IFB 0173) and the resolicitation of the requirement under IFB No. DTCG40-84-B-0281. EMC seeks award under the original solicitation. Turbine Engine Services Corp. (Turbine) maintains that the specifications in the new IFB are inadequate and ambiguous in several respects.

We sustain EMC's protest and dismiss Turbine's protest as academic.

IFB 0173 covered a Coast Guard requirement for overhauling gas turbine generator engines used in Coast Guard vessels, and included Standard Repair Specification No. 2630 which called for a major shop inspection, repair, reassembly, testing, and other tasks in performing the overhaul. The bidding schedule in the solicitation called for 2 separate prices: one price for a definite item entitled simply "Gas Generator Major Shop Inspection," but intended by the Coast Guard to refer to all of the tasks enumerated in the standard specification; and one price for an indefinite item—the replacement parts which might be used in performing the overhauls (the IFB also included a list of parts, each to be priced individually). Award was to be based on the lowest total price for the 2 items. The Coast Guard received the following responsive bids:

	Definite item	Indefinite item	Total
EMC	$20,000.00	$75,532.80	$95,532.80
Gas Turbine Corp	38,000.00	87,015.00	125,015.00
Airwork Corp.	29,000.00	141,729.00	170,729.00
Turbo Power and Marine Systems, Inc	48,900.00	313,933.09	362,833.09
Aviall	99,157.00	342,737.00	441,894.00

Turbine's bid was rejected as nonresponsive.

Following bid opening, the Coast Guard determined that the IFB was ambiguous and should be canceled based on its suspicion that bidders had been confused as to what tasks were encompassed by the term "Gas Generator Major Shop Inspection." The wide disparity in the definite item bid prices led the Coast Guard to suspect that, notwithstanding the clear enumeration of all the required overhaul tasks in the standard specification, different bidders may have read the term "Gas Generator Major Shop Inspection" as requiring performance of different combinations of the enumerated tasks. The Coast Guard believed the fact that Airwork Corporation (Airwork), the firm which ordinarily performs EMC's major shop inspection work, bid $9,000 more than EMC on the definite item further supported its suspicion that bidders were confused by the

schedule. As a result of this perceived ambiguity, the Coast Guard was unsure whether an award based on the original IFB would meet the government's actual needs, and thus canceled the IFB and issued a new solicitation with all of the overhaul tasks from the standard specification now specifically listed under the definite item.

EMC maintains that since the specification attached to the solicitation fully apprised bidders of the work to be performed, the IFB, read as a whole, was not ambiguous. EMC asserts that its bid was based on all tasks described in the specification and argues that it thus was entitled to the award under the original IFB. We agree.

A contracting officer must have a compelling reason to cancel an IFB after bid opening. Federal Acquisition Regulation, 48 C.F.R. § 14.404-1(a)(1) (1984); *Dyneteria, Inc.; Tecom, Inc.,* B-210684, B-210684.2, Dec. 21, 1983, 84-1 C.P.D. ¶ 10. While IFB specification deficiencies may constitute a compelling reason to cancel, cancellation on this ground generally is not justified except where an award under the ostensibly deficient IFB would not satisfy the government's actual needs, or would prejudice other bidders. *American Mutual Protective Bureau,* 62 Comp. Gen. 354 (1983), 83-1 C.P.D. ¶ 469. Neither exception has been established here.

A contract award will satisfy an agency's needs, essentially, even in the face of some solicitation deficiency, where bidders can be said to have offered to perform the work actually required by the agency. We do not believe an agency's mere failure to include on a bid schedule every task already enumerated in an attached standard specification automatically renders an IFB so ambiguous as to support a conclusion that bidders were not offering to be bound to perform all the required tasks. Here, while the schedule alone may not have reflected all required tasks, it is undisputed that the remainder of the IFB and the attached specification did set forth these tasks. Thus, viewing the IFB as a whole, see *JVAN, Inc.,* B-202357, Aug. 28, 1981, 81-2 C.P.D. ¶ 184, the IFB fully set forth the Coast Guard's requirements. Listing all of the required tasks on the schedule might make the IFB clearer, but the IFB as originally issued, read together with the standard specification, was sufficient to assure that bidders understood what they were bidding on and thus, that an award to EMC would satisfy the Coast Guard's actual needs as reflected in the specification.

Because we do not believe the IFB was materially deficient, we do not believe other bidders would be prejudiced by an award to EMC. Prejudice would exist only if the IFB contained some deficiency which prevented bidders from competing on the same basis. We already have found that the IFB, read as a whole, set forth the Coast Guard's actual requirements with sufficient clarity that all bidders should have been aware that their bid prices on the definite item bound them to perform all of the tasks in the attached

standard specification. In order to be misled by the schedule into bidding on less than all of the required work, a bidder literally would have had to ignore the attached specification. Such a selective reading of the IFB would have been unreasonable, and thus would not be a sufficient basis for a finding of prejudice.

As to the evidence that the Coast Guard relied on, the fact that widely disparate prices were bid, by itself, does not establish that bidders were bidding to perform different portions of the required work. The Coast Guard has furnished us neither its own estimated cost for this procurement, nor data indicating the historical cost for meeting this requirement, and has neither asserted nor shown that this omitted information is inconsistent with EMC's bid or the range of bids, generally. No firm, including the 2 protesters here, ever complained of confusion as to what tasks were encompassed by the term "Gas Generator Major Shop Inspection." Further, while the Coast Guard bases much of its suspicion of confusion on the 500 percent range of bid prices on the definite item, we note that there is a similar 450 percent disparity in the prices bid on the indefinite item. Since these prices were merely the total prices for all of the listed parts, there is no reason to believe bidders were materially confused in calculating their indefinite item prices. In addition, we consider it significant that the bidders' definite item prices bear a relatively constant relation to the bidders' indefinite item prices. These considerations suggest to us that, contrary to the Coast Guard's view, the overall disparity of prices was not attributable to confusion over what was required.

We also do not think the Coast Guard's suspicion concerning the difference in the EMC and Airwork bids was a sufficient basis for assuming there was confusion over the schedule. Neither firm had complained it was confused and, given the disparity in the bid prices generally, it is not evident to us how these two bids could be deemed so aberrant as to cast doubt on the adequacy of the schedule. Airwork (commonly a subcontractor according to the Coast Guard) simply may not have been able to perform the entire contract as inexpensively as EMC. For the same reason, other presumably experienced contractors found it necessary to bid far greater prices than either EMC or Airwork.

The Coast Guard suggests the EMC's bid may have been "qualified" because it listed the prices of 2 parts (under the indefinite item) as "per Stator" and the price of a third part as "per Quadrant." The Coast Guard states it could not determine the exact meaning of this added language, but that it could indicate EMC's intent to increase its listed prices for these parts as much as eightfold (or $22,500), depending on how the language is interpreted. EMC states that it clarified to the Coast Guard after bid opening that the prices listed were its total prices for the parts.

The ambiguity as to EMC's price did not render its bid nonresponsive or otherwise unacceptable. *Frontier Contracting Co., Inc.*, B-214260.2, July 11, 1984, 84-2 C.P.D. ¶ 40. Rather, since the bid would be low by a significant margin even under the least favorable interpretation, it was a matter which properly could be clarified by EMC after bid opening. See *Pacific Coast Utilities Service, Inc.*, B-210285, June 29, 1983, 83-2 C.P.D. ¶ 43. EMC did explain after bid opening that it intended to be bound to perform at the lowest price in the range of uncertainty, not at some higher price. In view of this explanation we see no reason why EMC's listed price for the indefinite item should not be accepted as its intended price.

The Coast Guard argues that this qualification of EMC's bid is further evidence of confusion over IFB requirements. We do not believe, however, that one bidder's listing of 3 part prices with explanatory language evidences a misunderstanding of the work required sufficient to warrant cancelling the IFB. Such confusion, by itself, would be immaterial in any event given our conclusion that the IFB as a whole adequately set forth the work required.

We sustain EMC's protest and therefore are recommending that IFB 0173 be reinstated and award made to EMC (if otherwise found to be eligible for the award).

Because Turbine's protest challenges the specifications of the resolicitation, and we are recommending that award be made under the original IFB, Turbine's protest is dismissed as academic. See *Phil Con Corp.*, B-207082, July 23, 1982, 82-2 C.P.D. ¶ 70

EMC's protest is sustained; Turbine's protest is dismissed.

[B-218234.2]

Contracts—Protests—Court Action—Dismissal—With Prejudice

A dismissal with prejudice by a court constitutes a final adjudication on the merits of a complaint which is conclusive not only as to matters which were decided, but also as to all matters that might have been decided. Therefore, General Accounting Office will not consider a protest involving issues which were or could have been raised in the court action.

Matter of: Santa Fe Corporation, March 27, 1985:

Santa Fe Corporation protests the award of a contract to Allied Defense Industries (ADI) by the Department of the Navy under solicitation No. N00033-84-R-0110, a small business set-aside for hull roughness surveys and analyses. We dismiss the protest.

Santa Fe originally protested to GAO against the award to ADI on September 20, 1984. Santa Fe alleged that the award was improper because Santa Fe's offer was more advantageous to the government, cost and other factors considered, and because a former Santa Fe employee participated in the evaluation process. Subse-

quently, another disappointed offeror, NKF Engineering Associates, Inc., protested to the agency that ADI was not an eligible small business concern for purposes of the solicitation. The agency and Santa Fe then agreed to suspend action on Santa Fe's protest until the Small Business Administration (SBA) issued a final ruling on ADI's size status. We therefore closed our file on Santa Fe's protest subject to reopening if the SBA found ADI qualified as a small business.

On February 11, 1985, the SBA Office of Hearings and Appeals found ADI qualified as a small business for purposes of the solicitation. On February 19, 1985, Santa Fe and NKF filed suit in the United States District Court for the District of Columbia (Civil Action No. 85-0599) seeking a temporary restraining order and a preliminary and a permanent injunction to prevent the Navy from implementing the award to ADI. The grounds for the suit were that ADI is not eligible as a small business concern because of its affiliation with a foreign firm, that the award to ADI is precluded by the conflict of interest provision in the solicitation and that several contract provisions are rendered unenforceable by ADI's affiliation with the foreign corporation.

The court dismissed Santa Fe and NKF's complaint with prejudice, concluding that the plaintiffs had "utterly failed to show any wrongful act" by the defendants. Santa Fe then filed this protest with our Office. In the protest, Santa Fe raises the same issues presented in its suit as well as the issues contained in its original protest.

A dismissal with prejudice by a court constitutes a final adjudication on the merits and bars further action by this Office. *Cecile Industries, Inc.*, B-211475.4, Sept. 23, 1983, 83-2 CPD ¶ 367; *see* Fed. R. Civ. P. 41(b). Further, the effect of such a judgment extends not only to matters which were decided, but also to all matters that might have been decided. See *Frontier Science Associates, Inc.—Reconsideration*, B-192654, Dec. 26, 1978, 78-2 CPD ¶ 433; *Perth Amboy Drydock Co.*, B-184379, Nov. 14, 1975, 75-2 CPD ¶ 307. Although Santa Fe's protest presents two issues which were not expressly raised in its suit,[1] those issues clearly could have been raised in the court action. Therefore, we consider the court's dismissal of the protester's complaint as a full adjudication on the merits of the issues presented by its protest, and we will not consider them further.

[1] The two additional issues are that Santa Fe's offer was more advantageous to the government and that the participation of Santa Fe's former employee in the evaluation process was improper.

Santa Fe's protest is dismissed.

NKF has filed comments on Santa Fe's protest in which it alleges that the solicitation should have provided for the evaluation of estimated travel and per diem costs. NKF argues that these costs should have been considered because there are significant savings inherent in an award to a firm whose technical personnel are located in the United States rather than in a foreign country. NKF also contends that the agency engaged in improper discussion with ADI prior to the submission of best and final offers.

We will not consider NKF's contentions. NKF joined in Santa Fe's lawsuit and these issues could have been raised there. Therefore, our consideration of NKF's latest allegations would not be proper, in view of the court's dismissal of the suit with prejudice. Further, we note that contract award was made to ADI in September of 1984, but NKF did not raise these concerns until March of 1985. Accordingly, they appear to be untimely under section 21.2(a) of our Bid Protest Regulations. 49 Fed. Reg. 49,417, 49,420 (1984) (to be codified at 4 C.F.R. Part 21).

[B-205508]

Miscellaneous Receipts—Agency Appropriation *v.* Miscellaneous Receipts—Insurance, etc. Collection—Prior Reimbursement by Agency—Refunds—Personal Property Loss/Damage

Amounts recovered by Govt. agency from private party or insurer representing liability for damage to Govt. motor vehicle may not be retained by agency for credit to its own appropriation, but must be deposited in general fund of Treasury as miscellaneous receipts in accordance with 31 U.S.C. 3302(b). 61 Comp. Gen. 537 is distinguished.

Matter of: Disposition of amounts recovered for damage to Government motor vehicles, March 29, 1985:

The assistant Attorney General for Administration, Department of Justice, asked whether the Department may retain, for credit to its own appropriation, amounts received from private parties or their insurers for liability resulting from motor vehicle accidents. Although the request is limited to motor vehicle accidents, the principles involved would appear to apply to other Government property as well. As discussed below, we see no reason to depart from the traditional principle that the monies must be deposited in the general fund of the Treasury as miscellaneous receipts.

In the hypothetical situation presented, a private party negligently collides with a parked Government vehicle, causing damage in the amount of $1,500. The agency then proceeds to have the vehicle repaired. The Government is entitled to pursue a claim for

damages against the private party (or its insurer) under common law tort principles. The Assistant Attorney General states that the Department's practice thus far has been to account for such recoveries as miscellaneous receipts.

At the outset, we note that, as a practical matter, we are primarily talking about vehicles purchased or leased by a particular agency and not General Services Administration (GSA) motor pool vehicles. GSA motor pool vehicles are governed by the Federal Property Management Regulations. If a GSA motor pool vehicle is damaged by the negligent or wrongful act of an identifiable party other than the user agency or its employee, GSA will pursue the Government's claim and the user agency will not be charged for the repairs. 41 C.F.R. §§ 101-39.805, 101-39.807 (1983).

The disposition of monies received for the use of the United States is governed by 31 U.S.C. § 3302(b) (1982) (formerly 31 U.S.C. § 484), which requires prompt deposit in the general fund of the Treasury unless there is statutory authority for some other disposition. In addition, an agency may retain receipts which qualify as "refunds to appropriations" as defined in Treasury Department-GAO Joint Regulation No. 1, § 2b, September 22, 1950, *reprinted in* GAO Policy and Procedures Manual for Guidance of Federal Agencies, title 7, Appendix B.[1] Since there is no statutory authority which would permit agency retention of recoveries in the situation under consideration, the question is whether the recovery may be deemed a "refund" within the scope of the regulation.

It is suggested that agency retention of the recovery in this case follows from our decision in 61 Comp. Gen. 537 (1982). In that decision, we held that an agency may retain amounts received from a carrier or insurer for damage to an employee's personal property where the agency has paid a claim by the employee under 31 U.S.C. § 3721, and may credit those amounts to the appropriation from which the employee's claim was paid.

As we pointed out in 61 Comp. Gen. 537, an agency has a choice, based on its own policy determination, when considering claims under 31 U.S.C. § 3721. The agency may, if it so chooses, pay the employee's claim immediately without awaiting any third-party settlement. The agency then becomes subrogated to the employee's claim against the liable third party. Alternatively, the agency may require the employee to pursue the third-party claim first, and consider any remaining claim by the employee only after the third-party claim has been settled.

[1] Refunds to appropriations, as defined in § 2b, "represent amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances."

If the agency chooses the latter policy, it will not receive third-party recoveries but will pay correspondingly lesser amounts to its employees in cases where there is third-party liability. If the agency chooses the former policy, it will be paying somewhat higher amounts to its employees in the first instance, in anticipation of the third-party recovery. In this situation, we concluded that "it is entirely legitimate to treat a third-party recovery as a reduction in the amount previously disbursed rather than as an augmentation of the agency's appropriation." 61 Comp. Gen. at 540. The recovery is analogous to the recovery of an overpayment or the return of an unused advance, and may properly be treated as a refund to the disbursing appropriation.

It is the nature of the agency's discretion under 31 U.S.C. § 3721, as described above, that distinguishes 61 Comp. Gen. 537 from the instant situation. If the agency wishes to have its motor vehicle repaired (and in many cases it will have no choice), it must pay for the repairs, and the amount it pays bears no relationship to the possibility of a third-party recovery.

By way of contrast, the instant situation is similar to our decision in 52 Comp. Gen. 125 (1972), holding that recoveries from tortfeasors pursuant to the Federal Medical Care Recovery Act must be deposited in the Treasury as miscellaneous receipts. See 61 Comp. Gen. at 539–40. While recoveries in the instant case, as in 52 Comp. Gen. 125, are certainly "related" to a prior expenditure, they are not "adjustments" of a prior disbursement as contemplated in the regulation.[2]

The Assistant Attorney General also notes our decisions to the effect that no impermissible augmentation results where the private party responsible for the damage either replaces the property in kind or makes payment directly to the party making the repairs. *E.g.,* 14 Comp. Dec. 310 (1907). While this is true, it is nothing more than an exception that may be advantageous if the timing of repair and payment can be made to coincide.

Finally, we note that where the Congress has found it desirable to permit agency retention of recoveries in the type of situation involved in this case, it has provided the necessary authority by statute. For example, the GSA motor pool system, noted earlier in this decision, is financed by means of the General Supply Fund. 40 U.S.C. § 491(d). Recoveries for damage to property procured through the Fund are expressly authorized to be credited to the Fund. 40 U.S.C. § 756(c).

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[2] To look at it another way, a recovery in the instant situation would amount to the refund of an "earned payment," which must be accounted for as a miscellaneous receipt. 39 Comp. Gen. 647, 649 (1960).

In view of the foregoing, absent statutory authority to the contrary, amounts received by an agency for liability resulting from damage to Government property must be deposited in the Treasury as miscellaneous receipts. 26 Comp. Gen. 618 (1947). The Treasury Department has established a receipt account for this purpose, account no. 3019, "Recoveries for Government property lost or damaged, not otherwise classified."

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Timeliness of comments on agency's report

General Accounting Office (GAO) will not reopen a case which was closed because the protester did not send an indication of its continued interest in the protest within 10 working days after receiving the agency report where the protester's alleged lack of proper notification of requirement for a statement of continued interest resulted from the protester's failure to advise GAO of change of corporate official representing the protester in proceedings 259

Timeliness of protest

Adverse agency action effect

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10 working days GAO filing period

Where initial protest is untimely filed with the contracting agency (more than 10 working days after protest basis is known), subsequent protest to General Accounting Office will not be considered even though it was filed within 10 working days of the agency denial of the protester's initial protest. 317

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Protest relating to awards under a prior solicitation is untimely and not for consideration 290

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What constitutes notice

When record indicates that a protester has had difficulty in obtaining information as to whether when, and at what price awards have been made, General Accounting Office (GAO) will consider protests that, so far as can be determined from the record, were filed within 10 days of the protester's notice that its offers had been rejected or that orders had been placed with other sources. 194

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Notice

To contracting agency

Under section 21.1(d) of GAO Bid Protest Regulations, 49 Fed. Reg. 49417, 49420 (to be codified at 4 C.F.R. 21.1(d)), a protest may be dismissed where the protester fails to furnish a copy of the protest to the contracting officer within 1 day after the protest is filed with GAO. Dismissal is not warranted in this case of first impression where agency was aware of protest basis, raised no objections prior to filing its protest report, and timely filed the protest report. However, GAO emphasizes criticality of compliance with this filing requirement. 325

Timeliness. (*See* **CONTRACTS, Protests, General Accounting Office procedures, Timeliness of protest**)

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Small business concerns

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Prior to resolution of size protest

Agency properly awarded a small business set-aside contract to a firm determined to be small by a Small Business Administration (SBA) Regional Office where the award was made after the Regional

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Purchase of "Source Controlled" parts (Sec. 1-313(c))
Approved supplier requirement
Applicability
When spare parts are critical to the safe and effective operation of aircraft propellers, with tolerances measured in ten thousandths of an inch, Defense Acquisition Regulation 1-313 which states that parts generally should be procured only from sources that have satisfactorily manufactured or furnished them in the past, is applicable. ... 194

DEPARTMENTS AND ESTABLISHMENTS
Services between
Reimbursement
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To the extent that they are inconsistent with this decision, 13 Comp. Gen. 234 (1934), 59 Comp. Gen. 366 (1980), and all similar decisions, will no longer be followed. Since this decision represents a change in our views on nonreimbursable details, it only will apply prospectively 370

DETAILS
Between agencies
Non-reimbursable details
Nonreimbursable details of employees from one agency to another or between separately funded components of the same agency continue to be permissible where the details pertain to a matter similar or related to those ordinarily handled by the loaning agency, and will aid the loaning agency in accomplishing a purpose for which its appropriations are provided or when the fiscal impact on the appropriation supporting the detail is negligible. 370

ECONOMY ACT
Leases
Rent limitation. (*See* LEASES, Rent, Limitation, Economy Act restriction)

FEDERAL GRANTS, ETC
Generally. (*See* GRANTS, Federal)

FEES
User fees
Recovery of cost
By Government employees requirement
Department of Agriculture proposal to permit contractor employees to collect recreation fees in national forests is permissible. General Accounting Office decision in 62 Comp. Gen. 339 (1982), holding that a similar proposal involving volunteers was not permissible, is

FEES—Continued Page
User fees—Continued
Recovery of cost—Continued
By Government employees requirement—Continued
not pertinent in view of current plan to use contractor employees. Further, in view of a recent change in Office of Management and Budget Circular No. A-76, the collection of established fees should not be considered to be an inherent governmental function, and therefore need not be performed only by government employees. This decision distinguishes 62 Comp. Gen. 339 408

FOREIGN SERVICE
Travel expenses
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Other than timber sales. (*See* AGRICULTURE DEPARTMENT, Forest Service)

GENERAL ACCOUNTING OFFICE
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Contract Disputes Act of 1978
General Accounting Office generally does not consider mistake in bid claims alleged after award, since they are claims "relating to" contract within the meaning of the Contract Disputes Act of 1978, which requires that all such claims be filed with the contracting officer for decision 330
Grants-in-aid. (*See* CONTRACTS, Grant-funded procurements, General Accounting Office review)
Mobilization needs. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, National Defense needs)
National Defense needs
General Accounting Office (GAO) will not disturb determination and findings justifying negotiation for purchase of mobilization base item, since under 10 U.S.C. 2304(a)(16), determination is final. However, GAO will consider whether findings support the determination. In addition, determination of itself does not justify sole source award when defense agency's immediate requirements apparently can be met by other suppliers 260
Discrimination complaints under Title VII
Civil Rights Act
Monetary awards
In view of authority granted to the Equal Employment Opportunity Commission by statute, the Comptroller General does not render decisions on the merits of, or conduct investigations into, allegations of discrimination (including age discrimination) in employment in other agencies of the Govt. However, based upon the authority to determine the legality of expenditures of appropriated funds, he may determine the legality of awards agreed to by agencies in informal settlements of discrimination complaints 349

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GENERAL SERVICES ADMINISTRATION
Transportation rate audit
Utilization of outside auditing firm
Compensation
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Under 31 U.S.C. 3718(b), transportation audit contractors engaged by the General Services Administration (GSA) to assist in carrying out GSA's responsibilities under 31 U.S.C. 3726 may be paid from proceeds recovered by carriers and freight forwarders, but only for services attributable to the recovery of "delinquent" amounts (as defined in sec. 101.2(b) of the Federal Claims Collection Standards), as opposed to audits and other services in connection with non-delinquent accounts. 366

GRANTS
Federal
Earmarked authorization
The National Endowment for Democracy, a private non-profit organization, was authorized to receive $31.3 million in fiscal year 1984 in grant monies, to be provided by USIA. Funding, however, was subject to earmarks of $13.8 million and $2.5 million for two specific subgrantees. Subsequent to enactment of the authorization, the Endowment received $18 million in its fiscal year 1983 appropriation. General Accounting Office concludes that, contrary to the actual disposition of grant funds by the Endowment, the earmark language of the authorization was binding on the Endowment, and that the Endowment must comply with earmark requirements in future grant awards. 388

HANDICAPPED PERSONS
Handicapped employees
Subsistence reimbursements. (*See* **SUBSISTENCE**)

HEALTH AND HUMAN SERVICES DEPARTMENT
Office of Community Services
Regional office
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The Department of Health and Human Services did not act improperly in fiscal year 1983 in terminating the functions of the regional offices of the Office of Community Services (OCS). There was no statutory requirement that the offices remain open, and the managers of the Department and the OCS had broad discretion to determine how they would carry out the OCS block grants program and how they would spend the money in the fiscal year 1983 appropriation to the OCS, Pub. L. No. 97-377, 96 Stat. 1830, 1892 (1982) 370

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Appropriations. (*See* **APPROPRIATIONS, Housing and Urban Development Department**)

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Award basis
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Estimate of overtime usage developed for purpose of evaluating cost of competing offers could be revised without advising offerors of the change, and without allowing them to amend their proposals, because the estimate was not stated in the solicitation and offerors were neither aware of nor entitled to rely on the original, defective estimate..... 415
Evaluation of offers
Basis
Even though solicitation evaluation criteria could have been better written, the contracting agency did not act improperly where it used an annual basis for evaluating cost, because the solicitation stated that offers would be so evaluated and the selection made meets government's needs..... 415

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Seven Administrative Law Judges (ALJs) seek court leave for service as witnesses for plaintiff in *Assn. of Administrative Law Judges, Inc. v. Heckler,* Civil Action No. 83-0124 (D.D.C.). The suit was brought by the plaintiff association to challenge certain practices of the Social Security Administration in management of ALJs and their caseloads. The ALJs attended the trial subject to court issued subpoenas and each testified for the plaintiff. They are entitled to court leave under 5 U.S. Code 6322(a)(2) (1982) for necessary traveltime, time spent testifying, and time waiting to testify..... 200
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A handicapped employee arrived early at his temporary duty site in order to avoid driving in inclement weather. Whether or not the employee should be charged annual leave in connection with his early arrival is primarily a matter of administrative discretion. However, under the circumstances of this case, we would not object to an administrative determination to excuse the employee for the time in question, without a charge to his annual leave account..... 310

LOBBYING
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Possibly with the exception of 18 U.S.C. 1913, a penal antilobbying statute administered by the Dept. of Justice, there is no antilobbying restriction against the use of TVA fiscal year 1985 appropriations for grass roots lobbying activities..... 281

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MEETINGS

Attendance, etc. fees

Meals included

Employees of the National Park Service sought reimbursement for meal costs incurred while attending a monthly Federal Executive Association luncheon meeting. Meal costs may not be reimbursed. The meetings were held at the employees' official duty station and the employees meals were not incidental to the meetings, a prerequisite for reimbursement, since the meetings took place during the luncheon meals. B–198471, May 1, 1980, explained. This decision distinguishes B–198882, Mar. 25, 1981 406

MILITARY PERSONNEL

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Transportation

Dependents. (*See* **TRANSPORTATION, Dependents Military personnel**)

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

MISCELLANEOUS RECEIPTS

Agency appropriation *v.* **miscellaneous receipts**

Insurance, etc. collection

Prior reimbursement by agency

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Amounts recovered by Govt. agency from private party or insurer representing liability for damage to Govt. motor vehicle may not be retained by agency for credit to its own appropriation, but must be deposited in general fund of Treasury as miscellaneous receipts in accordance with 31 U.S.C. 3302(b). 61 Comp. Gen. 537 is distinguished.... 431

Debt collections

The term "collection service," used in 31 U.S.C. 3718(a), does not include the servicing of non-delinquent accounts, but rather, is limited to actions taken to collect amounts that have become "delinquent," as defined in sec. 101.2(b) of the Federal Claims Collection Standards (to be codified in 4 C.F.R. ch. II). Therefore, the exception to the miscellaneous receipts act (31 U.S.C. 3302) contained in sec. 3718(b) authorizes agencies to pay debt collection contractors from the proceeds of their activities to collect delinquent amounts, but does not authorized payments from proceeds from contractors who service non-deliquent accounts 366

MONRONEY AMENDMENT. (*See* **COMPENSATION, Prevailing rate employees, Wage schedule adjustments**)

OFFICE OF MANAGEMENT AND BUDGET

Circulars

No. A–76

Application matters. (*See* **CONTRACTS, In-house performance** *v.* **contracting out**)

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Circulars—Continued
No. A-76—Continued
Exhaustion of administrative remedies
General Accounting Office (GAO) affirms its dismissal of a protest against the propriety of a cost comparison performed pursuant to OMB Circular A-76 when the solicitation contained a provision setting forth an administrative appeals procedure that the protester did not exhaust. This administrative procedure is the final level of agency review afforded protesters, and until such time as this procedure is completed, the protester has not exhausted its administrative remedies. 231
Policy matters
Not for GAO review
Determination under Office of Management and Budget Circular No A-76 to contract for services rather than have them performed in-house is a matter of executive branch policy not reviewable pursuant to a bid protest filed by a union local representing federal employees 244

OFFICE OF PERSONNEL MANAGEMENT
Jurisdiction
Retirement matters
A retired civil service employee requests the time of his voluntary retirement be backdated from Jan. 8 to Jan. 3, 1983, so that he may be allowed an annuity payment for the month of Jan. 1983. The employee suggests that his selection of Jan. 8 as the retirement date resulted from a mistake or ignorance of the law. The Office of Personnel Management is vested with exclusive authority to adjudicate civil service retirement annuity claims. Regarding amount of pay already paid the claimant there is no basis to change the employee's status as an employee on duty and on leave based on the claimant's assertion that he was not aware of the requirements of existing law 301

OFFICERS AND EMPLOYEES
Compensation. (*See* **COMPENSATION)**
Contributions from sources other than United States
Travel expenses. (*See* **TRAVEL EXPENSES, Contributions from private sources, Acceptance by employees)**
Debts to U.S.
Satisfaction
Upon convicting an accountable officer of embezzlement, court ordered restitution as condition of probation as authorized by 18 U.S.C. 3651. Since agency was still attempting to mitigate its loss, amount submitted to court was an estimate not intended to reflect full amount of actual loss. In these circumstances, lower amount in restitution order does not preclude agency from asserting civil claim for actual loss as finally determined 303
Per diem. (*See* **SUBSISTENCE, Per diem)**
Retirement. (*See* **RETIREMENT, Civilian)**

OFFICERS AND EMPLOYEES—Continued Page
Training
Expenses
Travel and transportation
An employee was sent to a location away from his old duty station for long-term training to be followed by a permanent change of station (PCS) to a then undetermined location. Employee claims reimbursement for his move to the training site as a PCS move since he was promoted for purpose of that travel under agency merit promotion program. Since travel to a location for training contemplates either a return to the old duty station or another permanent duty station upon its completion, a training site is but an intermediate duty station. Until the employee is actually transferred to a new permanent duty station, the duty station from which he traveled to the training site remains his permanent duty station..... 268
An employee received a PCS, with long-term training at an intemediate location en route. Employee claims travel and relocation expenses to the training location under 5 U.S.C. 5724 and 5724a. Although PCS expense reimbursements are governed by secs. 5724 and 5724a, travel and transportation rights for long-term training are specifically governed by 5 U.S.C. 4109. Hence, an employee's entitlement for travel to a training location are limited by those provisions. Since an agency is authorized to limit reimbursement under sec. 4109, where employee was informed before being accepted into the training program that all travel and transportation expenses to the training site would have to be borne by him as a condition of acceptance and all trainees were treated equally, his travel and transportation expenses to the training location may not be certified for payment..... 268
An employee received a PCS, with long-term training at an intermediate location en route. Employee was reimbursed for travel and relocation expenses under 5 U.S.C. 5724 and 5724a from the training site to new PCS location, but at old duty station. His claim for the sales expenses is allowed. An employee away from his duty station for training has not effected a change of station during pendency of that assignment. Therefore, where an employee and family are not actually residing at the old duty station because of long-term training elsewhere, such residence nonoccupancy does not preclude reimbursement for expenses of the residence sale upon his move to his new permanent duty station, so long as all other conditions of entitlement are met..... 268
Transfers
Agency liability for expenses of transfer
An employee was transferred from Chicago, Illinois to Washington, D.C., following a 6-month temporary duty assignment in Washington. The employee's claim for moving expenses may be allowed if otherwise proper, since the change of an employee's official station to the location of his temporary duty assignment will not defeat his entitlement to the relocation expenses authorized by 5 U.S.C. 5724 and 5724a..... 205
Miscellaneous expenses
Nonreimbursable items. (*see* OFFICERS AND EMPLOYEES, Transfers, Nonreimbursable expenses

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Transfers—Continued

Nonreimbursable expenses

House lease with option to buy

Under a lease with an option to purchase agreement a transferred employee forfeited the $3,500 amount paid as consideration for the option because he had not exercised the option to purchase the leased residence before he was transferred. Since agency transfer of employee appears to be the proximate cause of forfeiture, the deposit may be claimed as a miscellaneous relocation expense to the extent authorized under FTR para. 2-3.3. However, forfeited deposit may not be reimbursed as a real estate transaction expense. This decision distinguishes B-207420, Feb. 1, 1983 323

Mortgage expenses

Mortgage discounts, "points," etc.

An employee who upon transfer sold his residence at his former duty station claims reimbursement for the loan discount or mortgage placement fee, also known as seller's points, which he paid as a part of the cost of selling his former residence. The claim may not be paid even though under Regulation Z, which implements the Federal Truth in Lending Act, seller's points are no longer included among finance charges, because reimbursement for points or mortgage discounts as a miscellaneous expense of a real estate transaction is specifically prohibited by the Federal Travel Regulations and Volume 2 of the Joint Travel Regulations 266

Real estate expenses

Husband and wife divorced, etc.

House sale

A transferred employee who was divorced from his wife after reporting for duty at his new duty station but prior to the sale of his residence at his old duty station may be reimbursed for only one-half of the real estate expenses incurred since his wife, with whom he held title to the residence, was not a member of his immediate family at the time of settlement 299

Insurance

A transferred employee sold his residence at his old duty station. Among the expenses claimed incident to that sale was the cost of an ERA warranty, which protects him as seller against the cost of replacement or repair of latent defects in the residence for a specified period after its sale. His claim is denied since FTR para. 2-6.2d(2) specifically excludes the cost of property loss and damage insurance and maintenance costs 296

A transferred employee was required to purchase hazard insurance as a condition of obtaining a mortgage loan. He claims that since it was property insurance and required by the lender, it is reimbursable. The term "property insurance" is a term describing, generally, all types of real or personal property insurance and is not a term used in the FTR to describe such potentially reimbursable cost. Under FTR, para. 2-6(d)(1) only the cost of the one type of property insurance, title insurance, may be reimbursed and then only if it is required by a lender. Hazard insurance is another type of property insurance which relates to financial protection against loss or damage to structures or improvements to real estate, occasioned by

OFFICERS AND EMPLOYEES—Continued Page
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Insurance—Continued
specific catastrophic events. Since FTR, para. 2-6.2(d)(2)(a) specifically precludes reimbursement of the costs of loss and damage insurance, the claims may not be paid..... 306
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A transferred employee purchased a residence at his new duty station and was charged a loan assumption fee. Para. 2-6.2d(1) of the FTR, as amended, effective Oct. 1, 1982, permits reimbursement of loan origination fees and similar fees and charges, but not items considered to be finance charges. The employee's loan assumption fee may be reimbursed where it is assessed in lieu of a loan origination fee, since it involves charges for services similar to those otherwise covered by a loan origination fee..... 296
Loan origination fee
A transferred employee purchased a new residence and was charged 1 percent of his loan, plus $250, as a "loan origination fee." He was reimbursed the 1 percent and now claims the additional $250. Under Federal Travel Regulations (FTR) para. 2-6.2d(1)(b), such fees are reimbursable not to exceed amounts customarily charged. Since HUD advised that the customary range of fee charged in the area is 1 to 1½ percent of the loan, the maximum of the customary range may be used for FTR purposes and when reduced to a dollar amount, establishes the not to exceed amount which may be reimbursed in any one case. Thus, the employee may be reimbursed an additional amount up to the maximum of 1½ percent..... 306
Taxes
Tax certification charges
A transferred employee sold his residence at his old duty station. Among the expenses claimed incident to the sale was a tax certification fee imposed by the local taxing authority to certify that all real estate taxes on the property had been paid. Paragraph 2-6.2c of the Federal Travel Regulations (FTR) authorizes reimbursement of the cost of title search and "similar expenses." Since the purpose of a title search is to determine whether title in the seller is in any way encumbered by recorded liens, and since a claim by a taxing authority for real property taxes not paid always runs against the property, a certification of taxes paid is an essential element in establishing clear title. Thus, the fee charged by a taxing authority qualifies as a reimbursable seller's cost as a "similar expense" under the cited FTR provision..... 296
Time limitation
Mandatory
An employee entered into a "land sale agreement" in order to sell his former residence at his previous permanent duty station. Claim is denied here since the expenses in question were not incurred until 3 years and 26 days after the employee reported for duty at his new duty station. This is in excess of the maximum allowable period permitted for the completion of real estate transactions, 3 years in this case. *Larry W. Day,* 57 Comp. Gen 770 (1978), clarified..... 215

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OMNIBUS RECONCILIATION ACT OF 1981. (*See* POSTAL SERVICE, United States, Authority, Omnibus Reconciliation Act of 1981)

Pay
Retired
Survivor Benefit Plan
Spouse
Social Security offset

The Survivor Benefit Plan is an income maintenance program for the families of deceased service members. Social security "offset" provisions were included in this program because annuities are intended to complement a Plan participant's social security coverage. No reduction of an annuity by this offset is appropriate, however, if the Social Security Administration determines that the annuitant is completely ineligible for social security survivor benefits. Therefore, an annuity offset is not required in the case of an Army Reserve sergeant's widow who was determined ineligible for social security survivor benefits because of her receipt of a governmental pension based on her own employment 203

POSTAL SERVICE, UNITED STATES
Authority
Omnibus Reconciliation Act of 1981

Omnibus Reconciliation Act of 1981 language established a new subchapter to ch. 45 of title 5, U.S.C. (5 U.S.C. 4511—4514). The new section 4514 of title 5 reads as follows: "No award may be made under this title after September 30, 1984." Question posed is whether use of the word "title" in section 4514 should be read literally which would mean that all title 5 awards authority expired after Sept. 30, 1984. It is clear from the legislative history that the reference to "title" should have been "subchapter." The clear congressional intent as shown from the legislative history is controlling over the drafting error contained in the statutory language. Federal courts have allowed the expessed intention of Congress to prevail over the erroneous language of a statute. 221

PROTESTS
Contracts. (*see* CONTRACTS, Protests)

PUBLIC HEALTH SERVICE
Commissioned personnel
Dual employment

An active duty Public Health Service commissioned officer provided medical consulting services for which he was paid on an hourly basis under personal services contracts with the Social Security Administration over a period of 13 years. The officer was not entitled to receive compensation for services rendered under this arrangement

PUBLIC HEALTH SERVICE—Continued Page

Commissioned personnel—Continued

Dual employment—Continued

because as an officer of the Public Health Service, a uniformed service, he occupied a status similar to that of a military officer and his performance of services for the Govt. in a civilian capacity was incompatible with his status as a commissioned officer. Also, receipt of additional pay for additional services by such an officer is an apparent violation of statutory prohibition, 5 U.S.C. 5536 395

Compensation paid to an active duty commissioned officer of the Public Health Service for medical consulting services he performed under personal services contracts with the Social Security Administration constituted erroneous payments because he was entitled to receive only the pay and allowances that accrued to him as a member of the uniformed services. He is, therefore, indebted to the Govt., for the compensation paid to him for the services he rendered to the Social Security Administration 395

QUARTERS ALLOWANCE

Basic allowance for quarters (BAQ)

Dependents

Children

Adopted

A member of the uniformed services who adopted her 26-year old disabled brother who is incapable for self-support, may claim him as her dependent to receive basic allowance for quarters at the with dependent rate. In this case the "child" is legally adopted, is in fact dependent upon the member for support, and resides with the member; thus, a *bona fide* parent and child relationship exists. 42 Comp. Gen. 578 (1963), amplified. 333

With dependent rate

Eligibility

Separation of husband and wife

A divorced member of the uniformed services, who is paying child support for a dependent residing with the member's former spouse in Government quarters, is not entitled to a basic allowance for quarters, at the with-dependent rate. However, if the dependent resides with the member in private quarters for more than 3 months, he or she is entitled to the increased allowance, since under 37 U.S. Code 403 and the pertinent regulations, periods in excess of 3 months are considered nontemporary. 224

REGULATIONS

Force and effect of law

Federal travel regulations

A transferred employee purchased hazard insurance on his new residence as a condition of obtaining a mortgage loan. He claims reimbursement based on his agency's "Employees Relocation Guide" publication as authority. The Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), which are specifically authorized by law and have the force and effect of law, strictly govern the relocation expense entitlements of Federal employees. The cited publication is administrative and does not have the force and effect of law.

REGULATIONS—Continued Page
Force and effect of law—Continued
Federal travel regulations—Continued
Therefore, to the extent that such publication may be inconsistent with provisions of the FTR it is not binding on the Government..... 306

REPORTS
Contract protest
Timeliness of report
Agency's failure to submit an administrative report responding to the protest in a timely manner, *i.e.*, within 25 working days, does not render invalid the otherwise proper award..... 245

SET-OFF
Pay, etc. due military
personnel
Private employment earnings
The debt of an officer of the Public Health Service, occasioned by his receipt of erroneous pay from the Social Security Administration, may be collected by administrative offset against his current Public Health Service pay, or upon his separation or retirement for the Service, offset may be affected against any final pay, lump-sum leave payment and retired pay to which he may be entitled. The 10-year limitation on collection by setoff does not apply in this case where facts material to the Govt.'s right to collect were not known by Govt. officials until 13 years after the erroneous payments began. Amounts collected are to be deposited into the general fund of the Treasury as miscellaneous receipts..... 395

SMALL BUSINESS ADMINISTRATION
Loans
Appropriation obligation
Spending levels established in authorizing legislation for three Small Business Administration (SBA) loan programs in 1984 fiscal year were not superseded or repealed by higher levels indicated in conference report on 1984 SBA appropriation which appropriated two lump-sums to fund these and other SBA programs. The authorizing legislation and the appropriation provisions were entirely consistent with one another on their face. In these circumstances, an express statutory limitation cannot be superseded or repealed by contrary indications contained only in committee reports or other legislative history. 36 Comp. Gen. 240 (1956) and B–148736, September 15, 1977, distinguished. B–214172, July 10, 1984, affirmed..... 282
Expenditures by SBA in 1984 in fiscal year that exceeded statutory ceilings in the authorizing legislation on the amount of direct loans that SBA could make in two of its direct loan programs would violate the Antideficiency Act since such expenditures would exceed available appropriations as that term is used in the Antideficiency Act. However, since a loan guarantee is only a contingent liability that does not require an actual obligation or expenditure of funds, SBA would not violate the Antideficiency Act if it exceeded the statutory ceiling of the amount of loans it could guarantee in a particular program in the 1984 fiscal year. B–214172, July 10, 1984, affirmed as modified..... 282

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STATUTES OF LIMITATION

Debt collections

Military personnel

The Government's claim against a member of the uniformed services for erroneous dual pay is not barred from court action if the facts material to the claim were discovered within less than 6 years of the date that an action is filed. Nor is the claim barred from consideration under the statute waiving the Govt.'s claims for dual pay if not received in the General Accounting Office within 6 years when it was received in that Office within 6 years of the last date of an unbroken period during which the individual occupied a status in which he was to receive compensation 395

SUBSISTENCE

Actual expenses

Maximum rate

Reduction

Meals, etc. cost limitation

Meal costs not incurred

An employee who attended a meeting sponsored by a private organization in a high rate geographical area was provided a lunch and dinner without cost to the Government. Under 5 U.S. Code 4111 and paragraph 4-2.1 of the Federal Travel Regulations, the employee's reimbursement for actual subsistence expenses which is limited to $75 per day need not be reduced by the value of the provided meals... 185

Per diem

Additional expenses

Early departure from duty station

A handicapped employee claims reimbursement for additional subsistence expenses he incurred when he arrived at his temporary duty site several days early, and then delayed returning to his official duty station, in order to avoid driving in inclement weather. We hold that the employee may be reimbursed for the additional subsistence expenses because he acted prudently in incurring those expenses. Furthermore, reimbursement is justified as a "reasonable accommodation" to the employee under the Rehabilitation Act of 1973..... 310

Temporary duty

Long-term assignments

An employee received travel and subsistence allowances during an alleged 6-month detail in Washington, D.C., and then was permanently assigned to Washington. Whether a particular location should be considered a temporary or permanent duty station is a question of fact to be determined from the orders directing the assignment, the duration of the assignment, and the nature of the duties to be performed. Under the facts and circumstances of this case, we conclude that the employee's 6-month detail in Washington constituted a legitimate temporary duty assignment. Therefore, he was entitled to temporary duty allowances in Washington until the day he received definite notice of his transfer there..... 205

SURVIVOR BENEFIT PLAN. (*See* **PAY, Retired, Survivor Benefit Plan)**

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TRANSPORTATION

Dependents

Military personnel

Children

Travel to attend school, etc.

Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. The construction of a statute as expressed in implementing regulations by those charged with its execution, however, is to be sustained in the absence of plain error, particularly when the regulations have been long followed and consistently applied with Congressional assent. Hence, regulations of the Secretary of State in effect since 1960 authorizing shipments of unaccompanied baggage for the student dependents of Federal civilian employees stationed overseas on occasions when those dependents travel to and from schools located in the United States, issued under a statute broadly authorizing reimbursement of their "travel expenses," are upheld as valid 319

A statute enacted in 1983 provides that under regulations prescribed by the Secretary of Defense, members of the uniformed services stationed overseas may be paid a "transportation allowance" for their dependent children who attend school in the United States. The legislative history reflects that Congress intended to provide service members with benefits similar to those authorized by a law enacted in 1960 to cover the "travel expenses" of the student-dependents of civilian employees stationed overseas. Regulations of the Secretary of State under the 1960 enactment properly include provisions for unaccompanied personal baggage shipments, so that there is no objection to a similar provisions adopted through regulation by the Secretary of Defense under the 1983 enactment, since related statutes should be construed together in a consistent manner 319

Vessels

Foreign

Reimbursement

The Foreign Service Travel Regulations impose "personal financial responsibility on employees for using a foreign-flag vessel under certain conditions. Since those regulations do not specify the amount of financial responsibility, they may be interpreted as precluding reimbursement of any part of the cost of such travel only if an American-flag vessel is also available. If American-flag vessels are not available, then the regulations are viewed as imposing financial responsibility for such use to the extent that the cost of the foreign-flag vessel exceeds the constructive cost of less than first-class airfare..... 314

TRAVEL EXPENSES

Official business

Vehicle breakdown, etc.

When use of a privately owned vehicle for the performance of official duties is determined to be advantageous to the government, a breakdown and resultant delay may be viewed as being incident to the official travel. Travel or transportation expenses caused by the delay may be reimbursed if the period of delay is reasonable and the

TRAVEL EXPENSES—Continued Page
Official business—Continued
Vehicle breakdown, etc.—Continued
traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234
Return to official station on nonworkdays
Reimbursement
Limitation
An employee on temporary duty who used the return portion of a "super saver" airline ticket for his weekend voluntary return travel to his permanent duty station claims that the difference between the regular one-way coach fare and the "super saver" fare should be used in the computation of the maximum allowable reimbursement for his voluntary return travel. He argues that the "super saver" fare applied only to round trips, and if he had not used the return portion, the Government would have had to pay the full coach fare for his travel to the temporary duty point because his other travel was performed by automobile with another employee. The agency properly limited his reimbursement to the per diem which he would have received if he had remained at the temporary duty station. There is no basis to include costs other than those the employee would have incurred had he remained at his temporary duty station.. 236
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Return to official station on nonworkdays. (*See* **TRAVEL EXPENSES, Return to official station on nonworkdays)**

VEHICLES
Rental
Long-term basis
Temporary duty
An employee was reimbursed for the costs of renting an automobile to transport his personal effects from his permanent duty station to his temporary duty site, and for local transportation at his temporary duty station. The employee may not retain full reimbursement for the automobile rental charges since the rental was not approved based on a determination of advantage to the Government, and there is no authority to reimburse rental costs for periods in which no official business is performed. However, the employee may retain reimbursement attributable to his use of the rental car for official travel, limited to the constructive cost of transportation by a more advantageous mode. 205

WITNESSES
Court leave. (*See* **LEAVES OF ABSENCE, Court, Witness)**

WORDS AND PHRASES
"Dependents"
A member of the uniformed services who adopted her 26-year old disabled brother who is incapable of self-support, may claim him as her dependent to receive basic allowance for quarters at the with dependent rate. In this case the "child" is legally adopted, is in fact dependent upon the member for support, and resides with the member; thus, a *bona fide* parent and child relationship exists. 42 Comp. Gen. 578 (1963), amplified 333

WORDS AND PHRASES—Continued Page

"Not to exceed"

Fiscal Year 1985 appropriation to Board of International Broadcasting provided that not to exceed $15,000 was available for consulting fees and no such fees could be paid after January 1, 1985, if Director's position was vacant. The phrase "not to exceed" sets maximum amount that can be expended in fiscal year 1985 whether or not Director's position is filled 263

"Subchapter"

Omnibus Reconciliation Act of 1981 language established a new subchapter to ch. 45 of title 5, U.S.C. (5. U.S.C. 4511–4514). The new section 4514 of title 5 reads as follows: "No award may be made under this title after September 30, 1984." Question posed is whether use of the word "title" in section 4514 should be read literally which would mean that all title 5 awards authority expired after Sept. 30, 1984. It is clear from the legislative history that the reference to "title" should have been "subchapter." The clear congressional intent as shown from the legislative history is controlling over the drafting error contained in the statutory language. Federal courts have allowed the expressed intention of Congress to prevail over the erroneous language of a statute 221

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